

REPORT Nº 38/02
ADMISSIBILITY
PETITION 12.237
DAMIÃO XIMENES LOPES
BRAZIL
October 9, 2002

I. SUMMARY

1. On November 22, 1999, Mrs. Irene Ximenes Lopes Miranda submitted to the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") a petition against the Federative Republic of Brazil (hereinafter "Brazil," "the State," or "the Brazilian State"). That petition alleged violations of Articles 4, 5, 11, and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), on the right to life, the right to humane treatment, the right to privacy, and the right to judicial protection, all in connection with the generic duty of the State to respect and ensure the rights enshrined in the American Convention, as provided for in Article 1(1), to the detriment of Mr. Damiano Ximenes Lopes, her brother, who died while at the Guararapes Rest Home (hereinafter "*Casa de Repouso Guararapes*" or "*Casa de Repouso*"), in Sobral, Ceará, after he was admitted there to receive psychiatric treatment.

2. The petitioner alleged that the Brazilian State is responsible for the death of her brother, Damiano Ximenes Lopes, at the *Casa de Repouso Guararapes*, on October 4, 1999. According to the petitioner, her brother was admitted to said *Casa de Repouso* to receive psychiatric treatment as he suffered from a mental illness, and two days after being admitted, his mother went to visit him and found him with visible signs of torture, his hands tied, nose bleeding, face and abdomen swollen; he asked her to call the police. Hours later, after receiving medication, he died.

3. The petitioner alleged that, despite the situation described in the previous paragraph, the result of the autopsy performed on her brother's corpse only mentioned the apparent lesions, and was silent as to the cause of his death, reporting in its conclusion, "in view of what is set forth above, we infer that it is an actual death of undetermined cause." According to the petitioner, the above-noted *Casa de Repouso* is known for the inhumane treatment meted out to its patients. To this end, the petitioner cited statements made by former patients and newspaper clippings.

4. The State failed to respond to the Commission's request for information.

5. The Commission, in keeping with the provisions of Articles 46 and 47 of the American Convention, decided to admit the petition, with respect to the possible violations of Articles 4, 5, 11, and 25, all in relation to Article 1(1) of the Convention. The Commission decided to notify the parties of this decision, to publish it, and to include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BEFORE THE COMMISSION

6. On November 22, 1999, the Commission acknowledged receipt of a complaint lodged by Mrs. Irene Ximenes Lopes Miranda. On December 14, 1999, the IACHR forwarded to the State the petition that is the subject of this report, and gave it 90 days to respond. On February 14, 2000, the Commission received a petition from the complainant in which she reported that as of that date, the local authorities had not taken any measure on the case, and reporting that another patient¹ had been a victim of torture at that same *Casa de Repouso*. On February 17, the IACHR acknowledged receipt of the additional information from the petitioner, dated January 31, 2000, in which she added information and introduced new documents. On that same date, the Commission forwarded to the Brazilian State the additional information received, and gave it 60 days to provide the information it considered necessary within 30 days, lest it apply the provision of Article 42 of the Commission's Regulations, in force at that

¹ This was Mr. Adauto, a patient who was cited in the Incident Report of the *Casa de Repouso* (*Boletim de Ocorrência da Casa de Repouso*) as having been the victim of an assault by nurses of that *Casa de Repouso*. The petitioner did not introduce any information to identify the victim other than his first name.

time. As of the analysis set forth in this Report, the State had not provided any information on the violations alleged here.

III. THE POSITIONS OF THE PARTIES

A. The petitioner

7. The petitioner alleged before this Commission that her brother, Mr. Damião Ximenes Lopes, 30 years old, who had a mental illness, was killed on October 4, 1999, at the *Casa de Repouso Guararapes*,² while there for medical treatment. According to the complaint, Mr. Damião Ximenes suffered abuse and torture, and was cared for in an inexpert and negligent manner by the physicians and nurses of said *Casa de Repouso*, which caused his premature death.

8. According to the statement made by Damião Ximenes's mother, Mrs. Albertina Ximenes, to the Federal Public Ministry, at her hearing as part of the administrative proceeding opened to investigate the allegations made here, she reported that she had her son hospitalized on Friday, October 1, 1999, and when she went to visit him the following Monday, the guard at said *Casa de Repouso* informed her that her son was not in a condition to receive visitors. Not satisfied, Mrs. Albertina entered the institution calling her son by his name, and then "he came to her, collapsing, and with his hand tied behind his back, with a bloody nose, his head swollen and his eyes practically

shut, falling at her feet, all direct, reeking of feces and urine, that when he fell at her feet she cried out 'police, police, police,' and that she did not know what to do, imploring that he be untied; he had bruises all over his body, his head so swollen it appeared not to be his....".

9. Mr. Damião's mother recounted that after asking that they bathe her son, she went to find a physician, and, finding one on a mezzanine, she asked him to provide assistance to her son, for otherwise he would die. The physician, according to the petitioner, was Mr. Francisco Ivo de Vasconcelos, director of the *Casa de Repouso*, and medical examiner at the *Instituto Médico Legal of Sobral*, who allegedly answered, "Let him die, for whoever is born, it is to die," and said that she should stop crying because he hated to see people cry. Right where he was, and without examining the patient, the physician prescribed drugs for him.

10. After the aforementioned events transpired, Mrs. Albertina went to look for her son. On the way, she encountered a "cleaning woman" who told her that "the son of the deponent had struggled a great deal with the nurses and had lost a lot of blood." Immediately thereafter, she found her son "lying on the floor in one of the rooms, completely naked, his hands still tied behind him, that at that moment the nurse said that he had calmed down, that one shouldn't try to deal with him, since he was now calming down....".

11. According to the petitioner, after he left her son alive at the *Casa de Repouso*, and shortly after arriving home, there was already a message waiting for her from the same *Casa de Repouso* informing her that he had died. On that same day, the physician Francisco Ivo de Vasconcelos left a signed medical certificate at the *Casa de Repouso* indicating that the cause of death had been cardiorespiratory failure. The physicians of the *Casa de Repouso* were silent as to the torture and abuse suffered by Mr. Damião, and also as to the drugs taken.

12. She adduced that Damião's family members, not trusting in the medical examiner's report that could be produced at the IML of Sobral, since the director of that Institute was also the director of the *Casa de Repouso*, Mr. Ivo de Vasconcelos, took his corpse to the capital city for an autopsy. To the surprise and desperation of everyone, and in the face of all the physical evidence of torture, the autopsy report did not indicate the cause of death of petitioner's brother, concluding only that "in the face of what is set forth above, we infer that it is an actual death of indeterminate cause."

² According to the report attached by the petitioner, by the GAPH (Group for Monitoring and Evaluation of Hospital Psychiatric Care), the *Casa de Repouso Guararapes* was, at the time, licensed under the Single Health System, a system maintained by the Federal Government. It appears from the record that Mr. Damião Ximenes Lopes could have been admitted to said *Casa de Repouso* through the Single Health System.

13. The petitioner alleged that in the petition that reported the case to the competent authorities, she requested that the Civilian Police initiate an inquiry, and that the Federal Public Ministry initiate an administrative proceeding.³ She referred to several statements made by victims of said *Casa de Repouso*,⁴ and she attached the Report prepared by the Group for Monitoring and Evaluation of Hospital Psychiatric Care –GAPH-CE⁵ (*Grupo de Acompanhamento e Avaliação da Assistência Psiquiátrica Hospitalar*)– when it visited the *Casa de Repouso Guararapes* at the request of the Commission on Human and Citizen Rights of the Legislative Assembly of Ceará, after the complaint lodged by the petitioner with that Commission, and, notwithstanding that initiative, according to the petitioner, the case was not duly investigated, no action was filed, the *Casa de Repouso* continued operating, and the guilty persons continued to go unpunished.

14. The Group for Monitoring and Evaluation of Hospital Psychiatric Care – GAPH-CE, when visiting the *Casa de Repouso* in November 1999, just after the incident alleged here, collected information on the reports of the death of Damião Ximenes. In that respect, they concluded as follows:

The “Damião Case” evidences the precarious medical care, abusive treatment, various shortcomings listed in this report, which should be denounced to the various councils related to psychiatric care, and to the Public Ministry, for it to take the appropriate measures.

15. The report by the group of specialists in psychiatry and signed by Dr. Raimundo Alonso Batista de Aquino, Coordinator of Mental Health Care for the state of Ceará, concluded what was explained by the petitioner, i.e. that said *Casa de Repouso* was inadequate for the purposes to which it was earmarked:

The clinic does not have the conditions for operating, based on all the comments referred to above. Based on its strategic location, we suggest it be intervened, or that a similar measure be adopted, changing its management or having its license stripped by the Single Health System. Measures to be adopted by the municipal government of Sobral or in conjunction with the SESA.

16. Even though the petitioner had demonstrated the existence of a police inquiry and an administrative proceeding, there is nothing in the record about what happened in these procedures. Furthermore, the State has not provided the Commission any information as to the development and results of those procedures.

17. The petitioner alleged that the State is not fulfilling its obligation to carry out the judicial investigation in order to determine the responsibility for her brother's death, and she alleged State responsibility, as the State allowed and allows –as it continues to operate– the operation of said *Casa de Repouso*, which, through its staff of physicians, nurses, and monitors, dispenses cruel and inhuman treatment to its patients, treatment that caused the death of her brother Damião Ximenes Lopes.

B. The State's position

18. The Commission, as per its Regulations, notified the Brazilian State, asking that it provide any information it deemed pertinent to the complaint; it then did so again on three more occasions. Nonetheless, the State let the time periods run, and as of the analysis of this Report, it did not present any response to the facts alleged by the petitioner, nor did it call into question the admissibility of the petition that is the subject of this Report.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*

³ Administrative Proceeding no. 08105.001068/99-62.

⁴ Statements made in Inquiry no. 404/99.

⁵ Report dated December 2, 1999.

19. In keeping with Article 44 of the American Convention and Article 23 of the Rules of Procedure, the petitioner has standing to present petitions to the Commission referring to alleged violations of the human rights established in the American Convention. As for the State, Brazil is a party to the American Convention. The petitioner states as the alleged victim her brother, Damião Ximenes Lopes, whose rights as stated in the Convention the Brazilian State undertook to respect and ensure. Accordingly, the Commission is competent *ratione personae* to examine the complaint. Moreover, from an examination of the documents attached by the petitioner, one notes that the *Casa de Repouso* was a private entity licensed by the Federal Government's Single Health System, and, as such, could have provided care to Mr. Damião. Nonetheless, the IACHR shall decide on the alleged responsibility of the State for the acts alleged in the report on the merits.

20. The Commission is competent *ratione materiae*, for the petition refers to alleged violations of human rights protected by the American Convention at Articles 4, 5(1) and (2), 11, and 25, to the detriment of Damião Ximenes Lopes.

21. The Commission is competent *ratione temporis* insofar as the facts alleged occurred when the obligation to respect and guarantee the rights established by the Convention was already in force for the State, as it ratified the Convention on September 25, 1992.

22. The Commission is competent *ratione loci* because the facts alleged occurred in the territory of the Federative Republic of Brazil, which has ratified the American Convention.

B. Admissibility requirements

a. Exhaustion of domestic remedies

23. In the present case, the State did not allege failure to exhaust domestic remedies, and therefore one may presume a tacit waiver of the right to invoke the objection of failure to exhaust domestic remedies.

24. In this respect, the Inter-American Court has indicated that "the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed."⁶ The IACHR is of the view that the State tacitly waived this objection.

b. Time period for submission

25. In the complaint that is the subject of this report, the Commission determined that the Brazilian State tacitly waived its right to invoke the objection of failure to exhaust domestic remedies. As the Convention requirements of exhaustion of domestic remedies and submission within six months of the judgment that exhausts the domestic jurisdiction are independent, the Inter-American Commission must determine whether the petition under study was submitted within a reasonable time. This is because, on having determined that the State tacitly waived the requirement of prior exhaustion of domestic remedies, there is no date certain from which to count the six-month period. The lack of a date certain does not relieve the petitioner of the timely submission requirement. In this regard, the Commission, in view of the particular circumstances of this petition, considers that this complaint was submitted within a reasonable period.

c. Duplication of procedure and *res judicata*

26. The Commission does not see any indication in the record that the complaint brought before this Commission is pending before any other international procedure, and it did not receive any information indicating the existence of such a situation; likewise, there is no indication that it reproduces any petition or communication previously examined by the IACHR. Accordingly, the Commission understands that the requirement of Articles 46(1)(c) and 47(d) have been met.

⁶ Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, para. 88.

d. Characterization of the violations

27. The Commission considers that *prima facie* the facts alleged by the petitioner tend to establish violations of the American Convention at Articles 4, 5, 11, and 25, for possible violations of the right to life, the right to humane treatment, the right to privacy, and the right to judicial protection, all in connection with the State's generic obligation to respect and ensure the rights as established in Article 1(1) of the American Convention, to the detriment of Mr. Damião Ximenes Lopes.

V. CONCLUSION

28. The Commission concludes that it is competent to take cognizance of this case, and that the petition meets the admissibility requirements, as per Articles 46 and 47 of the American Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare, without pre-judging on the merits of this case, that the instant petition is admissible with respect to the facts alleged in relation to Articles 4 (right to life), 5 (right to humane treatment), 11 (right to privacy), and 25 (right to judicial protection), in conjunction with Article 1(1) (obligation to respect the rights contained in the Convention).
2. To transmit this report to the State and the petitioner.
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., the 9th day of October 2002. (Signed): Juan Méndez; President, Marta Altolaguirre; First Vice-President, Robert K. Goldman, Julio Prado Vallejo, and Clare K. Roberts, Commission members.