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First Vice-President: Clare K. Roberts;
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VICTIMS: Arnaldo Alves de Souza, Antonio Permonian Filho, Amaury Raymundo Bernardo, Tomaz Badovinac, Izac Dias da Silva, Francisco Roberto de Lima, Romualdo de Souza, Wagner Saraiva, Paulo Roberto Jesuino, Jorge Domingues de Paula, Robervaldo Moreira dos Santos, Ednaldo José da Fonseca, Manoel Silvestre da Silva, Roberto Paes da Silva, Antonio Carlos de Souza, Francisco Marion da Silva Barbosa, Luiz de Matos, and Reginaldo Avelino de Araujo. [FN1]

[FN1] List submitted by the petitioner organizations on August 15, 1995.

I. BACKGROUND

1. The Inter-American Commission on Human Rights began the processing of this case on February 8, 1989, based on a complaint filed by Americas Watch (presently Human Rights Watch/Americas) on February 7, 1989. In its complaint brief, the petitioner organization alleges that on February 5, 1989, there was an attempted uprising in the cells of the 42nd Police District of Parque São Lucas, in the eastern zone of the city of São Paulo. It also indicates that with a view to preventing any disturbance, approximately 50 prisoners were locked in a cell used for solitary confinement, measuring one meter by three meters, in which tear gas was released, and that 18 of the prisoners died of asphyxia and 12 were hospitalized. The detention facility, which has a capacity to hold 32 prisoners in four cells, was at that time, according to the complaint, holding 63 prisoners. As regards the legal arguments, the petitioner organization alleges, *inter alia*: that these events violate the victims' rights to life and to humane treatment (Article I of the American Declaration of the Rights and Duties of Man and Articles 4 and 5 of the American

Convention on Human Rights), and the minimum rules on conditions of detention. Specifically, the petitioner organization calls on the IACHR to intervene urgently to preserve “the health and safety” of the prisoners who survived.

2. On February 8, 1989, in keeping with Article 34 of the Commission’s Regulations, the pertinent parts of the complaint submitted by the complainant were forwarded to the Government of Brazil, which was given 90 days to provide the information it considered relevant in relation to the facts alleged.

3. In its answer of July 12, 1989, the Government reported, *inter alia*, (1) that the judicial investigations provided for in the law had been initiated to determine the criminal and administrative liability of the police officers involved, who had been suspended as a preventive measure; (2) that the cells for solitary confinement (*celas fortes*) of the police districts had been deactivated; and (3) that the investigation into the case by the competent authorities was being monitored by the Council for the Defense of the Rights of the Person, of the Ministry of Justice, which had received a complaint on the matter. Finally, the Government objected to the admissibility of the petition for failure to exhaust domestic remedies (Article 46(1)(a) of the American Convention; Articles 37(1) and 32(d) of the Commission’s Regulations). In addition, it stated its bewilderment that the petition had been considered “admissible in principle” (Article 34(1)(c) of the Commission’s Regulations), since the domestic remedies for determining the responsibility of the persons involved were still being pursued. This response from the Government was forwarded to the petitioners on July 13, 1989; it was then given 30 days to submit its observations.

4. On August 25, 1989, the complainant submitted its brief of observations, indicating, *inter alia*: that although the investigations had been initiated, they were unfolding slowly. That contrary to what was alleged by the Government, the police officers involved had not been suspended, but had been assigned to the *Corregedoria da Polícia*, the organ which, paradoxically, is in charge of investigating the crime of which they are accused. That in that office they performed functions normally, without being subject to any administrative suspension nor to any separation from service so as to facilitate the investigation. That in the criminal jurisdiction a trial for first-degree murder (*homicídio qualificado*) had been initiated against Dr. Carlos Eduardo Vasconcelos, first officer at the 42nd Police District; attorney Celso José da Cruz, investigator in charge at the time of the killing; and José Ribeiro, jailer. That, moreover, there was a separate investigation or inquiry (*inquérito*) against the members of the military police before the Court of Justice of the Military Police, and that the investigation was to conclude October 18, 1989. As regards the Government’s assertion that the Council for the Defense of the Human Person was monitoring the proceeding, the petitioners asserted that it has no legal powers, only ethical ones. Finally, it stated that domestic remedies have proven ineffective, and that therefore it cannot be required to exhaust them.

5. The petitioners requested, among other things, that “the Government be ordered to present information that shows that domestic remedies are effective and appropriate, indicating more precisely and in greater detail what results would have produced by pursuing them.” These observations by the petitioners were forwarded to the Government on August 31, 1989; it was given 30 days to submit its final observations.

6. On September 29, 1989, the Government submitted its final observations and indicated, inter alia, as follows: That the police investigation initiated to investigate the participation of the civil police (police investigation No. 16/89) had become part of criminal proceeding No. 227/89, which had been forwarded to the court known as the Primeira Vara do Juri of São Paulo. It also indicated that the military police investigation (inquérito) initiated to determine the responsibility of the military police officers involved was before the 3rd Military Justice Ombudsperson. That in addition, an administrative disciplinary process had been initiated against the police officers involved. That civil actions for damages had been initiated. That the officials directly involved had been suspended for 30 days immediately after the facts and that some of the civilians implicated were later transferred to the Corregedoria da Polícia, where they had not performed administrative functions, but had been assigned to carry out vigilance of the Corregedoria's premises. That, therefore, domestic remedies had not been exhausted. The Government's final observations were transmitted to petitioners on October 6, 1989.

7. Once the procedures provided for in the Regulations had concluded, from October 6, 1989, to December 12, 1994, additional information was received on the following dates: November 22, 1989 [FN2] ; January 18, 1990; January 26, 1990 (Note No. 22 of January 16, 1990) [FN3] ; March 3, 1990 [FN4] ; June 5, 1990; December 22, 1992; October 24, 1993; February 22, 1994 [FN5] ; September 16, 1994 [FN6] ; December 2, 1994 [FN7] ; and August 10, 1995.

[FN2] This communication from the petitioners indicated that the civil police officer were first suspended, but had then been assigned to the Corregedoria da Polícia with administrative functions or involving vigilance of the premises.

[FN3] In this communication, the Government confirmed that three of the police officer were at the disposal of the Corregedoria, denied that the police involved were working in contact with the Commission in charge of investigating the facts, and indicated that only two of them were working as guards of the grounds, and were not involved in the investigations.

[FN4] In this communication, the petitioners indicated that the military criminal proceeding was advancing more slowly than usual, since the first hearing had been postponed three times: first due to the health of the accused; the second because the judge's calender was overloaded; and the third because the accused had simply failed to appear. This last delay was considered unacceptable.

[FN5] In this communication, the petitioners reported that Celso José da Cruz had been found guilty (of murder) in the deaths of the 18 prisoners and had been sentenced to 516 years in prison; that the jury had accepted the prosecutor's argument that Cruz had acted with intent to kill when he locked the prisoners in a small cell, without ventilation; and with intentional cruelty, when preventing them from defending themselves. That for his part, José Ribeiro, the civil police officer who was the jailer, had been sentenced to 45 years of prison with the right to remain free while appealing the decision, and that the prosecutor was intending to appeal that sentence since it was lighter than the one imposed on Celso José da Cruz. The petitioners requested that the Center for Justice and International Law (CEJIL) be included as co-petitioners in this case, which was accepted by the Commission.

[FN6] In this communication, the petitioners reported that the civil police officer Carlos Eduardo Vasconcelos had been acquitted of the 18 counts of homicide, as a result of a jury trial conducted August 8 to 12, 1994, and that the second trial, of José Ribeiro, was to begin August 30, 1994.

[FN7] In this communication, the Government reported that civil police officer Celso José da Cruz, who in the first instance had been sentenced to 516 years and seven months in prison, had had the sentence reduced, on appeal, to 54 years and seven months. That the civil police officer, jailer José Ribeiro, had been sentenced to 45 years of prison, and that, considering that both the prisoner and the prosecutor had filed an appeal against that sentence, the proceeding was continuing its course in the first panel of the Court of Juries (“Primeira Vara do Tribunal do Júri”) of São Paulo. That the third civil police officer accused, officer Carlos Eduardo Vasconcelos, had been acquitted by a jury on August 12, 1994, and that the Public Ministry had appealed the verdict, the appeal at the time being heard, and that the military criminal trial was at the stage of hearing witnesses, as the stage of taking testimony from the accused had concluded.

8. According to Article 48(1)(f) of the Convention, the Commission, in a letter dated October 23, 1995, made itself available to the parties to pursue a friendly settlement of the matter. In that letter, the Commission gave the Government 45 days to report on whether it was interested in seeking such a settlement, and informed that if in that period it failed to do so, it would consider the possibility of reaching a friendly settlement to have been exhausted. The Government did not make known its position within that time or at any time thereafter.

With this background, the Commission now moves on to consider:

II. THE COMMISSION’S COMPETENCE

9. The Commission is competent, in keeping with Articles 26 [FN8] and 51 [FN9] of its Regulations, to take cognizance of and rule on this complaint of a violation of the right to life and humane treatment established in the American Declaration of the Rights and Duties of Man. [FN10]

[FN8] Article 26 of the Commission’s Regulations in force when the report on the merits in the instant case was adopted provided as follows: “Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the Organization may submit petitions to the Commission, in accordance with these Regulations, on one’s own behalf or on behalf of third persons, with regard to alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man.”

[FN9] Article 51 of the Commission’s Regulations in force when the report on the merits in the instant case was adopted provided as follows: “The Commission shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man, concerning the member states of the Organization that are not parties to the American Convention on Human Rights.”

[FN10] That Declaration, the Final Act of which was signed on May 2, 1948, in Bogotá, Colombia, by the Plenipotentiary Delegates of the Illustrious Government of Brazil, is a source of international obligations for Brazil.

10. It is also competent to examine complaints against the Brazilian state for violations of human rights, based on the provisions of the American Convention on Human Rights and Article 26 of its Regulations.

11. First, it is competent under the American Declaration of the Rights and Duties of Man, because the events that gave rise to this complaint occurred prior to the date on which the Brazilian state deposited its instrument of accession to the American Convention on Human Rights (September 25, 1992).

12. Second, the Commission is also competent to examine events (in this case the proceedings) prior to September 25, 1992, insofar as they may constitute a continuing violation or denial of the right to judicial guarantees and the right to judicial protection (Articles 8 and 25 of the Convention, respectively). The Brazilian state, on depositing its instrument of accession to the American Convention, assumed, in keeping with the case-law of the Commission and the Court, the explicit obligation to investigate and punish the persons guilty, especially the members of the military police involved. Nonetheless, in the present case it did not offer the corresponding judicial guarantees and judicial protection to the victims or their next-of-kin. This is expressed in the delays in the judicial proceedings, especially in the military justice system, which, to this day, seven years after the facts, are in the initial stage. In proceeding in this fashion, it also failed to comply with the provisions of Article 1(1) of the Convention, i.e. the duty to respect the rights and freedoms recognized in it, and to guarantee their free and full exercise to all persons subject to its jurisdiction. From these duties, in the view of the Commission, and as the Inter-American Court of Human Rights has indicated, is derived the duty to organize the whole governmental apparatus and the structures in which it finds expression, the exercise of public power, such that they are capable of legally guaranteeing the free and full exercise of human rights. The duties to prevent, investigate, and punish that we just referred to, and to re-establish the right violated, if possible, and, as the case may be, to pay compensation for harm caused. [FN11]

[FN11] See, Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 166.

13. Consequently, the Commission is competent *ratione temporis* to hear and decide the instant case under the American Declaration (Article XVIII) and also under the American Convention, with respect to the procedures in the Brazilian criminal justice system, especially in the military criminal courts, insofar as they constitute a continuing violation of Articles 8 and 25 of the Convention with respect to its Article 1(1).

14. On analyzing this case, the Commission has taken into account the case-law of the European Commission on Human Rights, which, while it has recognized and repeatedly applied the principle of the non-retroactivity of treaties, [FN12] in some of its decisions it has drawn a distinction between such situations and others that constitute continuing situations or violations. The European Commission has considered itself incompetent *ratione temporis* to consider the first type of situations, but it has assumed competence to examine continuing situations.

[FN12] See, e.g., Dec Adm Com 214/56 (June 9, 1958), II YB 214, 230_23 1; Dec Adm Com Ap 343/57 (September 2, 1959), II YB 412, 454; Dec Adm Com Ap 899/60 (March 9, 1962), V YB 136, 142; Dec Adm Com Ap (September 18, 1961), IV YB 324, 334; Dec Adm Com Ap (July 26, 1963), VI YB 332, 344.

15. On this point, the European Commission has noted:

Nevertheless, in accordance with the generally accepted principles of international law, the Convention is valid for all the Contracting parties only as it pertains to events occurring subsequent to its entry into force for that Party. In the case that those events consist of a series of legal proceedings which extend over several months' time, the date of entry into force of the Convention for the State Party in question serves to divide the period into two parts: the first part falls outside the jurisdiction of the Commission, while the second part cannot be rejected on the basis of those arguments. [FN13]

[FN13] European Commission on Human Rights, Decisions and Reports, Vol. 7, Application No. 7211/75, Decision of October 6, 1976 (Switzerland), p. 107.

16. Along these same lines, the European Commission stated as follows in another case related to the application of Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols:

The applicant has submitted several complaints regarding the criminal proceedings carried out against him in the Italian courts.

The Commission must determine, first, if and to what point it is competent *ratione temporis* to take cognizance of those complaints. In this regard, it refers to its earlier case-law, which establishes that when the facts consist of a series of legal proceedings, the date of entry into force of the Convention for the state in question divides the period into two parts, the first of which is outside of the Commission's jurisdiction *ratione temporis*, while the second cannot be rejected on that basis. To the contrary, when a court hands down a judgment after the entry into force of the Convention with respect to the state in question, the Commission is competent *ratione temporis* to ensure that the procedures carried out before a court are incorporated into its final decision, which, accordingly, would include any flaw on the part of said court. [FN14]

[FN14] European Commission on Human Rights, Dec Adm Com Ap 8261/78 (October 11, 1979), 18 D&R 150, 151.

17. The following has been argued with respect to the applicability of this doctrine of the European Commission to the inter-American system:

... the doctrine established by the European Commission and by the Human Rights Committee under the International Covenant on Civil and Political Rights according to which these organs have declared their competence to take cognizance of facts prior to the date of entry into force of the Convention with respect to a given state, so long as and to the extent that these facts are susceptible to having as a consequence a continuing violation of the Convention that is drawn out beyond that date, is applicable to the inter-American system. [FN15]

[FN15] Andrés Aguilar, *Derechos Humanos en las Américas*, supra, 202.

III. ADMISSIBILITY OF THE PETITION

18. The formal admissibility requirements are provided for at Article 46(1) of the American Convention on Human Rights, which establishes that in order for a petition or communication filed in keeping with Articles 44 [FN16] and 45 to be admitted by the Commission, the following shall be required:

[FN16] Article 44 of the Convention provides: “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

- a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
- b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
- c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
- d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

19. The present petition meets the formal requirement of admissibility provided for at subparagraphs 1(c) and (d) of Article 46 of the Convention, as the subject matter of the petition is not pending in any other international settlement; moreover, it meets the requirement of

subparagraph (d), as it contains the name and signature of the legal representative of the organization filing the petition, which is a non-governmental organization legally recognized in one or more member states of the Organization. The petition, moreover, is written on letterhead stationery of that organization, which contains its name and address. Accordingly, the Commission considers this requirement met.

20. The Commission will now consider whether the petition meets the requirements of Article 46(1)(a) and (b), and whether, if not, any of the exceptions provided for at Article 46(2) apply. These provide:

The provisions of paragraphs 1.a and 1.b of this Article shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

21. In this respect, the Government of Brazil has raised a preliminary objection for failure to exhaust domestic remedies, based on the fact that the complaint in the instant case was filed immediately after the underlying events, i.e. before there was time to set domestic remedies in motion. It also argues that said remedies are still being processed.

22. The petitioners, in turn, has argued that domestic remedies are ineffective, and that the delay in the processing of the cases against the persons responsible for the events at the 42nd Police District is unjustified, as well as invoking the exception provided for at Article 46(2) of the Convention. Moreover, the petitioners has alleged that the Government's argument that the complaint was submitted too quickly without giving any time to set domestic proceedings in motion may have been valid in 1989, but that today it is not. This is because more than six years have elapsed since it was filed, without any final decision in this respect, especially as regards the proceedings before the military courts.

23. As the Inter-American Court on Human Rights has indicated:

The rule of prior exhaustion of domestic remedies allows the state to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction (American Convention, Preamble). [FN17]

[FN17] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 61.

24. This rule, according to the Court, has implications that are not considered in the Convention. One is the obligation the states parties assume to provide effective domestic judicial remedies to the victims of human rights violations (Article 25 of the Convention), and another is that these remedies must be substantiated as per the rules of due process of law (Article 8(1) of the Convention). All this occurs within the scope of Article 1(1) of the Convention, which sets forth the obligation of the state to guarantee to the persons under their jurisdiction the free and full exercise of the rights recognized in the American Convention on Human Rights. [FN18]

[FN18] Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 62.

25. Now, it is clear that the burden of proof with respect to the exhaustion of domestic remedies is on the state that alleges non-exhaustion. This includes the duty to indicate which domestic remedies must be exhausted, and their effectiveness. [FN19]

[FN19] Inter-American Court of Human Rights, the following cases: Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987, para. 87; Fairén Garbi and Solís Corrales, Preliminary Objections, Judgment of June 26, 1987, para. 87; Godínez Cruz, Preliminary Objections, Judgment of June 26, 1987, para. 90; Velásquez Rodríguez, Judgment of July 29, 1988, para. 59, Gangaram Panday, Preliminary Objections, Judgment of December 4, 1991, para. 38; Neira Alegría et al., Preliminary Objections, Judgment of December 11, 1991, para. 30; and Castillo Páez, Preliminary Objections, Judgment of January 30, 1996, para. 40.

26. In the instant case, the Government of Brazil has limited itself to alleging the failure to exhaust domestic remedies, without specifying which of them could be useful. In addition, it has not refuted the allegations related to the ineffectiveness of domestic remedies, nor has it presented any documentary evidence in this regard.

27. Since the Government has not objected to most of the petitioners' allegations, nor has it justified the delay and the lack of efficacy of domestic remedies, the Commission must draw its conclusions in the absence of its more active participation. [FN20]

[FN20] See Inter-American Court of Human Rights, Velásquez Rodríguez Case, July 29, 1988, para. 137.

28. In the instant case, as appears from the record, the domestic remedies had not been exhausted when the complaint was filed. Nor today, seven years later, have they been exhausted, except for the case of one of the civil police officers involved. In effect, according to the information received up until the presentation of this report, the cases of two of the civil police officers are on appeal, and the proceedings before the military criminal courts are still at the stage of taking the statements of witnesses for the prosecution.

29. The basis of the international protection of human rights referred to in Article 46(1) of the Convention lies in the need to safeguard the victim from the arbitrary exercise of public power. [FN21] The exceptions set forth at Article 46(2) of the Convention are aimed precisely at guaranteeing international action when the domestic remedies and the domestic judicial system are not effective when it comes to guaranteeing respect for the human rights of the victims.

[FN21] Inter-American Court of Human Rights, *Godínez Cruz Case*, Preliminary Objections, June 26, 1987, para. 95.

30. Accordingly, the formal requirement with respect to the non-exhaustion of the domestic remedies that guarantee the principle of due process (Article 46(2)(a) of the Convention) refers not only to a formal absence of domestic remedies, but also to the case in which they are not adequate; the denial of justice (Article 46(2)(b) of the Convention) and the unwarranted delay in justice (Article 46(2)(c) of the Convention) are also related to the effectiveness of such remedies. [FN22]

[FN22] *Mónica Pinto, La Denuncia ante la Comisión Interamericana de Derechos Humanos*, Editores del Puerto, 1993, p. 64.

31. In this regard, the generally recognized principles of international law refer both to domestic remedies existing formally and to their being adequate to protect the legal interest infringed and effective for producing the result for which they were designed. [FN23] This is why their exhaustion should not be understood as the need to mechanically go through the formal procedures, rather, one must analyze, in each case, the reasonable possibility of obtaining the remedy. [FN24] Along these lines, the right to adduce failure to exhaust domestic remedies as the basis for declaring a petition inadmissible must never lead to “a halt or delay that would render international action in support of the defenseless victim ineffective.” [FN25] In other words, if the processing of the domestic remedies is drawn out, without justification, [FN26] one may deduce that they have lost their effectiveness for producing the result for which they were designed, which “renders the victim defenseless” [FN27] It is in such cases that one must apply the mechanisms of international protection, among others the exceptions provided for at Article 46(2) of the Convention.

[FN23] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paras. 62-66; *Fairén Garbi and Solís Corrales Case*, Preliminary Objections, March 15, 1989, paras. 86-90; *Godínez Cruz Case*, Judgment of January 20, 1989, paras. 65-69.

[FN24] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, para. 72; *Fairén Garbi and Solís Corrales Case*, Preliminary Objections, March 15, 1989, para. 97; *Godínez Cruz Case*, Judgment of January 20, 1989, paras. 75.

[FN25] Inter-American Court of Human Rights, *Godínez Cruz Case*, Judgment of June 26, 1987, para. 95.

[FN26] Such delays have a negative impact on the effectiveness of domestic remedies, since they lead to the deterioration of evidence, especially witness evidence, which over the years may change, or facts are forgotten. This clearly undercuts the effectiveness of procedures aimed at determining responsibilities and punishing the guilty.

[FN27] Inter-American Court of Human Rights, *Godínez Cruz Case*, Judgment of June 26, 1987, para. 95.

32. In the instant case, the Government had the opportunity to refute the petitioners' arguments in relation to the effectiveness of domestic remedies pursued, and of the judicial system itself, especially the military criminal courts. In addition, it had the opportunity to refute the arguments related to the delay and the lack of diligence in processing the cases, and, therefore, the lack of diligence of the judicial authorities and the Public Ministry, [FN28] which must take the procedural initiative. Nonetheless, it did not, saying only: "there has not been unwarranted delay in the processing of the cases." [FN29]

[FN28] In this respect, one must bear in mind that in crimes of public action and even those that depend on private initiative (in criminal matters), the State has the non-delegable obligation to prosecute criminal offenses, i.e. to preserve the public order and guarantee the right to justice. In these cases, accordingly, it is not valid to demand of the victim or the victim's next-of-kin that they exhaust domestic remedies. In effect, the state, through the Public Ministry, must set in motion the criminal justice system, promoting and giving impetus to the procedural stages until their conclusion. In relation to this point, see, for example, Report No. 12/95, Case 11,218, Nicaragua, OEA/L/II.90 Doc. 16, September 13, 1995, para. 7.19. As a Brazilian treatise-writer states, the Public Ministry is the "representative of the law and overseer of its enforcement." See Luis Claudio Alves Torres, *Prática do Processo Penal Militar*, Editora Destaque, Rio de Janeiro (1993), p. 31. With respect to the necessary diligence that the Public Ministry should display in exercising procedural initiative, see Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, para. 79. In the same judgment, the Inter-American Court of Human Rights indicated that the duty to investigate "must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government." *Id.*, para. 177.

[FN29] Note No.22 from the Government of Brazil, of January 16, 1990, received January 26, 1990.

33. The facts proven indicate, however, that seven years have elapsed since the events in question, [FN30] and that no verdict has yet been handed down with respect to any of the 28 military police involved, and there has been a firm judgment in the case of only one of the civil police implicated, who was acquitted. [FN31]

[FN30] The events occurred February 5, 1989, i.e. seven years ago.

[FN31] The Government of Brazil reported that, as a consequence of criminal proceeding 227/89, initiated to judge the civilian police involved, indictments were handed down against civilian police officers José Ribeiro, Carlos Eduardo Vasconcelos, and Celso José da Cruz (see information submitted by the Government of Brazil on September 29,1989). Similarly, and still referring to the information provided by the parties, in criminal case 227/89, defendant Celso José da Cruz was sentenced on September 29, 1993, to 516 years and seven months in prison, in the first instance, and to 54 years and seven months, on appeal; defendant José Ribeiro was sentenced, on December 1, 1993, to 45 years in prison in the first instance with a right to appeal, with release pending the appeal, even though both the office of the prosecutor and the defense appealed that sentence; and defendant Carlos Eduardo Vasconcelos was acquitted on August 12, 1994, a decision that was appealed by the Public Ministry on August 15, 1994 (additional information submitted by the Government on October 18, 1993 and December 2, 1994). As of the date of the preparation of this report, the latter two appeals have not been resolved, even though more than a year-and-a-half has elapsed since those appeals were filed by the Public Ministry.

34. In view of the foregoing, the Commission considers that the exception provided for at Article 46(2)(c) of the Convention, regarding unwarranted delay in criminal proceedings, especially those in the military criminal courts, applies to the instant case. [FN32]

[FN32] According to information received from the Government on December 2, 1994, the action in the military criminal courts against the 28 military police involved in the crime was at the stage of hearing from witnesses for the prosecution, as the questioning of the accused had concluded. This information was confirmed on August 10, 1995, by the petitioner organizations.

35. The Commission concludes, accordingly, that the complaint in the instant case is admissible, in keeping with Article 46(2)(c), cited above.

IV. MERITS ISSUES

A. Responsibility of the Federal State of Brazil for the acts of its agents

36. The Brazilian state has not controverted the information submitted by the petitioners with respect to the events of February 5, 1989 in a cell of the 42nd Public District of the Parque São Lucas, in the city of São Paulo, which, moreover, were publicized by the press and other local and international media [FN33] and have been studied by Brazilian organizations renowned for their work to defend and promote human rights. [FN34] On that occasion, approximately 50 detainees were enclosed in a cell designed for solitary confinement, measuring one meter by three meters, in which the state agents released tear gas. Eighteen of the detainees died of asphyxia and 12 were hospitalized.

[FN33] See, e.g., “Brazilian Deaths Coincide with U.S. Rights Report: 18 Men Suffocate in São Paulo Jail Cell,” R. House, Washington Post, February 16, 1989, p. E1. While these press reports are not documentary proof per se, “contain public and well-known facts which, as such, do not require proof” (Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 146).

[FN34] See, *Los Derechos Humanos en Brasil*, 95, Universidade de São Paulo, Center for the Studies of Violence, and Teotônio Vilela Commission, São Paulo: NEV: CTV, 1995; Chapter IV, Police and Prison System; 13. Account of a massacre. Death of 18 detainees at the 42nd Police District, Parque São Lucas, São Paulo, pp. 139 ff., confirming and expanding on the account of the facts.

37. From the information sent to the Commission, it appears that it was state agents who ordered and carried out the acts that caused the deaths of 18 detainees and the injuries to 12 others, and that the Brazilian state accepts this responsibility. Nor has it controverted the petitioners’ allegations [FN35] that the prisoners, who were naked and defenseless, had first been tortured by the police in charge of their custody. [FN36]

[FN35] Additional information sent by the petitioners on August 10, 1995, and received August 15, 1995. This information was not controverted by the Government of Brazil.

[FN36] According to press information, the dead were part of a group of 51 prisoners who had been locked, naked, in a cell designed for solitary confinement. When the police officers in charge of the prisoners’ custody went to open the door, nine had died from asphyxia; nine others died later, at the hospital. Twelve of the survivors who had testified in a preliminary investigation stated, according to the Washington Post, that with the help of members of the militia, the police officer on duty at the time, detective Celso José da Cruz, had forced the men to enter the cell as punishment for an attempted escape by 64 prisoners, two days earlier. One of the members of the Human Rights Commission of São Paulo who interviewed the survivors, Father Agostinho Duarte de Oliveira Guerra, stated: “This was not only degrading and inhumane punishment, but torture.” (“Brazilian Deaths Coincide with U.S. Rights Report: 18 Men Suffocate in São Paulo Jail Cell”), R. House, Washington Post, February 16, 1989, p. E1).

38. To the contrary, in its briefs Brazil indicates, inter alia, that police investigations were initiated to “look into the criminal and administrative liability of the civil and military police officers involved,” [FN37] that “the civil police officers involved were suspended preventively,” [FN38] that “in order to prevent the recurrence of similar episodes in the future, it was decided that the so-called isolation cells (celas fortes) of the police districts would be deactivated,” [FN39] and that “the officers directly involved in the events will be suspended on a preventive basis,” [FN40] which constitutes recognition that the incident that culminated in the death of 18 prisoners was caused by state agents. Similar assertions can be found in several of the communications that the Government forwarded to the Commission during the processing of the complaint. [FN41]

[FN37] Answer from the Government of Brazil, July 12, 1989.

[FN38] *Id.*

[FN39] *Id.*

[FN40] Answer from the Government of Brazil, September 29, 1989.

[FN41] See, e.g., information sent by the Government on September 22, 1992, and December 2, 1994.

39. International law attributes to the state the conduct of its organs when they act in that capacity, even outside of the regular exercise of their scope of authority. This includes the upper-level organs of the state, such as the executive, legislative, and judicial branches, and the acts and omissions of their officers or subaltern agents. [FN42] This is so insofar as the state, being a fictitious juridical person, can only act through its employees and organs. [FN43]

[FN42] See, Santiago Benadava, *Derecho Internacional Público*, Editorial Jurídica de Chile, 1976, p. 151.

[FN43] The following quote illustrates in simple and graphic terms what we have just said: “In the State administration of this country, the functions granted to the secretaries (constitutionally granted to the ministers because they are constitutionally accountable) are so diverse that no secretary could carry them out personally. The obligations imposed and the powers granted to the secretaries are generally exercised under their authority by responsible officers of each department. Were it otherwise, it would not be possible to conduct public affairs. Constitutionally, the decisions of those officers are naturally decisions of the secretary. The secretary is accountable. He is the one who must answer to Parliament for any act that the officers have performed under his authority and, if he should delegate an important matter to an inferior officer of whom one would not expect competent performance of the task entrusted, the secretary would have to answer to Parliament. The whole system of organization and administration by departments is based on the assumption that the secretaries, as they are accountable to Parliament, will see to it that the important tasks are entrusted to experienced officers. And if they do not act in this manner, it is to Parliament that any complaints should be addressed.” (Emphasis added.) See, *Trial of Lord Green M.R. en Carltona Ltda. Y. Commissioners of Works and Others* (1943) 2 All E.R. 560, cited in *Commission on Human Rights, Subcommittee on Prevention of Discrimination and Protection of Minorities*, 45th session E/CN.4/Sub.2/1993/21, June 25, 1993, footnote 108, p. 81.

40. The Inter-American Court of Human Rights, in its judgment of July 29, 1988 (*Velásquez Rodríguez Case*), established the following in this regard:

under international law a state is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law. [FN44]

[FN44] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 170.

41. In other words, the Illustrious Government is responsible, in the instant case, for the acts or omissions of its public agents, who inflicted inhumane treatment on approximately 50 prisoners who were locked in a very small isolation cell and who died or were injured as a result of tear gas having been released into it. It is also responsible for the acts and omissions of the agents entrusted with investigating the facts and for the acts and omissions of its judicial branch, particular the military courts, which seven years after the facts has yet to perform the duty to investigate and punish the guilty.

42. Now, as Brazil is a federal state, it is the national Government that must answer internationally. In effect, Article 28 of the Convention provides:

1. Where a state Party is constituted as a federal state, the national government of such state Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

43. Accordingly, the Commission concludes that in the instant case, the federal state of Brazil must answer internationally for the acts of the agents in charge of the custody of the prisoners and of the guarding, administration, and oversight of the detention center where the events occurred. It is uncontroverted that these agents used excessive and irrational means to control a group of prisoners, which resulted in the deaths of 18 of them, and in injuries to several others. Moreover, it is responsible for breaching Article XVIII of the American Declaration of the Rights and Duties of Man (right to justice), which assures a simple and prompt procedure by which justice protects the person against acts of the authority that violate a fundamental right; for failure to comply with Article 1(1) of the American Convention, which establishes the obligation of the state to respect the rights and freedoms recognized in the Convention and to ensure their exercise, and, finally, for breaching the duty that derives from this provision, which consists of “preventing, investigating, and punishing” the violations of rights recognized by the Convention.
[FN45]

[FN45] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 172.

44. The Commission also concludes that it is a responsibility of the federal state of Brazil to take the pertinent measures, in keeping with its Constitution and laws, to get the competent authorities of the states that are components of the federation to adopt the corresponding

initiatives to comply with the Convention, and in particular with its Article 1(1), in keeping with Article 28(2) of the Convention.

B. The right to life

45. On February 5, 1989, approximately 50 detainees were locked in an isolation cell measuring one meter by three meters, into which the state agents released tear gas. Eighteen of the detainees died from asphyxia, and 12 were hospitalized. Considering that the Brazilian state ratified the American Convention after the events that led to this complaint, [FN46] the petitioners alleged that these incidents violate “at least” the victims’ right to life, established at Article I of the American Declaration of the Rights and Duties of Man. In some of their briefs they also allege that the Government has violated Article 4 (right to life) of the American Convention on Human Rights.

[FN46] The facts that culminated in the death of 18 prisoners in the 42nd Police District of São Paulo occurred on February 5, 1989, and the illustrious Government of Brazil ratified the Convention on September 25, 1992.

46. By virtue of the non-retroactivity of treaties, addressed above in respect of the Commission’s competence, the Commission considers that it must examine the events of February 5, 1989, at the 42nd Police District in light of Article I of the American Declaration, as regards the right to life.

47. Article I of the American Declaration reads:

Every human being has the right to life, liberty and the security of his person.

48. The above-cited provision establishes, as a basic principle, the prohibition on the arbitrary taking of any person’s life.

49. As discussed above, it is a principle of international law that the state answers for the acts of its agents carried out in their official capacity, as well as for their omission, even if they act beyond the scope of their authority, or in violation of domestic law. [FN47] This state responsibility attaches, among other situations, to violations of the right to life resulting from the act or omission of a state agent. [FN48]

[FN47] See Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 164.

[FN48] See, for example, the decision of the Human Rights Committee related to the sudden death of a political prisoner. It states, in that case: “While the Committee cannot arrive at a definite conclusion as to whether Hugo Dermitt committed suicide, was driven to suicide or was killed by others while in custody; yet, the inescapable conclusion is that in all the circumstances the Uruguayan authorities either by act or by omission were responsible for not taking adequate

measures to protect his life, as required by Article 6(1) of the Covenant.” Human Rights Committee, *Dermit v. Uruguay* (No. 84/1981), para. 9.2, 1983 Report, p. 135.

50. In the instant case, having locked so many people in a cell measuring one meter by three meters, having obstructed the only ventilation duct leading to it, and releasing tear gas within it constitute acts by state agents that consciously and recklessly acted with disregard to the right to life of the prisoners, and without bearing in mind the likely consequences of their acts. These actions resulted in the deaths of 18 detainees, who died of asphyxia amidst their own excrement and vomit. Accordingly, the Commission considers that the Brazilian state, as a result of the action of its agents, has violated the right to life (Article I of the American Declaration) of the 18 persons who died in these circumstances.

C. Right to security and humane treatment

51. Based on the principle of non-retroactivity of treaties, referred to above, the Commission considers that it must examine the events of February 5, 1989 at the 42nd Police District, not in light of Article 5 of the American Convention, but in light of Article I of the American Declaration, insofar as it relates to the right to security and integrity of the person.

52. In this respect, the Commission considers that the agents of the Brazilian state had a detrimental impact on the physical, mental, and moral health of 50 detainees at the 42nd Police District, on beating them, overcrowding them in a punishment cell measuring one meter by three meters, and releasing tear gas in that cell, whose only ventilation had been obstructed. As a result of these acts, 18 of the prisoners died, and 12 were hospitalized. These actions were carried out in reckless and intentional disregard for the human rights of the victims who died or exited the cell covered in urine, feces, and vomit due to the effects of the gases and the lack of ventilation.

53. These acts, which are imputable to the Brazilian state, for having been committed by state agents performing their functions, constitute a violation of Article I of the American Declaration, which guarantees, among other things, the right to security and integrity of the person. This provision states, in the pertinent part: “Every human being has the right to ... the security of his person.”

54. In relation to the question of prisons and conditions of detention, the Commission considers it appropriate to transcribe press release No. 12/95, released by it on concluding its on-site visit to Brazil, in which it makes reference to this matter:

Its visits to the correctional facility of Carandirú and the Third Police Delegation of São Paulo gave the Commission a chance to confirm the authorities' statements to the effect that those facilities are experiencing a general crisis. Serious overcrowding is evident, with prisoners crammed into unhealthful or cramped quarters or open air yards. Unconvicted defendants are placed there together with first_time convicts and repeat offenders. Health services are practically nonexistent in these facilities. In addition, there are inmates entitled to be transferred to lower security facilities who cannot be moved there because those facilities lack space. In this

connection the IACHR recommends to the authorities that they immediately apply international standards on human rights and Brazil's own laws on prisons, including urgent steps to correct the appalling situation witnessed by the visiting Commission members.

55. Finally, the Commission deems it necessary to note that in its on-site visit to Brazil it had occasion to verify that isolation cells (celas fortes) are still in use, which refutes the information submitted by the Federal Government in its answer brief of July 12, 1989, in which it stated that such cells had been deactivated.

D. Right to a fair trial and judicial protection

56. The petitioners allege that the delays in the military criminal process and the time elapsed (seven years) without a definitive decision being adopted against the police officers involved in the facts that led to this complaint constitute a violation of their right to a fair trial and to judicial protection (Articles 8 and 25 of the Convention, respectively). The Government, moreover, does not controvert the allegation.

57. The Commission is of the view that in this case Article XVIII of the American Declaration of the Rights and Duties of Man, enshrining the right to justice, applies. This provision provides:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

58. It must now be determined whether Article 8 (right to a fair trial) and Article 25 (right to judicial protection) of the American Convention apply to the instant case.

59. As stated above, Brazil deposited its instrument of accession to the American Convention on September 25, 1992, when, more than three years after the facts in the case, the legal proceedings to investigate and punish the police involved were continuing to drag out. [FN49] The duty to investigate continues over time. The inaction of the Brazilian state, on not undertaking an effective investigation after September 25, 1992, is in itself a specific violation independent of the right to life and to humane treatment. The violations of the right to justice and of the duty to adopt provisions of domestic law, with reference to the rights enshrined in Articles 1(1), 8, and 25 of the Convention, also constitute examples of denial of justice.

[FN49] See, e.g., Dec Adm Com Ap 232/57, I YB 246; Dec Adm Com Ap 7211/75 (October 6, 1976), 7 D&R 104, 106-107.

60. Under the Convention, the Brazilian state assumed the duty to investigate and punish the police involved, a duty that derives from Article 1(1) of the Convention, and which is continuing until the case is resolved. In the view of the Commission, this obligation also gives rise to the

state duty to offer the required judicial guarantees for a fair trial (Article 8 of the Convention) and the judicial protection (Article 25 of the Convention) to the victims and their next-of-kin.

61. In this same line of thinking, the Inter-American Court of Human Rights has determined that are considered ineffective remedies those that prove illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions ... [FN50]

[FN50] Inter-American Court of Human Rights, Advisory Opinion No. 9, October 6 1987, par. 24.

62. According to Article 1(1) of the Convention, the States Parties have the duty to acknowledge and respect the rights and freedoms recognized in it and to ensure their free and full exercise to all persons subject to their jurisdiction through the required judicial guarantees to ensure that they are effective. One of these guarantees is, precisely, the right that every person to be heard within a reasonable time, by an independent and impartial court (Article 8 of the Convention).

63. In effect, only an independent and impartial court can ensure the free and full exercise of human rights. As a corollary, a military court or tribunal that acts as judge and party in the trial of common crimes committed by the members of the military police [FN51] cannot offer the necessary guarantees for ensuring the exercise of those rights for the victims and their next-of-kin. Proof of this is the delay in the judicial proceedings before the military criminal courts of Brazil, the dilatory incidents that unwarrantedly delay the judicial decisions against the military police officers involved, the acquiescence and resulting impunity, which fosters police violence.

[FN51] The military police in Brazil are not part of nor are they coordinated with the Navy, as they, like the civilian police forces, answer to the state governors and the governor of the Federal District, and the governor of the Territories (Article 144(III)(6) of the Federal Constitution in force). Nonetheless, they are auxiliary and reserve units of the Army. See Ministry of Foreign Affairs, "Relatório Inicial Brasileiro Relativo ao Pacto Internacional dos Direitos Civis e Políticos de 1966," Ministry of Foreign Affairs, Fundação Alexandre de Gusmão, and Center for the Study of Violence, Universidade de São Paulo, p. 34 (1994). Article 42 of the Constitution provides further that the members of the military police are military employees. In this respect, it says: "the members of the Armed Forces and military employees of the States, Territories, and Federal District, the members of their military police forces, and of their military firefighter corps are federal military employees."

64. The natural purpose of the special military jurisdiction is to maintain discipline among the members of the Armed Forces in the exercise of their military functions. Therefore, this jurisdiction should not extend, under any circumstance, to judging the common crimes

committed against the civilian population by the military police officers in the performance of their police functions.

65. In the instant case, the Commission considers that the lack of diligence in punishing the police involved, especially of the military criminal courts, has triggered the international responsibility of the Brazilian state. In effect, the unwarranted delay in the decision of the judicial procedures related to what happened in the 42nd Police District not only released petitioners of the obligation to exhaust domestic remedies – as said in the chapter on admissibility – but it also violated Article 8 of the American Convention on Human Rights, on depriving the victims and their next-of-kin of the right to have their case resolved “within a reasonable time,” in keeping with the provisions of that Article.

66. Moreover, submitting the case to trial by the military justice system, whose delays, inefficiency, and partiality have been shown in this case, [FN52] also violated Article 25 (judicial protection) in relation to the right of all persons to be judged by “an independent and impartial tribunal”. This Article provides that:

[FN52] See, among others, the press release issued by the IACHR upon concluding its on-site visit to Brazil, in which the Commission mentions the problems that have arisen from the testimony provided by the human rights organizations and the representative of civil society. Of those problems, special mention can be made of the following, in relation to the instant case: the administration of justice, including the powers of the Public Ministry; police violence and impunity; the prison system and the jurisdiction of the military courts for trying common crimes committed by the Military Police. The Commission stated, in addition: “While an in_depth analysis of those topics is scheduled for its meeting in February of next year, the IACHR wishes to point out here that an effective judicial branch is an essential requirement of a modern democratic system. Under the provisions of the Pact of San José, the inhabitants of the states parties to the Convention are entitled to access to justice within a reasonable time. Article 25 of that instrument establishes everyone's right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights. The member states, for their part, undertake to guarantee the exercise of that recourse. In this respect the Commission notes with concern the difficulties which the exercise of the right under reference __ i.e., to try a case initiated within a reasonable time __ entails in Brazil.”

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

67. In this respect, the Commission considers it important to reproduce, in the pertinent parts, Press Release No. 12/95, issued on culminating its on-site visit to Brazil. There it stated as follows:

The Commission also received information about acts of violence committed by the police and the impunity accorded them. To combat police violence the Commission feels that an imperative step would be to pass a law ensuring that any crime committed by military police against civilians be adjudicated through the regular justice system. The Commission similarly feels that efficient procedures should be established to receive and consider complaints against police officers. [Emphasis added.]

68. This conclusion reached by the Commission fits within Article 1(1) of the Convention, with respect to the obligation of the States Parties to ensure the free and full exercise of the rights recognized in the Convention to every person subject to their jurisdiction. From this obligation derives the duty to organize the government apparatus and structures through which public power is exercised; the duty to prevent, investigate, and punish any violation of the rights recognized by the Convention; and the duty to seek to re-establish, if possible, the right violated, and, as appropriate, pay compensation for damages. [FN53]

[FN53] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 169.

69. It also fits within the obligations derived from Article 2 of the Convention, which establishes the obligation of the States Parties to adopt provisions of domestic law. That provision states:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

70. To conclude, the Commission considers it pertinent to indicate that, as the Inter-American Court of Human Rights said, the obligation to guarantee the free and full exercise of human rights, set forth in Article 1(1) of the Convention:

not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.

71. Based on the foregoing, the Commission concludes that in the instant case, the Brazilian state has violated Article XVIII of the American Declaration of the Rights and Duties of Man, and Articles 8 and 25 of the American Convention on Human Rights, in relation to Article 1(1).

72. In view of the foregoing, the Inter-American Commission on Human Rights agrees:

1. To declare that the Brazilian state is responsible for having violated Article I (right to life, security, and personal integrity) and Article XVIII of the American Declaration, and Article 8

(right to a fair trial) and Article 25 (right to judicial protection) of the American Convention, in relation to its Article 1(1).

2. To recommend to the Brazilian state that it adopt the legislative measures needed to transfer to the regular criminal courts the trial of common crimes committed by military police officers in the performance of their public order functions.

3. To recommend to the Brazilian state that use of the cells designed for solitary confinement (*celas fortes*) be discontinued.

4. To request of the Brazilian state that it punish, in keeping with the gravity of the crimes committed, the civilian and military police officers involved in the facts that gave rise to the instant case.

5. To recommend to the Brazilian state, in those cases in which it has not done so, that it pay fair and adequate compensation to the victims' next-of-kin for the harm caused as a result of the breaches of the above-mentioned provisions.

6. To request of the Brazilian state that it report to the Inter-American Commission on Human Rights, within three months, on the measures adopted to comply with the operative points of this report.

7. To transmit this report to the Brazilian state, through the Federal Government, in keeping with Article 50(2) of the American Convention, and to inform it, in keeping with that same provision, that it is not authorized to publish it.

V. PROCEEDINGS SUBSEQUENT TO REPORT N° 16/96

73. The Commission adopted Report on the Merits N° 16/96, on the instant case, on March 6, 1996, during its 91st session. That Report, with the Commission's recommendations, was forwarded to the Brazilian state on July 15, 1996. In that report, the Commission requested the Brazilian state to inform it, within three months, of the measures that had been adopted to comply with the Commission's recommendations. In this respect, the Government's response was received on October 21, 1996; it is discussed in this report.

74. The Government's response, dated October 17, 1996, states textually:

It is my honor to forward to Your Excellency, as an annex to note 228 of August 30, 1996, information from the Brazilian Government regarding the recommendations of the Inter-American Commission on Human Rights with respect to Case 10,301 (Parque São Lucas), contained in Report No. 16/96, adopted by the Commission at its 91st regular session:

(1) Recommendation: Transfer to the Regular Courts the trials of common crimes committed by military police.

On August 7, 1996, Law No. 9,299 was adopted, amending provisions of the Military Criminal Code and the Code of Military Criminal Procedure, providing for the transfer to the regular courts of jurisdiction over the trial of crimes against life by military police officers against civilians.

Despite some restrictions on its content and scope, there is no doubt but that the advent of the new law represents a milestone in relation to the defense of human rights in the country.

As it is a procedural norm, the application of Law No. 9,299/96 was immediate, resulting throughout the country in the transfer of jurisdiction to the regular courts of proceedings that had already begun – for example those regarding the episodes at Corumbiara and Eldorado de Carajás, and of criminal proceedings whose investigation had begun in the military justice system. This latter situation is that of the criminal proceeding aimed at investigating responsibilities in the context of the Parque São Lucas case.

In effect, proceeding No. 35,887/89, which was being processed before the Third Military Ombudsperson (Terceira Ouvidoria Militar) for the state of São Paulo, was removed on August 14, 1996, to the criminal courts of the state, as a result of the decision written and justified by the hearing judge (Juiz Ouvidor). The proceeding was received by the judge for criminal matters of the First Court of Jury Trials for the capital district of the state of São Paulo, and was entered with the number 2576/96-unit I.

(2) Recommendation: Punish the civil and military police officers involved.

The investigations into the incident indicated the participation of civil and military police officers. Accordingly, legal proceedings were instituted to determine the responsibility of the accused, and the indictment considered that there were situations of multiple criminal perpetrators in relation to the commission of 18 murders and 32 cases of attempted murder.

Of the three civil police officers involved, the jailer José Ribeiro was prosecuted criminally and found guilty by the Vara do Juri, and was sentenced to 45 years and six months of detention. A new trial was held, requested by the defense, which led to affirmation of the penalty, after which two appeals were filed: one by the Public Ministry, aimed at increasing the penalty, and another by the defense, seeking a new trial. The appeals (Proceeding TJ No. 188.066.3/4) were assigned to the Fifth Criminal Chamber of the Court of Justice for the state of São Paulo, which ruled that the prison term could only be enforced once there is a ruling on the appeals, with which the accused was released from prison after having served over two years of the sentence.

Another civil police officer, Carlos Eduardo de Vasconcelos, was tried criminally and acquitted by the Vara do Juri of the state of São Paulo. The judgment of acquittal was appealed by the Public Ministry of the state, and is before the Fifth Chamber of the Court of Justice of São Paulo.

The third civil police officer, Celso José da Cruz, was tried criminally and found guilty by the Vara do Juri of the capital of the state of São Paulo, and was sentenced to 516 years imprisonment. The defense filed an appeal, which led to a new guilty verdict, which, however, reduced the sentence to 54 years of imprisonment. The same Fifth Chamber for Criminal Matters assumed jurisdiction on receiving an appeal of protest for a new jury, which led to the filing of a special motion by the Public Ministry of the state of São Paulo, which was recently submitted to the consideration and judgment of the Superior Court of Justice. After denying successive habeas corpus motions on behalf of the accused, the Fifth Chamber decided, deferring the consideration of dilatory motions by the defense, to release the accused, who was being held in the Special Prison of the Civil Police for more than two years. For this reason, the accused is

to await, on his own recognizance, the decision on the special motion, and, if the Superior Court of Justice does not endorse the arguments of the Public Ministry, the holding of a new jury trial.

Finally, as regards the 29 military police officers involved – one official, five sergeants, one corporal, and 21 soldiers – they are to be tried by the First Jury Court of the capital city, pursuant to the transfer of jurisdiction determined by Law 2,299 [sic], discussed above.

(3) Recommendation: Payment of adequate compensation to the victims' next-of-kin.

With the conclusion of the police inquiry and the inquiry of the Military Police into the incident, the Public Ministry of the state of São Paulo placed itself at the disposal of the victims' next-of-kin for the filing of judicial actions for compensation aimed at securing a finding that the Government of the state of São Paulo was civilly liable for the unlawful action of its public agents. Accordingly, the following actions were presented:

- First Public Treasury Judge - Proceeding Nº 127/89
Action seeking reparation for consequential damages due to unlawful act
Plaintiff: Geraldo Cardoso de Paula
Respondent: Public Treasury of the state of São Paulo
- Second Public Treasury Judge - Proceeding No. 118/89
Action seeking reparation for consequential damages due to unlawful act
Plaintiffs: Antonio Pernomiam and Luiza Pernomiam
Respondent: Public Treasury of the state of São Paulo
- Third Public Treasury Judge - Proceeding No. 128/89
Action seeking reparation for consequential damages due to unlawful act
Plaintiffs: Aparecida Inés Fabri Jesuino
Respondent: Public Treasury of the state of São Paulo
- Fifth Public Treasury Judge - Proceeding No. 90/89
Action seeking reparation for consequential damages due to unlawful act
Plaintiffs: Carmem Silva de Souza, Irandi Cardozo de Araujo, Maria Dilma Barbosa Bastos, Juvenal Raymundo Bernardo, Octília Bernardo
Respondent: Public Treasury of the state of São Paulo
- Fifth Public Treasury Judge - Proceeding No. 90/89
Action seeking reparation for consequential damages due to unlawful act
Plaintiff: Antonio Carlos de Souza
Respondent: Public Treasury of the state of São Paulo
- Fifth Public Treasury Judge - Proceeding No. 90/89
Action seeking reparation for consequential damages due to unlawful act
Plaintiff: Public Ministry of São Paulo
Respondent: Public Treasury of the state of São Paulo
- Sixth Public Treasury Judge - Proceeding No. 125/89
Action seeking reparation for consequential damages due to unlawful act
Plaintiff: Silvia Cristina de Oliveira Lucio
Respondent: Public Treasury of the state of São Paulo
- Tenth Public Treasury Judge - Proceeding No. 117/89
Action seeking reparation for consequential damages due to unlawful act

Plaintiff: Joaquim Saraiva

Respondent: Public Treasury of the state of São Paulo

The above-referenced actions for compensation are mostly on appeal, and one is at the phase of payment of the judgment. It should be clarified that Brazil's administrative system imposes on the contentious organs that represent the authorities the obligation to file appeals, so long as they are admissible. It should also be noted that none of the judgments handed down as a result of these actions declared anything opposing the right to compensation.

(4) Recommendation: Cease to use the solitary confinement regime (celas fortes)

Brazil's prison legislation is consistent with the recommendations of the United Nations on the treatment of prisoners and the rights of detainees. Therefore, the situation that provoked the death of the prisoners—the confinement of several of them in a cubicle—is a prohibited practice.

What is still accepted is individual isolation, in cases of proven necessity, on condition that it be in an adequate locale and with the necessary ventilation. Abuses and illegal practices are being combated by the Government. In the specific case of the state of São Paulo, an agreement was recently signed between the federal government and the state government to modernize the system, whose initial objective—deactivating the Carandiru detention center—is the symbol of a new prison policy for Brazil.

Final observations

By virtue of the foregoing considerations, one can conclude that the recommendations made by the Inter-American Commission on Human Rights with respect to the Parque São Lucas case coincide exactly with the present concerns of the Federal Government as regards the defense of human rights and the search for mechanisms to enhance the administration of justice, with the consequent reduction of impunity.

The recommendation transferring to the regular courts the processing and trial of common crimes perpetrated by military police officers is being considered in the terms of Law No. 9,299/96. In the specific context of the Parque São Lucas case, it was addressed by transferring to the regular courts of the state of São Paulo the criminal proceeding against the military police officers who participated in the incident.

The recommendation referring to ending the use of cells for solitary confinement finds support in the prison legislation in force; it is an objective of the Brazilian Government to step up efforts aimed at prohibiting and effectively punishing illegal practices of solitary confinement of prisoners in cubicles.

In relation to the recommendations to pay compensation and punish the persons responsible, the work developed by the Ministry of Justice through the Council for the Defense of Human Rights should continue, so that the authorities of the state of São Paulo can conclude, as soon as possible, the civil and criminal actions aimed at punishing the guilty and compensating the victims' next-of-kin.

To that end, it will be necessary for the Public Ministry of the state of São Paulo and the judicial branch of the state to take specific measures. In this respect, the Secretariat for Justice and Citizenship of the state of São Paulo has stated that it identifies with these objectives, as has the Office of the Attorney General of São Paulo, in terms of speeding up the adoption of the necessary measures. The Attorney General of São Paulo designated a prosecutor to follow up on each of the actions related to the case, to ensure they are processed quickly. At the same time, the Ministry of Justice and the Council for the Defense of Human Rights will continue undertaking the tasks of follow-up and orientation of the state authorities for the purpose of swiftly proceeding with the trials aimed at compensating the victims' next-of-kin and punishing the guilty.

The Permanent Mission before the Organization of American States will continue forwarding to the Executive Secretariat of the Inter-American Commission on Human Rights all supervening information, be it administrative or judicial, regarding the Parque São Lucas case.

I take this opportunity to convey to you, Your Excellency, the assures of my highest esteem.

Analysis of the Government's response to the recommendations of the Inter-American Commission on Human Rights:

1. Transfer to the Regular Courts of the trial of common crimes committed by military police officers.

75. The Government reported that Law No. 9,299/96 amended provisions of the Military Criminal Code and the Code of Military Criminal Procedure, transferring to the regular courts jurisdiction to try crimes against life perpetrated by military police officers against civilians. Accordingly, the criminal proceeding concerning the massacre that occurred in Parque São Lucas was remitted to the criminal justice system of the state of São Paulo on August 14, 1996.

76. These facts demonstrate the positive intent of the Government to comply with the Commission's recommendations. Nonetheless, the grave restrictions on the content and scope of Law No. 9,299/96, recognized in its response by the Brazilian Government itself, continue to stand in the way of the Brazilian state complying with the obligations it assumed in relation to the American Convention, especially because according to that law, only intentional criminal offenses, and, moreover, only those committed against life, will be transferred to the jurisdiction of the regular courts; non-intentional offenses against life and intentional criminal offenses not committed against life will continue to fall under the jurisdiction of the military justice system. Accordingly, this law does not meet the purposes for which it was apparently designed, i.e. to protect not only the right to life, but also all other rights guaranteed by the Convention, in their full extent, independent of the criminal intent of the perpetrator.

77. In addition, in keeping with Law 9,299/96, the investigation of the crimes committed by military police officers will continue to be entrusted to the Military Police. This means that the impartiality needed for the administration of justice, as established at Articles 1, 2, and 8 of the American Convention, will continue to be compromised.

78. The Commission considers these restrictions unacceptable, and observes that there is no reason whatsoever that justifies the military courts continuing to have jurisdiction over crimes committed by military police officers against civilians. It is also of the view that the Brazilian state must adopt legal norms that transfer jurisdiction over all crimes committed by military police officers against civilians to the regular courts, not just crimes against life.

2. The punishment of the civilian and military police involved

79. The Government's answer shows that judicial efforts were made to punish the persons guilty of the massacre. In relation to the 29 military police officers involved, the Commission notes the importance of the decision providing for the proceedings to be removed to the regular courts. It must be noted, at the same time, that the crime was committed on February 5, 1989, yet the military police officers continue in impunity and free, awaiting a trial that has yet to take place.

80. In relation to the civil police officers, the Government, in its answer, reported that they too continue in impunity and free, and are awaiting a final verdict.

81. The Government did not report whether there were any significant administrative sanctions in relation to civil or military police officers. Accordingly, the Commission concludes, based on the Government's answer submitted September 29, 1989, that the police officers continue performing their duties in the police institutions. The Commission observes that the continuation of these persons in the police corps endangers the life and security of third persons, and aggravates the situation of impunity.

82. The Commission considers that the delay in the prosecution and punishment of the accused perpetuates injustice and is not consistent with the obligations assumed by the Brazilian state in relation to the American Convention, which provides at Article 25 the right to a simple and prompt remedy aimed at protecting against acts that violate the fundamental rights of the human person.

3. The payment of compensation

83. In its answer, the Government reported that the Public Ministry placed itself at the disposal of the families of the victims for submitting judicial actions for compensation. Nonetheless, said actions are still, eight years after they were filed, being appealed. The Commission, while it recognizes the current efforts of the Government to provide economic compensation to some of the victims' next-of-kin, reiterates the need for swifter procedures, given that the delay in handing down a final judgment violates the state's obligation to ensure the judicial guarantees established by the American Convention, and aggravates the suffering of the victims' next-of-kin.

4. Ending the use of the solitary confinement regime (celas fortes)

84. The Government asserted that Brazil's prison legislation is consistent with the recommendations of the United Nations on the treatment and rights of prisoners, in which context solitary confinement is an acceptable practice. Nonetheless, the use of such practices should be governed by minimum standards required by international provisions. In other words, not only must it be verified that it is necessary, but also that the cell is installed in an adequate locale, and with the necessary ventilation, with any inhumane or degrading treatment categorically prohibited. The Government's response to that recommendation contradicts information presented earlier, on July 12, 1989, when the Government reported that to prevent similar episodes it had decided to end the use of the cells for solitary confinement in the police district jails. Given the breach of this recommendation to the Brazilian Government, the Commission will continue monitoring compliance with said international standards.

VII. CONCLUSIONS

a. The Inter-American Commission on Human Rights concludes that in the instant case the Brazilian state violated the human rights of Arnaldo Alves de Souza, Antonio Permonian Filho, Amaury Raymundo Bernardo, Tomaz Badovinac, Izac Dias da Silva, Francisco Roberto de Lima, Romualdo de Souza, Wagner Saraiva, Paulo Roberto Jesuino, Jorge Domingues de Paula, Robervaldo Moreira dos Santos, Ednaldo José da Fonseca, Manoel Silvestre da Silva, Roberto Paes da Silva, Antonio Carlos de Souza, Francisco Marion da Silva Barbosa, Luiz de Matos, and Reginaldo Avelino de Araujo, enshrined in Articles I and XVIII of the American Declaration and Articles 8 and 25 of the American Convention, and that it breached the obligations established in Article 1 of the Convention.

b. The Commission recognizes the efforts made by the Government to punish the perpetrators of the human rights violations, and to pay compensation for the violations of rights committed by its agents. In this respect, some of the police officers responsible for the events in question were tried and convicted. Several of the judicial proceedings aimed at paying monetary compensation to the victims' next-of-kin are about to culminate.

c. The state promulgated a new law, No. 9,299/96, which establishes the jurisdiction of the regular courts over the crimes against life committed by members of the Military Police. As a result of that law, the judicial proceedings referring to agents of the Military Police who participated in the incident referred to in this case were already transferred to the regular courts, as they refer to common crimes.

d. Nonetheless, that law did not recognize the jurisdiction of the regular criminal courts to judge other common crimes committed by members of the Military Police, nor to investigate crimes, independent of their nature. All those crimes continue to be investigated by military organs. Accordingly, some cases of violations of rights perpetrated by members of the Military Police considered here, such as torture and mistreatment, cannot, under this law, be removed to the regular courts for them to investigate or assume jurisdiction over them.

e. As regards punishing the persons responsible, the Commission considers the sluggishness with which the proceedings have moved inexcusable, in view of the serious and clear nature of the violations. The fact that the accused have been free, and performing functions in the police institutions, highlights the breach, by the Brazilian state, of the obligations it has assumed under the American Convention on Human Rights.

f. The Commission recognizes the intention of the Brazilian Government to adapt the special cells for solitary confinement and maximum security to the international standards. The Commission will continue monitoring their use.

85. Accordingly, given that the Brazilian state has not adopted the measures stipulated within the term provided for in Report 16/96, to correct the situation emerging from the violations of rights reported, and has even allowed impunity for the persons responsible for those violations, the Inter-American Commission on Human Rights decides to adopt the present report, send it to the Brazilian state, and decide, in due course, how to publish it, in keeping with Article 51 of the American Convention and Article 48 of its Regulations.

VII. PUBLICATION

86. On March 24, 1997, the Commission forwarded report 10/97—whose text is all the foregoing—to the Brazilian state, in keeping with Article 51(2) of the Convention, and gave it an additional 30 days to comply with the recommendations transcribed supra (paragraph 70). On that same date, the IACHR forwarded the report to the petitioners. On September 22, 1997, the Brazilian state indicated that it accepted the offer by the IACHR, prior to the adoption of the report on the merits, to enter into a friendly settlement, and it provided information on actions taken to comply with the recommendations contained in Report No. 10/97. As of that date, and with the active participation of both parties and the backing of the IACHR, a process was begun to seek a friendly settlement to this case. On September 29, 1997, the Commission invited both parties to a hearing, which was held October 8, 1997, to address a possible friendly settlement with respect to compliance with the recommendations made in that report.

87. On December 22, 1997, the state provided additional information related to compliance with the recommendations contained in Report No. 10/97. On January 15, 1998, the parties met in São Paulo. On May 18, 1998, a working meeting was held at the IACHR headquarters, on which occasion both parties and the IACHR signed a preliminary friendly settlement document. At the same time, the Secretariat of the IACHR undertook to prepare and send the parties, for their signature, a draft final friendly settlement agreement.

88. The IACHR then made several efforts to obtain the signature of the final act of the friendly settlement agreement, which included a visit to Brazil by the President of the Commission, without positive results. On June 27, 2002, the Commission send a communication to both parties requesting up-to-date information about compliance with the recommendations contained in Report N° 10/97. On August 15, 2002, the co-petitioner Center for Justice and International Law (CEJIL) submitted the information requested, while the Brazilian state did not respond. On October 22, 2002, the response of the petitioners was forwarded to the state, and it was requested to submit observations within 30 days; Brazil did not present any response to that request for observations.

89. On February 27, 2003, in the context of the 117th regular session of the IACHR, a working meeting was held at the offices of the IACHR, called by the Commission in order to follow up on compliance with the IACHR's recommendations made in Report No. 10/97. At that meeting, it was agreed that the state would provide information to the IACHR regarding

compliance with the recommendations, and that both parties would study the possibility of meeting to update the information on compliance with the recommendations.

90. On March 10, 2003, the state sent the IACHR updated information on the trials of the police involved in the events denounced in the instant case. On May 14, 2003, that information was forwarded to the petitioners, which was asked to submit any observations it deemed pertinent on that information within 30 days; the petitioners did not submit any observations.

91. Bearing in mind the foregoing, the Commission, before reaching its conclusion regarding the publication of the merits report in the instant case, considers it appropriate, based on the updated information that both parties have provided, to state for the record the extent of compliance with the recommendations made in report on the merits No. 10/97 (paragraph 70, *supra*).

92. In this respect, the Commission considers that the recommendation that Brazil “adopt the legislative measures needed to transfer to the regular criminal courts the trial of common crimes committed by military police in the performance of their public order functions” has met with partial compliance. In effect, the IACHR reiterates that although Law No. 9,299/96 represents major progress in this respect, it is insufficient, as it merely transfers to the regular courts crimes against life committed by military police in the performance of their functions, and keeps jurisdiction over all other crimes committed by members of the Military Police under the Military Police.

93. With respect to the recommendation that “use of the cells designed for solitary confinement (*celas fortes*) be discontinued,” the Commission reiterates that this recommendation has not yet met with compliance.

94. As regards the recommendation that the state “punish, in keeping with the gravity of the crimes committed, the civilian and military police officers involved in the facts that gave rise to the instant case,” the Commission observes that according to the information provided by Brazil on March 10, 2003, a criminal proceeding was begun in 1989 against 32 people in relation to the facts of the present case: José Ribeiro (jailer); Celso José da Cruz (police investigator); Carlos Eduardo de Vasconcelos (police officer); and 29 military police officers.

95. From that information, it also appears that José Ribeiro was convicted through a final and firm judgment, and sentenced to a prison term of 45 years and six months, and that he is serving the sentence in a São Paulo prison. Celso José da Cruz and Carlos Eduardo de Vasconcelos were acquitted, and the respective decisions were appealed, and are now awaiting a decision by the Court of Justice (*Tribunal de Justiça*) of São Paulo. Both are free. Finally, and with respect to the 29 military police officers who were also accused of participating in the facts, it was decided not to try them, in a decision that was appealed by the Public Ministry, yet to date there has been no decision on that appeal. Accordingly, this recommendation has not met with full compliance.

96. As regards the recommendation that the Brazilian state, “in those cases in which it has not done so ... pay fair and adequate compensation to the victims’ next-of-kin,” the Commission observes that the government of the state of São Paulo published Decree 42,788 on January 8,

1998, authorizing the payment of compensation to the next-of-kin of the victims who died, for moral injury, and for an amount equivalent to 300 minimum salaries per dependent. In this respect, a working group was created within the Office of the Attorney General for the state, to identify the beneficiaries and the amount of compensation. The IACHR was informed that at the end of the work of that working group, the result was that compensation was paid to the next-of-kin of another seven victims, it was determined that there were no beneficiaries with respect to two victims; and, finally, that the next-of-kin of two of the victims had pursued judicial actions against the state for material and moral injury, and the state was awaiting the results of those proceedings before paying compensation.

97. By virtue of the foregoing considerations, and the provisions of Article 51(3) of the American Convention and Article 45 of its Rules of Procedure, the Commission decides to reiterate the conclusions and recommendations contained in chapters IV and VII supra; to publish this report; and to include it in its Annual Report to the OAS General Assembly. The Commission, in implementing its mandate, will continue evaluating the measures adopted by the Brazilian state with respect to the recommendations, until they have been carried out.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 8th day of the month of October, 2003. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.