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Title/Style of Cause: Jailton Neri Da Fonseca v. Brazil
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Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Evelio Fernandez Arevalos; Freddy Gutierrez, Florentin Melendez.
Commissioner Paulo Sergio Pinheiro, national of Brazil, did not participate in the consideration or determination of this report, in accordance to article 17(2)(a) of the Rules of Procedure.

Dated: 11 March 2004
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Represented by: APPLICANTS: the D. Luciano Mendes Defense Center

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I. SUMMARY

1. On December 7, 1995, during the visit of the Inter-American Commission on Human Rights (hereinafter “the Commission” or “IACHR”) to Brazil, it received a complaint from the D. Luciano Mendes Defense Center (Associação Beneficente São Martinho [St. Martin Charitable Association]), against the Federal Republic of Brazil (hereinafter “Brazil,” or “the State,” or “the State of Brazil), for the alleged extrajudicial execution of Jailton Neri da Fonseca, a child[FN2], by members of the military police of the State of Rio de Janeiro. The complaint in question reported the violation of Articles 4, 7, 8, 19, and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), all in relation to Article 1(1) of that legal instrument.

[FN2] According to the Convention on the Rights of the Child of the UN, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. The Brazilian Criminal Code establishes that people under eighteen years of age are criminally incompetent and are subject to special legislation. The Brazilian Statute of the Child and Adolescent establishes in its Article 2 that a child for the legal effect of that instrument are the persons as old as twelve uncompleted years and adolescents are the persons between twelve and eighteen years of age. The Commission, following the established in

the Convention on the Rights of the Child uses the word “child” in the present report, to refer to the victim, Jailton Neri da Fonseca, who was fourteen years old at the time of his murder.

2. The petitioner alleged that the State should be made accountable for the murder of the child by the military police of Rio de Janeiro State on December 22, 1992. It argued that the State did not guarantee full exercise of the right to justice, to freedom, and to due legal process, that it failed to carry out the domestic remedies to substantiate the murder of the child, and consequently that it had failed to comply with its obligation to guarantee exercise of the rights established in the American Convention.

3. The State responded that it had no evidence either that the victim had been murdered by members of the military police, or that the judicial system had been ineffective in pronouncing judgment within the military proceedings.

4. The Commission concluded that the State of Brazil was responsible for violation of the rights to personal liberty, to humane treatment, to special measures of protection for children, to equal protection before the law, and to a fair trial, as set forth in Articles 7, 5, 4, 19, 25, and 8, respectively, of the American Convention. The Commission further determined that the State failed to comply with its duty to adopt domestic legal measures, pursuant to Article 2 of the Convention, and that it was also in violation of the obligation stipulated in Article 1(1) to respect and guarantee the rights recognized in the Convention. Finally, the IACHR made the pertinent recommendations to the State of Brazil.

II. PROCESSING BY THE COMMISSION AND FRIENDLY SETTLEMENT PROCEEDINGS

5. On June 14, 1996, the Commission decided to begin processing the petition and it opened Case No. 11,634. On that same date, the Commission requested information from the State, which in turn requested an extension of the deadline for response, on September 18, 1996 and on November 26, 1996. On November 27, 1996, the Center for Justice and International Law (CEJIL) joined the case as a co-petitioner. In view of the delay by the State in providing the information requested, the IACHR sent a notice to inform it of the application of the provisions of Article 42 of the former Rules of Procedure. The State sent information on August 17, 1998, a copy of which was forwarded to the petitioner for the customary observations.

6. In 2001, the Commission published Admissibility Report No. 35/01, in which it determined that it was competent to examine the merits of the case.[FN3] Following the publication of the aforementioned report, the Commission convened the parties to a hearing during its 114th Period of Sessions, to discuss the merits of the case. The State contested the alleged facts. On July 9, 2002, the petitioner provided additional information on the case, which was forwarded to the State for its observations. As of the date of this report, those observations have not been submitted. On January 23, 2003, the Commission placed itself at the disposal of both parties for the purposes of seeking a friendly settlement; on February 3, 2003, the petitioners declared that they did not consider it opportune to start a friendly settlement. The State did not respond in the deadline granted by the Commission.

[FN3] Admissibility Report N°35/01 of 2001, appearing in the IACHR Annual Report for 2000.

III. POSITION OF THE PARTIES

A. Petitioners

7. The petitioners reported that on December 22, 1992, Jailton Neri da Fonseca, a child residing in the favela [shantytown or slum neighborhood] of Roquete Pinto, at Praia de Ramos [Ramos Beach], in the city of Rio de Janeiro, was summarily executed by members of the military police from the Ramos Community Police Station, a police unit located in that place.

8. The petitioners indicated that Jailton Neri da Fonseca was 14 years old when he was killed, and that he was the only surviving son of Mrs. Maria dos Santos Silva, a 40-year old widow who had a son, Marco Neri da Fonseca, 18 years old, who had been allegedly murdered by the military police, and another son, Alexandre, who died at 14 years of age of pulmonary edema.[FN4]

[FN4] Material published in the newspaper, "O Dia" on 12/23/92.

9. According to the petitioners, Jailton Neri da Fonseca was constantly being harassed by military police posted at the Ramos Community Police Station (PCC), who were responsible for policing the neighborhood in which he lived. They added that Jailton had been illegally detained three times by the police from that unit on previous occasions, without any crime being committed and without an arrest warrant issued by a competent judge.[FN5] They reported that one week before Jailton was murdered, he had been arrested by policemen from that military post and was not released until his father paid to Heliomar Coutinho Antunes, the military police commander of that PCC, the amount, at that time, of 1.5 million cruzeiros (one million, five hundred thousand cruzeiros). Moreover, according to the petitioners, the military police in that unit had been accused of extorting money from local drug trafficking in exchange for release of sales of narcotics.[FN6]

[FN5] Statement by the mother in the course of the military police inquest (Inquérito Policial Militar) on 6/28/94.

[FN6] Information reported by the father of Jailton Neri, in his deposition to the Rio de Janeiro Military Police on 6/28/94, and also appearing in the deposition of Arnaldo Tristão de Mello, a trafficker, at IPM headquarters on 1/7/93.

10. They contended that on the morning of December 22, 1992, when Jailton Neri da Fonseca was in the favela of Roquete Pinto, Praia de Ramos, he was illegally arrested by military

policemen Eduardo Bezerra de Mattos, Nilton Oliveira do Nascimento, and Adilson Bruno de Andrade, and taken to the Community Police Station, on the false pretense of obtaining information on drug trafficking in the neighborhood from the child. They further reported that the child's body was recovered from the sea by residents of the Ramos favela on that same day.[FN7]

[FN7] See record of removal of corpse.

11. According to the petitioners, the official report of the autopsy performed on the body of the child, attached to the court records, stated that Jailton Neri had been killed by five shots from a firearm-- two shots to his neck, one in the back, one in the back of his left arm, and one just below the right eye--all fired at short range. Later, the ballistics report concluded that the bullets withdrawn from the body of Jailton were expelled by a weapon examined by the experts, who reported that it belonged to the Ramos Military Police[FN8] and was carried by Military Police Soldier Eduardo Bezerra Matos.[FN9]

[FN8] As the military police in charge of patrolling the Ramos neighbourhood was known.

[FN9] Information taken from the autopsy report and the comparative ballistics test, included in the court files.

12. The petitioners reported that local residents had seen the police dragging the child through the streets of the favela to a place close to the beach, where they shot him five times and killed him.[FN10]

[FN10] Deposition of the father of Jailton Neri da Fonseca in the course of the military police inquest (Inquérito Policial Militar) and information published in "O Dia" on 12/23/92, on page 10 of the police session.

13. In fact, the petitioners named military police corporals Heliomar Coutinho Antunes, Eduardo Bezerra de Matos, and Nilton Oliveira do Nascimento, and Third Sergeant Adilson Bruno de Andrade, as the persons responsible for the illegal detention and MP Corporal Eduardo Bezerra de Matos, as the person who fired two of the shots that took the victim's life. According to statements by the defendants in various documents from the proceedings included in the court records, they admitted to arresting the child and to detaining him at the Police Unit, but they denied the charges of extortion and murder.

14. The petitioners reported that an investigation into the crime perpetrated by the military police was not initiated until there had been repeated complaints from the mother of Jailton Neri da Fonseca, Mrs. Maria dos Santos Silva. The investigation was conducted by the military police itself, which had jurisdiction over investigation and judgment of crimes of intentional homicide

committed by members of the military. They alleged that there were serious errors, irregularities, and unjustified delays in the course of the investigation, which resulted in the acquittal of the accused policemen.

15. They further alleged that a disciplinary administrative inquiry and a military police inquest (IPM) were initiated, both under the responsibility of the military, and that a civil inquest was begun as well. All of these proceedings were to investigate the irregular conduct of the accused military policemen. As a result of the investigations conducted in the course of the military police inquest referred to, criminal action was brought against the implicated persons.

16. As for the administrative inquiry, the petitioners contend that on December 22, 1992, after learning of the death of the child in the newspapers and on the basis of the accusations made in there, the Military Police Command of Rio de Janeiro State decided to initiate an inquiry proceeding.[FN11] During that proceeding, the above-mentioned policemen, who were alleged to have been involved in the death of the victim, testified. According to their statements, they admitted that they had detained the victim on the day of his death. They further stated that Jailton had been murdered by traffickers, who were trying to put the blame on the military police. The concluding report of that proceeding established that there was insufficient evidence to support the charges against the military police, on January 22, 1993.[FN12]

[FN11] Order N. 056;92, of December 22, 1992, 16th Military Police Battalion.

[FN12] Report of January 22, 1993 issued by the investigator of the 16th Military Police Battalion of Rio de Janeiro.

17. As regards the civilian police inquiry, the petitioners indicated that on December 22, 1992, the 22nd Civilian Police Station initiated an inquiry into the death of Jailton Neri.[FN13] During the 9 months of the investigation, only two of the military police involved in the crime gave statements, but no light was shed on the death of Jailton. In September 1993, by decision of the Public Prosecutor's Office [Ministério Público], in view of the social repercussions and relevance of the incident, responsibility for the investigation was transferred to the Defense of Life Division. On September 27, 1997, the head of the Investigative Section who was in charge of substantiating the facts, among other things, concluded in his report that during the investigative proceedings initiated by the civilian police, not all the military police involved in the death of the child Jailton Neri had given statements, and that the firearms carried by the police who participated in the incident had not been seized. Moreover, pertinent pieces of evidence, such as the autopsy report, the report by the expert of the crime scene, etc., had not been included in the investigation.[FN14]

[FN13] Police Investigation N 601-93, 22, Rio de Janeiro Police Station. Since the authors of the crime were not known, the civilian police had competence to investigate the murder of the child, Jailton Neri da Fonseca.

[FN14] Report of Police Investigation 049-93 of the Defense of Life Division.

18. According to the petitioners, it was not until two years after the death of the victim, and repeated complaints lodged by the mother of Jailton Neri da Fonseca, that the military police made statements and their deposition was taken only two years and five months afterwards. Finally, the petitioners contended that the police investigation opened by the civilian police was never completed.

19. With regard to the military police inquest, the petitioners alleged that the military police never initiated an official inquest to investigate the death of the child at the alleged hands of its commanders. It was only after the order by the Public Prosecutor's Office on August 6, 1993 that Military Police Commander Edmar Ferreira de Castro decided to initiate such proceedings, and this was on September 9, 1993.[FN15]

[FN15] Government Order N 012-93 of August 6, 1993, Office of the Commander of the 16th Military Police Battalion.

20. One month after beginning the inquest, the military police concluded their report stating that the policemen "remained with the child, Jailton Neri da Fonseca, for a certain number of hours, walking with him through the favela ...". Finally, they concluded that the policemen committed a disciplinary violation for failing to hand over the child to the appropriate and responsible party.[FN16]

[FN16] IPM Report established by Government Order N 012-93, dated October 7, 1993.

21. Later, on October 28, 1993, the Military Police Command decided to detain Corporal Heliomar for ten days and soldier Eduardo Bezerra, for eight days, for having committed a serious disciplinary violation, by detaining the child Jailton "without having observed the police rules in force." [FN17]

[FN17] Id.

22. Subsequently, the victim's mother reported the murder of her son to the local authorities, the press, and organizations, and this impelled the Public Prosecutor's Office, on June 1, 1994, to request the Military Police Commander to conduct an effective investigation into the reported events, since the Public Prosecutor's Office was not satisfied with the investigations appearing in the records of the inquest.[FN18] Consequently, the military police took the deposition of the victim's father, and of the police that were implicated in the case.

[FN18] Decision appearing in Official Communication N 846 of the Office of the Attorney General, in reference to IPM 1470-93.

23. The petitioners alleged that it was not until September 1, 1994, nearly two years after the crime, that a ballistics test was performed to compare the weapons of the military police with the two bullets taken from the body of the child, Jailton Neri. The results of the technical test confirmed that the bullets that hit the child were fired from a revolver carried by the military police. In fact, the experts concluded that "... the bullets (taken from the body of Jailton Neri da Fonseca) were expelled from the second weapon examined (Taurus revolver, 1634590)...". According to the petitioners, that weapon belonged to the Ramos Military Police and was carried by the military police soldier Eduardo Bezerra Matos, one of the policemen who had detained Jailton on the day of the crime.[FN19] The petitioners contended:

On 11/10/94, the military police published a supplementary report, charging MP soldier Eduardo Bezerra Matos with the death of Jailton Neri da Fonseca, and concluding that he killed the child by using a 38 caliber revolver, serial number 1634590 (as demonstrated by the expert), further charging MP soldiers Adilson Bruno de Andrade and Nilton Oliveira do Nascimento of being accomplices or accessories in the death of Jailton Neri; the report inexplicably failed to charge MP Corporal Heliomar of being an accomplice in the crime, since there was insufficient evidence of his participation in it (...).[FN20]

[FN19] Ballistics Report (Firearms and Bullets), September 1, 1994.

[FN20] Supplementary Report of the IPM published on 11/10/94.

24. Based on the IPM report, the petitioners alleged that on December 26, 1994, the Public Prosecutor's Office filed formal charges with the Court of Military Justice against the following military policemen: Corporal Heliomar Coutinho Antunes, Corporal Eduardo Bezerra de Matos, Soldier Nilton Oliveira do Nascimento, and 3rd Sergeant Adilson Bruno de Andrade, who were jointly accused of the crimes of homicide and extortion.[FN21] Criminal proceedings were initiated, the parties and witnesses testified, and the existing evidence of expert witnesses was gathered. Once the discovery period of the trial was over, the representative of the Public Prosecutor's Office himself contended that the evidence produced in the proceedings was very weak to produce a conviction of the defendants: "... the evidence is relatively precarious to charge the defendants with the crimes set forth in the indictment; as a result, their acquittal is requested."[FN22]

[FN21] Charges filed by the Public Prosecutor's Office with the Military Court against the policemen implicated in the IPM, on 12/26/94.

[FN22] Information contained in the record of the court session held on March 12, 1996.

25. On March 12, 1996, three years and three months after the murder of the child Jailton Neri da Fonseca, following the opinion of the Public Prosecutor's Office, the Permanent Justice Council of the Court of Military Justice unanimously decided to declare the terms of the indictment unfounded and absolve the defendants.[FN23]

[FN23] Id.

26. The petitioners reported that at the time of the trial of the military policemen, the military courts still had jurisdiction to prosecute crimes of intentional homicide perpetrated by military agents.

27. Finally, the petitioners alleged that they had exhausted domestic remedies, since the judgment was handed down by the Permanent Council of the Military Court on March 12, 1996 sitting in judgment and that in accordance with Brazilian law, that decision could not be appealed.

B. The State

28. The State of Brazil responded on August 17, 1998, and alleged that:

according to information from the Office of the Rio de Janeiro State Public Prosecutor, the child Jailton Neri da Fonseca was murdered on the occasion of an operation carried out by the military police of that State to curb illegal trafficking in narcotics and to apprehend traffickers who were taking refuge in the favela of Ramos.

29. Subsequently, the State contended that the murder of the child Jailton Neri da Fonseca had been investigated and resulted in criminal proceeding No. 9630/95, whereby criminal action was brought pursuant to law in the military courts, where the preliminary criminal proceedings allowed for ample examination and cross-examination. For information purposes, the State explained that "... the jurisdiction of the military courts was determined by constitutional and legal provisions in effect at the time, since the homicide resulted from the action of members of the military police."

30. Brazil further alleged that the criminal proceeding initiated to determine the perpetrators of the murder of the child and the extortion of his mother resulted in an acquittal, according to which the military police defendants were absolved of the crimes of homicide and extortion.

31. The State reported that it had made efforts to punish the perpetrators of human rights violations against the Brazilian people, but that these efforts were hampered by the complex Brazilian legal system and by the structure of the judiciary system, including the slow pace of court proceedings and excessive defense appeals, which delayed the administration of justice.

32. As regards civil reparations, the State alleged that the Brazilian legal system only authorized payment of civil indemnities for illicit acts perpetrated by government agents,

whether under the authority of the judicial or the legislative branch, and must be specifically at the behest of victims or their next of kin.

IV. ANALYSIS OF THE MERITS

33. The reason for the present petition is the murder of the child, Jailton Neri da Fonseca, which occurred in the form of a summary execution attributed to the military police of Rio de Janeiro State, Brazil.

34. The State does not deny the crime, nor does it deny the authors of the crime. However, it contends that during the military criminal proceedings against the military police, their guilt was not proven, and as a result they were acquitted.

35. Before its merits analysis the Commission considers it important to highlight the context in which the facts occurred. The victim, the child Jailton Neri da Fonseca, was an Afro-Brazilian[FN24], poor and lived in a poor neighborhood (favela) in Rio de Janeiro who was murdered by military police officers. In this respect, the Commission stated its concern over police violence and the racial profiling used by military agents in Brazil in its report on the human rights situation in Brazil. In that report, the Commission pointed out that social indicators revealed that the Afro-Brazilian population was more likely to be suspected, harassed, prosecuted, and convicted than others.[FN25] On the basis of these reports, the IACHR recommended to the State that “it take steps to educate judicial and police officers to prevent behavior involving bias and racial discrimination in criminal investigations, trials, and sentencing.”

[FN24] See the autopsy report in the case files, and the material published in the newspaper “O Dia” on 12/23/92..

[FN25] Report on the Situation of Human Rights in Brazil, Chapter IX, paragraph 24.

36. Similarly, based on a report on the human rights situation of Afro-Brazilians submitted at the 114th session of the Commission by attorneys from Brazilian organizations,[FN26] the IACHR learned that in Brazil, racial profiling was evident in the high number of illegal arrests, as the black population was under the closest surveillance and was the most likely to be targeted by the police system.

[FN26] General hearing on the human rights of Afro-Brazilians, held on March 8, 2002 at the headquarters of the IACHR during its 114th session.

37. The report further stated that a survey conducted by IBASE (Brazilian Institute of Social and Economic Analysis) showed that “in Rio de Janeiro, based on 265 investigations, the profile of most children murdered showed that they were poor, male, and black or of mixed race.”

38. In another survey conducted by ISEB, it found that: “the role of race in the use of lethal force by the police is perhaps the source of the most serious violations of human rights in Brazil. After studying over 1,000 homicides committed by the Rio de Janeiro police between 1993 and 1996, the report concluded that race was a factor that influenced the police, either consciously or not, when they shot to kill. The darker the skin of the person, the more likely he was to become a victim of a fatal act of violence on the part of the police.” Furthermore, the report concluded that police violence is discriminatory, as it affects blacks in greater numbers and with a greater degree of violence. Another determining factor in the analysis of police violence in Brazil was social and economic factors, since in the large majority of cases, the victims were poor and/or lived in or around favelas or slums.

39. Although in the specific case in point, the Commission does not have compelling evidence that the reason for the murder of Jailton Neri da Fonseca was his race, it does have sufficient indications not to rule out the fact that such circumstance was a significant factor in his murder. Accordingly, the Commission expresses its concern over the serious relationship in Brazil, and especially in Rio de Janeiro, between police violence and the race of the persons affected by that violence.

A. Proven Facts

40. In examining the statements by the parties and the documents submitted, the Commission considers that the following facts have been proven:

41. Jailton Neri da Fonseca was a black, 14 year-old child, the only surviving son of a family with three sons, of Mrs. Maria de Jesus da Silva.[FN27]

[FN27] Information contained in the certificate of the forensic medical institution appearing in the file and in the statement of the child’s mother to the newspaper, “O Dia,” published on 12/23/98, page 10.

42. The victim was illegally detained by members of the military police at around 10:00 in the morning on December 22, 1992, without a court order, without being caught in the process of committing a crime, and in violation of the provisions of criminal legislation and of the Statute of Children and Adolescents, on the contradictory pretext of obtaining information on drug trafficking in the favela. Administrative military sanctions were imposed on two members of the military police as a result of this act.[FN28]

[FN28] Report of the IPM initiated by Government Order N 012-93, dated October 7, 1993.

43. The military policemen implicated in the case confirmed in their statements at the Military Police Inquest and in military court that they had detained the child prior to his death and that they had walked around the favela with him for several minutes.[FN29]

[FN29] Statement by the mother at the IPM.

44. According to the deposition by the child's mother, various residents of the favela, who did not want to be identified for fear of reprisals, saw the police dragging the body of the child to Ramos beach. The statement by the policemen is contradictory, with regard to the information as to the time and the place of the release of the child, and as to who released him.[FN30]

[FN30] Id.

45. The ballistic report proved that the bullets that took the life of the child came from the weapon of one of the military policemen of the Ramos Community Police Station.[FN31]

[FN31] Comparative Ballistics Report (Firearms and Bullets), September 1, 1994, and information contained in the charges by the Public Prosecutor's Office on December 26, 1994.

46. From the location and distance of the shots that took the life of the child, it was determined that he was shot in the back.[FN32]

[FN32] Id.

47. Three inquiries were initiated to substantiate the crime reported: one civilian investigation, one military administrative investigation, and one military police investigation. Of these three, only the military police investigation was eventually completed.

48. The military police did not ex officio begin any official inquest to investigate the death of the child attributed to its agents. It was not until eight months after the event occurred, at the request of the Public Prosecutor's Office, that the Military Command initiated the relevant investigation.[FN33] Because of this, various pieces of evidence essential to determine the truth of the alleged facts were lost. There was no expert crime scene investigation, ballistic tests were not performed, and the testimony of witnesses was not taken. As a result, the results of this inquest were inconclusive.[FN34] The murder of the child was not investigated, nor was the reported extortion. The only conclusion was that the child remained in police custody for a number of hours on the day of the incident.

[FN33] Order N 012-93 of August 6, 1993, Office of the Commander of the 16th Battalion of Military Police.

[FN34] Report of the IPM begun as a result of Order N 012-93, dated October 7, 1993.

49. Eighteen months after the murder of Jailton Neri, the Public Prosecutor's Office ordered the Military Command to reopen the investigation.[FN35] It was only at that inquest that the mother of the child gave a statement, as did the police involved in the murder. At that inquest, twenty-one months after the crime, a ballistics test was performed to compare the bullets withdrawn from the body of the child with the revolvers of the implicated police. That examination concluded that the bullets that took the life of the child were fired from the weapon of military police agent Eduardo Bezerra Matos.

[FN35] Decision appearing in official notice N 846 from the Public Prosecutor's Office in reference to IPM 1470-93.

50. With regard to the criminal proceedings, despite the irregularities that had occurred throughout the investigative process, the military criminal court had evidence that the child, Jailton Neri da Fonseca, had been murdered by military police.[FN36] Nonetheless, the Public Prosecutor's Office, in final arguments, asked for the acquittal of the defendants, on the grounds of insufficient evidence in the court file. The Military Council, for its part, unanimously decided to absolve the defendants, by applying the principle of in dubio pro reo.[FN37]

[FN36] The evidence included the Comparative Ballistics Report appended to the court documents, the statement by the mother of Jailton Neri da Fonseca at the military criminal inquest on 6/28/94, and the report by the Public Prosecutor's Office on December 26, 1994.
[FN37] Record of the hearing of the judgment of the military policemen, on March 12, 1996.

51. For these reasons, the Commission is of the opinion that the investigation conducted both by the military police and by the civilian police was defective. Both investigations were fraught with delays, irregularities, negligence, and collusion, and led to the acquittal of the accused by the military criminal court.

B. Right to Liberty

52. The American Convention states in its Article 7 that:

Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

53. An arrest is arbitrary and illegal when it does not occur in accordance with the causes and procedures established by law, when it is effected without observing the practices stipulated by law, and when it has been effected as a distortion of the authority to arrest, or in other words, when it is effected for purposes other than those stipulated and required by law. The Commission has also maintained that arrest for inappropriate purposes is, in and of itself, a punishment that constitutes a type of punishment without due process, or an extralegal punishment that violates the guarantee of a prior trial.[FN38]

[FN38] IACHR, 2001 Annual Report, Report N° 101/01 – Extrajudicial Executions and Forced Disappearances of Persons, Cases 10,247 et al (Peru). para. 217.

54. The Commission has followed the practice of examining the compatibility of deprivation of freedom with the provisions of paragraphs 2 and 3 of Article 7 of the American Convention, by pursuing three steps. The first consists in determining the legality of the arrest in a material and official sense, which involves determining the compatibility of the arrest with the domestic legislation of the State in question. The second step consists in analyzing the domestic law in the light of the guarantees established in the American Convention, to determine whether or not it is arbitrary. Finally, if the arrest meets the requirements of a rule of domestic law compatible with the American Convention, it must be determined whether the law was applied to the case in question in an arbitrary manner.[FN39]

[FN39] IACHR, Report N° 53/01 Case 11.565 Ana, Beatriz and Celia González Pérez, Mexico, April 4, 2001, paragraphs 23 and 27. For further examples, the Working Group on Arbitrary Detention of the United Nations established that there are three circumstances in which an arbitrary detention can occur, as follows: “When it is obviously impossible to invoke any legal basis that justifies it (such as keeping a person in detention after he has fulfilled the sentence or despite an amnesty law applicable to him); when freedom is deprived as a result of a trial or conviction for exercise of the rights or freedoms stipulated in Articles 7, 13, 14, 18, 19, 20, and 21 of the Universal Declaration of Human Rights, and, in respect of the States Parties, in Articles 12, 18, 19, 21, 22, 25, 26, and 27 of the International Covenant of Civil and Political Rights; or, when total or partial non-compliance with international rules pertaining to the right to a fair trial, established in the Universal Declaration of Human Rights and in pertinent international instruments accepted by the affected States, is so egregious that it confers an arbitrary nature the deprivation of liberty , no matter what form it may take. (Category III)”.

55. On this point, the Commission notes that the Brazilian legal system is built on the fundamental principle of presumption of innocence, which requires the State to restrict liberty on the assumption of being caught in a criminal act or by court order. Chapter I, on Individual and Collective Rights and Duties, of the Federal Brazilian Constitution, establishes the following:

Art. 5 All persons are equal before the law, without distinction of any kind, and Brazilians and foreigners residing in the country are guaranteed the inviolability of the right to life, to liberty, to equality, to safety, and to property, in the following terms:

LIV- Nobody shall be deprived of liberty or of his assets, without due legal process;

LXI- Nobody shall be detained unless in the act of committing a crime or by written or well-founded order by a competent judicial authority, except in cases of a military violation or specifically military crimes, as defined by law;

LXII- The detention of any persons and the place where they are detained shall be immediately reported to the competent judge and to the family of the detainee or the person indicated by them;

LXII- The detainee shall be informed of his rights, including the right to remain silent, and shall be assured of the assistance of family or legal counsel.

56. The court documents indicated that the child, Jailton Neri da Fonseca, had been illegally detained on other occasions prior to his death by the same policemen that were implicated in and accused of his murder, according to his mother's statement. On the day of his murder, Jailton was violently coerced by the military police to assist them in a "false and illegal" operation.

57. As the police responsible for his illegal arrest themselves admitted in their testimony, they had arrested the child even though he had not committed any offense that would warrant detention. They remained with him for several hours, in defiance and violation of constitutional authority. Moreover, they did not report this fact to the competent judicial authority, in this case, the judge for children and child, nor did they take him to the judicial institution stipulated by law. Furthermore, they interrogated him in the absence of family members, an attorney, or any person who could serve as his protector or guardian.

58. In the case in point, the State of Brazil, through its military agents, denied the child the peaceful exercise of his liberty and the rights ensuing from that. In addition, the State failed to guarantee him freedom against illegal arrest, which he suffered at the hands of the persons who had the legal duty to protect him.

59. The Commission concluded that Jailton Neri da Fonseca was deprived of his freedom in an illegal manner, without having given cause for any arrest warrant or without any situation of flagrante delicto. When he was detained, he was neither informed of the reasons for his arrest, nor of the crime or crimes with which he was being charged. Nor was he promptly taken before a judge. He did not have the right to recourse to a competent court, so that it could issue a prompt decision as to the legality of his detention and order his release, since he was murdered immediately after he was arrested. The purpose of Jailton's arrest was his murder, which in and of itself makes it arbitrary and illegal.

60. Based on this line of reasoning, the Commission concludes that since this case does not meet the first of the three steps of the aforesaid analysis, the State of Brazil is liable for violation of the right to liberty protected by the American Convention, to the detriment of Jailton Neri da Fonseca. The Commission concludes that the State of Brazil failed to guarantee the child, Jailton Neri da Fonseca, his right to liberty and personal safety, thereby violating Article 7 of the American Convention.

C. Right to Humane Treatment

61. The American Convention establishes as follows:

Article 5. Right to humane treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social adaptation of the prisoners.

62. In a case in which several children were detained for several hours by police agents before executing them, the Inter-American Court of Human Rights determined as follows:

It should be remembered that the youths were retained clandestinely by their captors for between 10 and 21 hours. This lapse of time occurred between two extremely violent circumstances: forced seizure and death due to the impacts of a firearm while defenseless, which the Court has already declared proved (*supra*, para. 82). It is reasonable to conclude that the treatment they received during those hours was extremely aggressive, even if there was no other evidence in this regard.

While they were retained, the four youths were isolated from the external world and certainly aware that their lives were in danger. It is reasonable to infer that, merely owing to this circumstance, they experienced extreme psychological and moral suffering during those hours.

In this respect, it is relevant to recall that the Court has previously stated that the mere fact of being placed in the trunk of a car “constitutes an infringement of Article 5 of the Convention relating to humane treatment, inasmuch as, even if no other physical or ill treatment occurred, that action alone must clearly be considered to contravene the respect due to the inherent dignity of the human person.”

(...)

Similarly, the European Court has stated that the mere threat of a behavior that is prohibited by the provision of the European Convention (Article 3), which corresponds to Article 5 of the American Convention, when it is sufficiently real and imminent, may in itself be in conflict with the respective norm. In other words: creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment.

Furthermore, it is worth recalling, as this Court has already stated, that a persons who is unlawfully detained (supra, para. 134) is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated.[FN40]

[FN40] Inter-American Court of Human Rights, Case of Villagrán Morales et al, judgment of November 19, 1999, paras. 162-166.

63. From the established facts in the present case, it is evident that Jailton Neri da Fonseca was in the custody of the military police when he was forced to proceed through the Ramos favela. It is reasonable to infer that Jailton was perfectly aware that his life was in serious and imminent danger and that such circumstance caused extreme fear and psychological and moral suffering in him. The Commission considers that these acts constitute torture, defined in Article 2 of the Inter-American Convention to Prevent and Punish Torture, for the purposes of this Convention, as:

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person, for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.[FN41]

[FN41] Brazil ratified this Convention on July 20, 1989.

64. On this point, although this article leaves some room for interpretation in defining whether a specific act constitutes torture, in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim's health, and his maturity, for instance.

65. The Commission is of the opinion that Jailton Neri da Fonseca must have experienced extreme fear and terror in finding himself in the hands of the military police, not knowing where

they were taking him. The IACHR considers that such circumstance brought on Jailson Neri da Fonseca a situation of extreme psychological and moral suffering.

66. Based on the preceding considerations, the Commission concludes that the State of Brazil violated the right to humane treatment of Jailton Neri da Fonseca. Hence Brazil violated Article 5 of the American Convention.

D. Right to Life

67. Article 4 of the American Convention establishes the following:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

68. The human right to life is a fundamental human right, the basis for the exercise of the other human rights. The Inter-American Court has stated that enjoyment of the right to life

is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.[FN42]

[FN42] Inter-American Court, Villagrán Morales et al. Case (Case of the “Street Children”), judgment of November 19, 1999, para. 144.

69. The right to life entails, for States, the obligation to guarantee it. In accordance with Article 1(1) of the American Convention, this implies their obligation to prevent violations of that right, to investigate violations of the right to life, to punish the perpetrators, and to provide for reparations to the families of the victim, when the perpetrators were State agents.

70. In the case in point, the petitioners allege that the child, Jailton Neri da Fonseca, was summarily executed by members of the military police. They point out that “... Jailton was deprived of his life arbitrarily, when he was only 14 years old.” They further contend that “the violation of Jailton’s most precious possession was done with complete impunity.”

71. The Commission considers it an established fact that it was members of the military police who murdered Jailton Neri da Fonseca. In fact, in this case there is technical proof and various pieces of evidence that the victim, the child Jailton Neri da Fonseca, was de facto murdered by agents of the military police of Rio de Janeiro State.

72. The victim was illegally detained by military police at around 10:00 o'clock in the morning on December 22, 1992, without a court order, without flagrante delicto, and in violation of the provisions of both criminal legislation and the Statute of Children and Adolescents. For this act, administrative military sanctions were imposed on two members of the military police.

73. The military police involved in the case confirmed in their testimony at the military police inquest and in military court that they had detained the child prior to his death and that they had walked through the favela for several minutes with him.

74. The testimony of the police is contradictory, as to the times and the place of the release of the child, and as to who released him. For that reason, the assumption remains that they were actually with the child up to the time that they killed him.

75. The ballistics test verified that the bullets that took the life of the child were shot from a weapon belonging to one of the policemen from the Unit, more specifically from the 38-caliber revolver, series 1634590, carried by MP soldier Eduardo Bezerra Matos.

76. From the location and distance of the shots that took the child's life, it was determined that he was shot in the back, as in a typical crime of summary execution.

77. The Commission feels compelled to highlight the particular gravity of this case, in that it involves the murder of a child. It would further point out that this case is not an isolated case, but that it reflects a pattern of acting outside the law followed by the military police of the State. For years the Commission has been receiving reports of escalating violence on the part of the State police. The military police in particular have been accused of acting with violence. In its general report on the situation of human rights in Brazil in 1997, the Commission indicated that: "...during the period running up to February 1996, average deaths per month at the hands of the military police went from 3.2 to 20.55 persons, or a total of 201 in 1996."

78. In analyzing this case, the IACHR considered as key information the statements, testimony, and evidence from the police inquests. On the grounds of those statements, testimony, and pieces of evidence appearing in the court records, which have been discussed at length, the Commission is of the opinion that there is clear and compelling evidence that leads to full conviction that agents of the military police of Rio de Janeiro State violated the right to life of the child, Jailton Neri da Fonseca, which means violation by the State of Brazil of Article 4 of the American Convention.

E. Rights of the Child

79. Article 19 of the American Convention establishes the following:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

80. In accordance with that Article, states have a duty to observe a particularly high standard in all matters related to the guarantee and protection of the human rights of children.[FN43] The Inter-American Commission has said that:

Respect for the rights of the child is a fundamental value in a society that claims to practice social justice and observe human rights. This respect entails offering the child care and protection, basic parameters that guided in the past the theoretical and legal conception of what such rights should embody. It also means recognizing, respecting, and guaranteeing the individual personality of the child as a holder of rights and obligations.[FN44]

[FN43] In March 2001, the Commission requested that the Inter-American Court issue an advisory opinion on the legal status and human rights of children. The Court in turn, in that advisory opinion, stated that the rights of children must be safeguarded both from the standpoint of their condition as human beings and because of their special situation, and this requires the state to guarantee the exercise of their rights within the family, in society, and vis-à-vis the state itself. Speaking to the judicial protection children warrant, the Court took the following position: “The guarantees stipulated in Articles 8 and 25 of the Convention are recognized for all persons equally, and must be considered in relation to the specific rights provided for in Article 19, so that they are taken into consideration in any administrative or judicial proceeding in which any right of a child is at issue.” Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, Legal Status and Human Rights of the Child, August 28, 2002.

[FN44] IACHR, Third Report on the Human Rights Situation in Colombia, 1999, Chap. XIII, para. 1.

81. For its part, the Inter-American Court has determined that in interpreting Article 19 of the American Convention, the provisions of the Convention on the Rights of the Child could be taken into account. It stated that:

Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.[FN45]

[FN45] Inter-American Court of Human Rights, Villagrán Morales et al, Case (“Street Children” Case), ob. cit., para. 194.

82. The Commission, in its report on Brazil, singled out the standard for protection of children and adolescents set by the American Convention on Human Rights and by the Brazilian legal system, and stated as follows:

Brazilian children are legally protected both by domestic legislation and by international conventions to which Brazil is a party. In addition to the inherent rights proclaimed for all

persons, the American Convention also provides for special protection, by recognizing that "every child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state (Article 19).[FN46]

[FN46] IACHR, Report on the Human Rights Situation in Brazil, 1997.

83. The Brazilian Constitution establishes in its Article 227 that it is the duty of the family, society, and the State to give absolute priority to guaranteeing children and adolescents the right to life, ... to dignity, ... in addition to protecting them from all forms of ... violence, cruelty, and oppression."

84. The Statute of Children and Adolescents, an advanced Brazilian law on this subject, confirms and strengthens the constitutional guarantees of children and adolescents, and is established as an adequate legal system to protect their life and personal safety, in the light of the obligations arising from the American Convention. That law contains the following provisions:

Art. 3°- Children and adolescents shall enjoy all the fundamental rights inherent in human beings, notwithstanding the full protection provided for under this law; they shall be assured, by law or by another methods, of all opportunities and facilities required for their physical, mental, moral, spiritual, and social development, in conditions of freedom and dignity.

Art. 4°- It is the duty of the family, the community, society in general, and the government to guarantee, on a priority basis, the effective exercise of rights having to do with the life, health, sustenance, education, sports, recreation, professional training, culture, dignity, respect, liberty, and family and community life.

Art. 5°- No child or adolescent shall be the object of any type of negligence, discrimination, exploitation, violence, cruelty, or oppression; any violation of their fundamental rights, by act or omission, shall be punished pursuant to the law.

Art. 6°- In interpreting this law, consideration shall be given to the social purposes it is designed to fulfill, the requirements of the common good, individual and collective rights and duties, and the specific condition of the child or adolescent, as developing persons.

Art. 15 – Children and adolescents are entitled to liberty, to respect, and to dignity, as human beings in the process of development and as subjects of civil, human, and social rights guaranteed by the Constitution and the law.

Art. 18 – It is the duty of everyone to ensure the dignity of children and adolescents, and to protect them from any inhumane, violent, intimidating, abusive, or coercive treatment.

Art. 106 – No adolescent shall be deprived of his liberty unless caught in the act of committing an offense, or by written, justified order issued by the competent judicial authority.

Single paragraph – Adolescents are entitled to identification of the persons responsible for their arrest, and must be informed of their rights.

Art. 107 – The arrest of any adolescent and the place where he is picked up must be promptly reported to the competent judicial authority and to the family of the detainee or the person indicated by him.

Single paragraph – The possibility of immediate release shall be examined right away, on penalty of legal obligation to compensate losses.

Art. 110 – No adolescent shall be deprived of his liberty without due legal process.

85. The Inter-American Commission has been repeatedly voicing its concern over the systematic violations of the human rights of children and adolescents in the hemisphere. As far as Brazil is concerned, at the time of the Commission's on-site visit, it expressed its concern over the high rates of murder of child by the military police and over the ineffectiveness of the government authorities in punishing the guilty parties and in curbing the escalating violence:

Both the American Convention and the Federal Constitution of Brazil guarantee the life and physical, mental, and moral integrity of persons. Further, the Constitution establishes that one of the fundamental objectives of the Federal Republic of Brazil is to promote the well-being of all persons, without prejudice for reasons of origin, race, sex, color, age, or any other type of discrimination..

Article 227 of the Constitution states that "it is the duty of the family, society, and the state to guarantee to children and adolescents, as an absolute priority, the right to life ..., ...dignity, ..., and protection from all forms of violence, cruelty, and oppression...." The Statute of Children and Adolescents reiterates these guarantees. In other words, legislation on minors in Brazil has an adequate formal framework to protect the life and personal safety of children, in light of the obligations arising from the American Convention.

Reality, however, paints a different picture. In fact, despite these absolutely clear laws, in the outskirts of Brazilian cities are millions of children and adolescents who live in a situation of personal and social danger and who make the streets "their space to struggle for survival" or "their living space." It is estimated that in the city of Rio de Janeiro, there are 30,000 children who frequent the streets on a daily basis and 1,000 who sleep in the streets. In São Paulo it is estimated that there are between 5,000 and 20,000 children who spend their days in the streets of greater São Paulo and who return to their homes at night.

These minors generally come from families who have migrated from impoverished rural areas to metropolitan centers, who subsist in outlying urban areas in conditions below minimum standards of well-being and dignity and who frequently need for their minor children to work to contribute to the family subsistence. Many of these children lead, or attempt to lead, a normal life and respect the law, but a large percentage of "street children" and "children in the streets" live a life of crime, with critical family situations, and subsist by minor theft or by rendering services, including drug trafficking. Their lives are usually short, since they frequently die through the action of murderous gangs or at the hands of the police, or as a result of the violence surrounding them.

Based on the statistics of Rio de Janeiro State, 424 minors under 18 years of age were victims of homicide in that State in 1992. In the first half of 1993, these victims numbered 229. Moreover, of the 562 homicides reported in Pernambuco State, located in northeastern Brazil, in the first eight months of 1995, 10% of the victims were less than 18 ears old.[FN47]

[FN47] IACHR, Report on Human Rights in Brazil, 1997, Chap. 5, para. 13 ff.

86. In this case, the State of Brazil, instead of providing special protection for the human rights of the 14-year old Jailton Neri da Fonseca, since his status as a child made him subject to special rights and guarantees, murdered him, through its State agents.

87. Moreover, under Article 19 of the Convention, the State had the duty to protect the child Jailton against abuse and mistreatment at the hands of its agents. In addition, Jailton was subject to the full protection of the aforesaid provisions, under which he was entitled to special treatment because of his status as a child. It is important to bear in mind that the child was arbitrarily detained and submitted to illegal interrogation, and forced to accompany the police around the favela on the pretext of giving information he did not have.

88. The PCC Commander stated in his testimony that he released Jailton Neri da Fonseca because they did not have anything against him. In other words, they illegally detained an innocent child. All of this was done outside the law, in complete violation of the special rules for protection of children, contrary to constitutional orders and in violation of the provisions of the convention, which guarantee children special treatment and judicial guarantees.

89. In addition, the Inter-American Court stated in Advisory Opinion OC-17:

The states party to the American Convention have the duty, pursuant to Articles 19 and 17, taken in relation to Article 1.1 of that instrument, to take positive steps to ensure protection of children against mistreatment, either in their relationship with government authorities or with other individuals or with nongovernmental entities.[FN48]

[FN48] Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, Legal Status and Human Rights of Children, August 28, 2002.

90. On these grounds, the Inter-American Commission concludes that the State of Brazil violated Article 19 of the American Convention by failing to adopt adequate preventive and protective measures for the benefit of the child, Jailton Neri da Fonseca.

F. Right to a Fair Trial and to Judicial Protection

91. Article 1.1 of the American Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

92. Article 8 of the Convention establishes that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

93. Article 25 of the Convention establishes:

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 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.

94. The states party to the Inter-American system of human rights have the obligation to investigate and punish the perpetrators of human rights violations, and to compensate the victims of those violations or their next of kin. Article 1 of the American Convention establishes the obligation of states to guarantee all persons under their jurisdiction the free and full exercise of the rights and freedoms recognized in that Convention. The Inter-American Court of Human Rights has explained that as a result of that obligation, states are required “to prevent, investigate, and punish all violations of the rights recognized by the Convention, and to further ensure the reinstatement of the violated right and, if applicable, to provide for reparations for the damages produced as a result of the human rights violation.”[FN49] Along the same lines, the honorable Court has stated that “the obligation by the State to investigate and punish any violation of the rights recognized by the Convention, as a means of guaranteeing those rights, clearly ensues from Article 1.1.” [FN50]

[FN49] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para.166.

[FN50] Inter-American Court of Human Rights, Villagrán Morales et al. Case (“Street Children” Case), Judgment of November 19, 1999, para. 225.

95. In relation to the provisions of the Convention transcribed above, the Inter-American Court of Human Rights has further stated that:

Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, inter alia, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered. As this Court has ruled, Article 25 “is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society ... That article is closely linked to Article 8(1), which provides that every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, for the determination of his rights, whatever their nature.

Consequently, it is the duty of the State to investigate human rights violations, prosecute those responsible and avoid impunity. The Court has defined impunity as the failure to investigate, prosecute, take into custody, try and convict those responsible for violations of rights protected by the American Convention and has further stated that “the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenseless of victims and their relatives.”[FN51]

[FN51] Inter-American Court, Loayza Tamayo Case, Judgment on reparations, November 27, 1998, paras. 169 and 170.

96. The government obligation to investigate and punish human rights violations must be seriously undertaken by states. The Inter-American Court has had this to say on this point:

In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation 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. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane. [FN52]

[FN52] Inter-American Court, Velásquez Rodríguez Case, ob. cit. para. 177.

97. The Inter-American Commission has also stated the following on the obligation of States to conduct a serious investigation:

[T]he fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts does not constitute a failure to fulfill the obligation to investigate. However, in order to establish in a convincing and credible manner that this result was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth, the State must show that it carried out an immediate, exhaustive and impartial investigation.[FN53]

[FN53] IACHR, 1997 Annual Report, Report N° 55/97, Case N° 11.137 (Juan Carlos Abella and others), Argentina, para. 412. On this same point, also see: IACHR 1997 Annual Report, Report N° 52/97, Case N° 11.218 (Arges Sequeira Mangas), Nicaragua, paras. 96 and 97.

98. This obligation to investigate and punish any act that involves a violation of the rights recognized by the Convention requires punishment not only of the material authors of the act violating the human rights, but also of the intellectual authors of those acts.[FN54]

[FN54] The Inter-American Court has declared, for instance, that “The American Convention guarantees that all persons have access to justice to ensure the effective practice of their rights, and the states parties have the duty to prevent, investigate, identify, and punish the intellectual authors and accomplices of human rights violations.” Inter-American Court of Human Rights, Case of the Constitutional Court, judgment of September 29, 1999, Series C, No. 71, para. 123. Also see Inter-American Court, Blake Case, Reparations, Judgment of January 22, 1999, Series C, No. 48, para. 65.

99. The state incurs international liability when its judicial organs fail to conduct a serious investigation and to punish, if appropriate, the material and intellectual authors of human rights violations.

100. A key characteristic of a serious investigation is that it be conducted by an independent, autonomous entity. The basis in the convention is found by reading together Articles 1.1, 25 and 8 of the American Convention. It is Article 8 that refers to the competence, independence, and impartiality of courts as a fundamental element for due process.

101. For the purpose of determining violation of the obligation to investigate, attributed to the State of Brazil in the present case, the Commission notes that Brazil initiated three investigations into the murder of Jailton Neri da Fonseca: two of them by the military police, one of which was administrative in nature; and one by the civilian police. Of these investigations, the only one that was completed was the investigation by the military police, which served as a basis for the trial in military court in which the accused military policemen were absolved from responsibility for the death of Jailton Neri da Fonseca.

102. In this regard, the Commission considers that the military police and the military courts do not have the independence and autonomy required either to investigate or to judge in an impartial manner the presumed human rights violations allegedly committed by the military police. Both the investigation of the alleged human rights violations perpetrated by the military police and the military court proceedings to hand down judgment in respect of these violations entail a violation per se of the American Convention.

103. The IACHR has stated that “the problem of impunity is aggravated by the fact that most cases involving violations of human rights by members of the State’s forces of law and order are processed by the military criminal justice system.”[FN55] It has repeatedly and consistently maintained that the military jurisdiction does not offer the guarantees of independence and impartiality required to try cases involving punishment of members of the military, and so impunity is ensured.”[FN56]

[FN55] IACHR, Second Report on the Human Rights Situation in Peru, June 2000, Chap. II, para. 209.

[FN56] IACHR, Third Report on Colombia, ob. cit., paras. 17 ff.

104. The Commission has also explained that the problem of impunity in the military criminal courts is not limited solely to acquittal of the accused, but that, “the investigation of cases of human rights violations by the military courts entails problems of access to effective and impartial judicial recourse.”[FN57] The Commission has further stated that:

The problem of impunity in the military justice system is not tied only to the acquittal of defendants. Even before the final decision stage, the criminal investigations carried out in the military justice system impede access to an effective and impartial judicial remedy. When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Investigations into the conduct of members of the State's security forces carried out by other members of those same security forces generally serve to conceal the truth rather than to reveal it. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system. The military authorities will probably not have gathered the necessary evidence in an effective and timely manner. In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage.[FN58]

The military criminal justice system has certain peculiar characteristics that impede access to an effective and impartial remedy in this jurisdiction. One of these is that the military jurisdiction cannot be considered a real judicial system, as it is not part of the Judicial branch, but is organized instead under the Executive. Another aspect is that the judges in the military judicial system are generally active-duty members of the Army, which means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context.[FN59]

[FN57] IACHR, Second Report on the Human Rights Situation in Peru, June 2000, Chap. II, para. 210.

[FN58] IACHR, Third Report on Colombia, ob.cit., paras 19.

[FN59] IACHR, Second Report on the Human Rights Situation in Peru, ob. cit., para. 211.

105. The Commission has insisted that only certain offenses having to do with military discipline and service can be judged by military courts in full respect of judicial guarantees:

[M]ilitary justice should be used only to judge active-duty military officers for the alleged commission of service-related offenses, strictly speaking. Human rights violations must be investigated, tried, and punished in keeping with the law, by the regular criminal courts.

Inverting the jurisdiction in cases of human rights violations should not be allowed, as this undercuts judicial guarantees, under an illusory image of the effectiveness of military justice, with grave institutional consequences, which in fact call into question the civilian courts and the rule of law.[FN60]

[FN60] Id. para. 214.

106. In a case pertaining to Brazil, the Commission indicated specifically that “it reiterates its conviction that prosecution of common crimes by a military forum, by the sole fact that the crime was perpetrated by members of the military, is a violation of the guarantee of an independent and impartial tribunal.”[FN61]

[FN61] IACHR, 2000 Annual Report, Report No. 55/01 – Aluísio Cavalcanti et al, Cases 11.286 and others, (Brazil). para. 153.

107. In the specific case of Brazilian legislation, which grants military organs jurisdiction over human rights violations committed by the military police, the Commission analyzed in detail Brazilian legislation on the subject, and concluded that it entailed in actual practice a situation of impunity in Brazil. The IACHR examined the history of this legislation, and found that up to 1977, the criterion prevailed that crimes committed by military police in the exercise of their police functions were civil in nature, and therefore came under the jurisdiction of the common courts. However, the IACHR pointed out as follows:

Constitutional Amendment No. 7 of 1977--amending Article 144.1(d) of the Constitution--, known as the "April Package" under the military regime of that time, made it possible to establish special state military justice to try and judge “military” police officers for military crimes defined in the law. The Federal Supreme Court then changed the criteria and began to consider that the state military justice system did indeed have the jurisdiction to try the “military” police for crimes defined in the Penal Code, when committed by them in the line of duty. This fundamental change in the jurisprudence of the Federal Supreme Court resulted in an increase in the crimes committed by “military” police with impunity.[FN62]

[FN62] IACHR, Report on the Human Rights Situation in Brazil, September 1997, Chap.. III, paras. 66 and 67.

108. From that time on, the state’s military courts have had competence to try and judge members of the military police accused of committing crimes, defined as military crimes, against the civilian population:

This jurisdiction is governed by military criminal law (Military Penal Code, CPM), exclusive to military personnel, which contains substantive penal standards and constitutes a set of legal provisions to ensure the accomplishment of the main purposes of military institutions, whose primary objective is the defense of the nation. “In this jurisdiction, rank and discipline prevail.” It is also regulated by the Code of Military Penal Procedure (CPPM), which contains formal or procedural provisions. The new law 9299/96 places under ordinary penal jurisdiction cases of attempts on life with criminal intent, but maintains intact the rest of the jurisdiction of the military justice system with regard to the police.

This is a special legal system, with its own principles and guidelines, in which most of the provisions apply only to military personnel and civilians who commit crimes against military institutions, unlike the ordinary penal system, which is applicable to all citizens.[FN63]

[FN63] Id, paras. 60 and 61.

109. The Commission further explained that in Article 125, paragraph 4 of the Federal Constitution, it states that “State military courts are competent to try and judge military police and military firemen for military crimes defined by law ...,” and pointed out that the law containing this definition is the Military Criminal Code which, in its Article 9, II(f) states:

Article 9°. The following are considered as military crimes in times of peace:

II. The crimes stipulated in this code, as long as they have the same definition as in common criminal law, when they are committed by:

f) members of the military who are in active service, or who, if not in service, are using weapons belonging to the military or any other warlike material under the custody, control, or management of the military, to engage in an illegal act.[FN64]

[FN64] Id, para. 63.

110. The Commission indicated that in accordance with the provision transcribed above, the “military” police forces, either federal, state, or federal district, which are the State corporations in charge of the preventive and ostensive police of civilians,

are subject to military criminal legislation and to military courts, even if they commit crimes against civilians in the performance of their functions, or while using military weapons.[FN65]

[FN65] Id, para. 64.

111. This competence by the military courts to investigate and punish human rights violations leads to an extreme situation of impunity, which has triggered various measures in the Chamber of Deputies to eliminate the special military jurisdiction for prosecution of crimes committed by military police in the performance of their public order duties. In this regard, former Deputy Hélio Bicudo submitted a bill which would return to the regular justice system the duty to prosecute crimes committed by or against state military police officers in the performance of their police duties. This proposed law, which would revoke Article 9(f) of the Military Criminal Code (Decree-Law No. 1,001 of October 21, 1969, would include the following “Single Paragraph”:

Military police officers and entities, in the performance of their police duties, shall not be considered as members of the military for criminal purposes. The common courts shall have jurisdiction to prosecute and judge crimes committed by or against them.

112. However, this bill was not approved in its entirety. An alternative text was adopted instead, and this text became Law 9,299 of August 7, 1996. This law amended Article 9 of the Military Criminal Code (Decree Law 1,001), which defined military crimes and established a new “Single Paragraph,” along the following lines:

The crimes referred to in this Article, when they are crimes of intentional homicide committed against civilians, shall come under the jurisdiction of the common courts.

113. The final version of the law included another serious provision, which amended a section of Article 82 of the Code of Military Criminal Procedure, to establish as follows:

In the case of intentional homicide against civilians, the military justice system shall refer the records of the military police investigation to the common courts.[FN66]

[FN66] CPPM, Article 82, section 2.

114. The Commission has written in this regard that the new provisions mean that the military police

will continue to be judged by special jurisdiction for crimes against humanity, such as criminal homicide, bodily injury, torture, kidnapping, illegal imprisonment, extortion, and battery.

Investigations (inquiries) will then be the responsibility of the military authority, even in cases of criminal attempts on life, despite the fact that, under the new law, these crimes would fall under the jurisdiction of the ordinary justice system. This new standard is in contradiction with Article 144.4 of the Constitution, which assigns judicial police functions and the investigation of criminal offenses, other than military offenses, to the civil police. Indeed, if criminal attempts on life cease to be military offenses under the new law, the criminal investigation should be handled by the civil police who, pursuant to Article 144.4 of the Constitution, have “the functions of judicial police and the investigation of criminal offenses.” By leaving the initial investigation in

the hands of the “military” police, the latter are given the authority to decide, from the outset, whether or not there is criminal intent. This means that law 9299 of the Republic is incapable of significantly reducing impunity.[FN67]

[FN67] IACHR, Report on the Human Rights Situation in Brazil, ob. cit., paras. 84 and 86. Underlining added.

115. Based on these considerations, the Commission determined that “impunity for crimes committed by the state, military, or civilian police is an element conducive to violence, and establishes chains of perverse loyalty among the police on the basis of complicity or false solidarity (...).”[FN68] It recommended that the State of Brazil:

Confer[] on the ordinary justice system the authority to judge all crimes committed by members of the state military police;

Transfer[] to the jurisdiction of the federal justice system the trial of crimes involving human rights violations, with the federal government assuming direct responsibility for initiating action and due process for such crimes.[FN69]

[FN68] Id, para. 94.

[FN69] Ibid, para. 95.

116. In accordance with the foregoing, the Brazilian legislation referred to entails a violation per se of Articles 1.1, 25, and 8 of the American Convention on Human Rights, since the competence granted to the military police to investigate alleged human rights violations committed by its agents prevents an independent, autonomous and impartial entity from conducting such investigations.

117. This conclusion is not altered by the fact that the military police is in charge only of the initial investigation, and that the authority to try cases has been assigned to courts in the regular system of justice. This is true because investigation of a case by the Brazilian military police precludes the possibility of an objective and independent investigation by judicial authorities not linked to the hierarchical command of the security forces. The fact that investigation of a case has been initiated by the Brazilian military police may make it impossible to obtain a conviction, even if the case is subsequently transferred to the regular courts. This is because of the lack of independence and impartiality of the Brazilian military police in investigating their own agents, and the fact that it is likely that the initial investigation and gathering of evidence are carried out for the purpose of hindering prosecution and in an effort to guarantee impunity for the persons responsible for the human rights violations.

118. In the case in point, the military police was in charge of the investigation into the murder of Jailton Neri da Fonseca, and the trial was also conducted in the military courts, since it occurred prior to the aforementioned Law 9,299 of August 7, 1996.

119. Consequently, by having the military police investigate the murder of Jailton Neri da Fonseca and by having a military court try the alleged offenders, the State of Brazil violated Articles 25 and 8 of the American Convention, to the detriment of the next of kin of the victim, in addition to violating the general obligation contained in Article 1.1 of that instrument.

120. The Commission further notes that during the investigation into the events, a series of irregularities occurred that made it difficult to get to the truth and identify the responsible individuals. As established above, the investigation conducted both by the military police and by the civilian police was defective. The civil inquest was never completed. The military inquest was opened twice. From an analysis of the facts, the Commission has determined that the State in fact failed to comply with its obligation to investigate, bring to trial, and punish the persons guilty for the murder of the child, Jailton Neri.

121. As a matter of fact, the Commission finds that the investigative process was fraught with serious defects. The military police did not ex officio establish any inquest to investigate the death of the child of which its agents were accused. It was not until eight months after the event had occurred, by order of the Public Prosecutor's Office, that the military command opened an inquest. In other words, various pieces of evidence critical for establishing the truth of the events were lost. There was no expert crime scene investigation, there were no ballistics tests, and no depositions of witnesses were taken. Consequently, the results of the inquest were inconclusive.

122. Initially, the murder of the child was not investigated. The only conclusion reached was that the child had been in the custody of the police for a certain number of hours on the day of the crime. Eighteen months after the murder, the Public Prosecutor ordered the military command to reopen the investigation. It was only in the course of that inquest that the mother of the child was heard, as were the police involved in the murder. On the basis of that inquest, 21 months after the crime, a ballistics test was conducted to compare the bullets taken from the body of the child with the revolvers of the policemen involved. That test concluded that the bullets that took the life of the child came from the firearm of military police officer Eduardo Bezerra Matos.

123. When one looks at the proceedings of both the military and the civilian police together during the investigation into the crime reported here, one would conclude that these agents deliberately destroyed existing evidence, and were inexpert and negligent in their duty to investigate and substantiate a crime, no matter who committed it. The serious failings of these authorities were referred to earlier, and they most certainly contributed to the decision to absolve the defendants, but even more importantly, they prevented punishment of the guilty parties.

124. With the results of the military inquest, the Public Prosecutor's Office brought criminal charges in the military courts of Rio de Janeiro State against the soldier, Eduardo Bezerra Matos, for the murder of the child, and against MP Corporals Heliomar Coutinho Antunes and Nilton

Oliveira do Nascimento, and MP Third Sergeant Adilson Bruno de Andrade, for being accomplices in the murder and for peculation [concessão].

125. Despite the accusation referred to above, and the various depositions and statements by the implicated policemen themselves, as well as testimony to the effect that the child, Jailton, was the victim of extortion, illegal detention, and murder, according to reports by the petitioners, supported by accompanying documents, the Public Prosecutor's Office, in its final arguments, requested that the defendants be acquitted, because of the inconclusive evidence in the court records. The Military Council, in turn, unanimously decided on acquittal of the defendants, on the basis of the principle of *in dubio pro reo*.

126. On these grounds, the Commission concludes that the State of Brazil has denied the next of kin of the child, Jailton Neri da Fonseca, the guarantee of an impartial, adequate, and effective trial in domestic courts, to punish the persons charged with the arbitrary detention and murder of the child.

127. In conclusion, the Commission finds that the State failed to comply with its obligation to conduct an effective and adequate investigation into the murder of Jailton Neri, a child, at the hands of military agents, in violation of Article 1.1 of the American Convention, taken together with Article 8 of the same. Moreover, it violated the right to an effective remedy to ensure punishment of the accused for the crime committed, in violation of the provisions of Article 25 of the Convention, taken together with its Article 1.1, all to the detriment of the next of kin of the child, Jailton Neri da Fonseca.

128. The Commission concludes that the lack of independence, autonomy, and impartiality on the part of both the military police that investigated the event and the military court that conducted the proceedings against the persons accused of the death of Jailton Neri da Fonseca, together with the other irregularities that occurred during the investigations and that undoubtedly had a decisive effect on the results of the proceedings, constitute a violation by the State of Brazil of the obligations contained in Articles 25 and 8 of the American Convention, together with the provisions of Article 1(1) of that instrument, to the detriment of the next of kin of Jailton Neri da Fonseca.

G. Obligation to make reparations, including the obligation to indemnify

129. Since in the present case the State of Brazil has not compensated the next of kin of the victim, the Commission is compelled to point out that this obligation is incumbent on the State of Brazil, even though its domestic courts have acquitted the military police accused of the murder of Jailton Neri da Fonseca.

130. In addition to the obligation to investigate and punish all human rights violations committed by its agents, the State also has the obligation to compensate the victims of such violations, or their next of kin, as applicable. In this regard, "a rule of common law, which is one of the fundamental principles of current international law on the responsibility of States" is the one pursuant to which, "when a wrongful act occurs that is imputable to a State, the latter incurs

international responsibility for violation of an international rule, and thus incurs a duty to make reparation.”[FN70]

[FN70] Inter-American Court, Castillo Páez Case– Reparations, Judgment of November 27, 1998, para. 50.

131. The Inter-American Court has had the following to say on the subject of reparations:

Reparation is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred. The specific method of reparation varies according to the damage caused; it may be restitutio in integrum of the violated rights, medical treatment to restore the injured person to physical health, an obligation on the part of the State to nullify certain administrative measures, restoration of the good name or honor that were stolen, payment of an indemnity, and so on. When the right to life is violated, as it was in the instant case, given the nature of the right violated, the reparation is primarily in the form of some pecuniary compensation, as has been the practice of this Court (...). The reparation may also be in the form of measures intended to prevent a recurrence of the offending acts.[FN71]

[FN71] Inter-American Court, Garrido and Baigorria Case– Reparations, Judgment of August 27, 1998, para. 41.

132. The Inter-American Court has pointed out that “indemnizations are compensatory in nature and hence are to be awarded to the degree and in the measure sufficient to compensate for the material and moral damages suffered.”[FN72] It has further stated that reparations intend:

[T]o wipe out the effects of the violation. Their quality and amount will depend upon the damage caused at both the material and moral levels. Reparation is not to imply either enrichment or impoverishment for the victim or his heirs.[FN73]

[FN72]Inter-American Court, Case of Garrido and Baigorria, ob cit., para. 47.

[FN73] Inter-American Court, Castillo Páez Case – Reparations, ob. cit, para. 53. Also refer to the International Court of Justice, Case of Chorzów Factory, which refers to the basic principles of international law on reparations for violations of international obligations. It stated as follows in this respect: “The fundamental principle underlying the current concept of an illegal act—a principle that appears to be established by international practice, and especially by decisions of courts of arbitration—is that reparations should, inasmuch as possible, erase all the consequences of an illicit act and reinstate the prior situation that would most likely still exist if the act had not been committed. Restitution should be in kind or, if that is impossible, it should be effected by payment of an amount corresponding to the value of the thing.. When indemnification is necessary, it shall be for losses not covered by restitution of the thing in kind, or by payment of

its value. These are the principles that should determine the amount of the compensation owed for a violation of international law.” P.C.I.J. Collection of Judgments, Series A, No. 17, Page. 47.

133 .Notwithstanding statements issued by the International Court of Justice, reparations are an essential complement to the breach of a Convention, and it is not necessary that they be stipulated in the Convention itself.[FN74] The American Convention contains provisions referring to reparations both in its Article 1(1) and in its Article 63(1). In Article 1(1), inasmuch as the obligation of States contemplated therein to guarantee to all persons under their jurisdiction the free and full exercise of the rights and liberties recognized in that Convention entails an obligation on their part to “prevent, investigate, and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”[FN75]

[FN74] See for instance the Case of Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, Series A, No. 9, p. 21.

[FN75] Inter-American Court, Velásquez Rodríguez Case, ob. cit., para.166. (Underlining added).

134. In accordance with international law, the obligation by the State to make reparations for human rights violations committed by its agents is an obligation of the State as such, and not of its agents, regardless of the content of domestic laws on the subject. In this regard, account should be taken of the fact that, pursuant to Article 27 of the Vienna Convention on International Treaties, “a party may not invoke provisions of its domestic law as justification for noncompliance with a treaty.” The IACHR has also found that:

States’ international obligation to compensate victims of human rights violations committed by their agents is therefore one of its direct, main responsibilities, i.e. it is a direct responsibility of the State and does not require that victims first take personal action against those agents, regardless of the content of domestic provisions on the matter.[FN76]

[FN76] IAHCR, Report N° 83/01, Petition 11.581, Zulema Tarazona Arriate, Norma Teresa Pérez Chávez, and Luis Alberto Bejarano Laura (Peru), para. 27.

135. The Commission concludes on this point that the acquittal of the military policemen accused of the murder of Jailton Neri da Fonseca does not release the State of Brazil of its international obligation to make reparations to his next of kin as a result of his murder at the hands of agents of Brazil.

136. The Commission concludes that Brazil has the international obligation to make reparations to the next of kin of Jailton Neri da Fonseca for the human rights violations committed by agents of the State of Brazil. These reparations include determination of

compensation to be paid by the State of Brazil, which must be computed on the basis of international parameters, and must be sufficient to make up for the material and moral damages suffered by the family of Jailton Neri da Fonseca as a result of his murder and of the other human rights violations referred to in this report.

H. Violation of Article 2 of the American Convention: Obligation of the state to adopt domestic legal measures

137. Article 2 of the American Convention states as follows:

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.

138. The Inter-American Court has said the following in reference to that article:

Regarding people's law, a customary rule prescribes that a State, which has entered into an international agreement, must introduce in its national law the necessary assumed modifications to ensure the execution of obligations assumed. This rule is universally valid and has been considered by the jurisprudence as an evident principle ("principe allant de soi"; *Echange des populations grecques et turques, avis consultatif*, 1925, C.P.J.I., Series B. No. 10, p. 20). In this sequence of ideas, the American Convention states the obligation of every State Party to adapt its national law to dispositions of said Convention, to guarantee the rights recognized therein.[FN77]

[FN77] Inter-American Court, *Durand and Ugarte Case*, judgment of August 16, 2000, para. 136.

139. The Inter-American Court has further stated that:

[T]he general duty set forth in Article 2 of the American Convention implies the adoption of measures on two fronts. On the one hand, the suppression of rules and practices of any kind that entail the violation of the guarantees set forth in the Convention. On the other, the issuance of rules and the development of practices leading to the effective observance of said guarantees.[FN78]

A State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2. Likewise, it may adopt provisions which do not conform to its obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes.[FN79]

[FN78] Inter-American Court, Cantoral Benavides Case, judgment of August 18, 2000, para. 178.

[FN79] Inter-American Court, Advisory Opinion OC-13/93 of July 16, 1993. Series A N° 13, para. 26.

140. In the present case, the failure by the State of Brazil to abolish from its legislation the provisions that grant the military police competence to investigate human rights violations committed by the military police constitutes a violation of Article 2 of the American Convention, since it means that Brazil has not adopted the legislative measures necessary to give effect to the rights and freedoms recognized in that treaty.

141. In fact, as explained earlier, Article 125, paragraph 4 of the Federal Brazilian Constitution of 1988 establishes that “the state military justice system has competence to try and judge the military police and firemen for military crimes defined by law...”. The definition of military crimes appears in the 1969 Military Criminal Code, which established in its Article 9, paragraph II(f) that: “Military crimes in times of peace are considered as: (iii) II. The crimes stipulated in this code, provided they have the same definition in common criminal law, when committed by: (...) (f) members of the military who are on active duty or, if not in service, who are using weapons belonging to the military or any warlike material in military custody or under military control or management, to engage in an illegal act.”

142. These were the provisions in force when Brazil ratified the American Convention on Human Rights on September 25, 1992. Upon ratification, pursuant to Article 2 of the American Convention, the State of Brazil assumed the obligation to adapt that legislation to the parameters of the American Convention, which meant both to revoke the competence of the military police to investigate human rights violations committed by its agents, as well as to do revoke the competence of the military courts to judge said crimes.

143. This was required by virtue of the fact that these provisions, as explained above, entail a violation by the State of Brazil of the right to effective recourse and to a fair trial, and prevent it from adequately fulfilling its obligation to duly investigate human rights violations committed by its agents, which implies a breach of Articles 25, 8, and 1(1) of the American Convention in every proceeding in which the military police is responsible for investigating human rights violations committed by its agents.

144. However, by Law 9,299 of August 7, 1996, Brazil amended Article 9 of the Military Criminal Code, and established a new “Single Paragraph,” pursuant to which “the crimes referred to in this article, whenever they are intentional crimes committed against the life of a civilian, shall come under the jurisdiction of the common courts.”

145. This law also amends a section of Article 82 of the Code of Military Criminal Procedure, by establishing that “in intentional crimes committed against the life of civilians, the military courts shall refer the documents from the military police investigation to the common courts.”

146. Therefore, with the partial amendment of that legislation, the State of Brazil complied in part with its obligations arising from Article 2 of the Convention, since it abolished the competence of military courts to try cases involving some human rights violations committed by members of the military police. However, its failure to annul the competence granted to the military police to investigate those crimes means that the State of Brazil is in violation of said Article 2 of the American Convention.

147. In accordance with these considerations, the Commission has concluded that Article 9, paragraph II(f) of the Military Criminal Code (with the exception of the single paragraph it added by Law 9,299 of August 7, 1996), and Article 82 of the Code of Military Criminal Procedure mean that the State of Brazil has not adopted adequate measures of domestic legislation to give effect to the rights recognized in the Convention, thereby contravening its general obligation under Article 2 of the American Convention.

I. Violation of Article 1(1) of the Convention: Obligation of the State to respect and guarantee individual rights

148. The foregoing analysis demonstrates that Brazil has not complied with its obligation to respect the rights and freedoms of individuals under its jurisdiction, as stipulated in Article 1(1) of the American Convention, because it violated the rights referred to in Articles 7, 5, 4, 19, 25, and 8 of that Convention.

149. As the Inter-American Court has determined: "Pursuant to Article 1(1), any type of action by the government authorities that violates the rights recognized by the Convention is illicit. In this context, in any circumstances in which a State organ or official, or a public institution unduly causes prejudice to one of those rights, the State is assumed to be in breach of its duty to respect them, as established in this Article." [FN80]

[FN80] Inter-American Court, Velásquez Rodríguez Case, Judgment of July 29, 1988, Serie C N° 4, para. 169.

150. The second obligation stipulated in Article 1(1) is that of guaranteeing the free and full exercise of the rights and freedoms recognized in the Convention. The Commission concludes that by violating the right to life, the right to humane treatment, the right to judicial protection, and the right to a fair trial, to the detriment of the victims referred to in this report, the State of Brazil failed to comply with its obligation to ensure the free and full exercise of the rights of all persons subject to its jurisdiction.

V. ACTIONS TAKEN SUBSEQUENT TO REPORT N° 23/03

151. The Commission adopted report No. 23/03 on the merits of the present case on March 4, 2003, during its 117th session. That report, with the Commission's recommendations, was transmitted to the State of Brazil on April 8, 2003, and the State was given two months, counting from the date the report was sent, to comply with the recommendations. This period of time has

now lapsed, and the government has not reported to the IACHR regarding action taken to carry out the recommendations made by the Commission. Furthermore, the Commission advised the petitioners of the adoption of said report on the merits, and requested their opinion regarding the possibility of submitting the case to the Inter-American Court of Human Rights. On May 20, 2003, the petitioners responded and requested the IACHR to adopt the final report, since the events reported occurred before the Brazilian government had recognized the jurisdiction of the Court.

152. In accordance with the provisions of Article 51(1) of the Convention, the Commission must determine at this stage in the proceedings whether or not the State has settled the matter. On this point, the IACHR notes that as of this date, the State of Brazil has not reported on any measures that it has taken to comply with the recommendations made by the IACHR in the report on the merits of this case. Since the Commission has not received information from other sources in this regard either, it therefore assumes that its recommendations have not been carried out.

153. Finally, the IACHR wishes to note in conclusion that in view of the specific circumstances of this case, which include the position of the petitioners requesting the Commission to approve the report stipulated in Article 51 of the American Convention, in addition to the fact that the date on which the events occurred, and the dates on which the investigations and the rest of the proceedings were initiated and concluded, all occurred prior to the date on which Brazil accepted the jurisdiction of the Inter-American Court of Human Rights, namely, December 10, 1998, the Inter-American Commission, in accordance with its Rules of Procedure, has decided not to refer this case to the Inter-American Court of Human Rights.

VI. CONCLUSIONS

154. On the grounds of the preceding analysis, the Commission concludes that the State of Brazil is responsible for violating the right to personal liberty, the right to human treatment, the right to life, the right to special measures for the protection of children, the right to judicial protection, and the right to a fair trial, as established in Articles 7, 5, 4, 19, 25, and 8, respectively, of the American Convention. The Commission further determines that the State was in breach of its duty to adopt measures of domestic legislation, pursuant to the terms of Article 2 of the American Convention, and that it also violated its obligation under Article 1(1) to respect and ensure the rights established in the Convention.

VII. RECOMMENDATIONS

155. On the grounds of the analysis and conclusions of this report, the Inter-American Commission on Human Rights makes the following recommendations to the State of Brazil:

1. That it make full reparations, in consideration of both moral and material damages, to the next of kin of Jailton Neri da Fonseca, for the human rights violations determined in this report, and, more specifically, that it do the following:

2. Ensure a full, impartial, and effective investigation into the crime conducted by nonmilitary organs, with a view to establishing responsibility for the acts related to the detention and murder of Jailton Neri da Fonseca and punishing the responsible parties.
3. Pay the next of kin of Jailton Neri da Fonseca compensation computed in accordance with international standards, in an amount sufficient to make up for both the material damages and the moral damages suffered on the occasion of his murder.
4. Amend Article 9 of the Military Criminal Code and Article 82 of the Code of Military Criminal Procedure, in addition to any other domestic legal provisions that need to be amended to abolish the competence of the military police to investigate human rights violations committed by members of the military police, and transfer that competence to the civilian police.
5. Adopt and implement measures to educate officers of the justice system and members of the police to prevent acts involving racial discrimination in police operations, and in criminal investigations, proceedings, or sentencing.

VIII. PUBLICATION

156. On October 8, 2003, the Commission approved Report No. 42/03, which is presented above, in accordance to Article 50 of the American Convention. On October 14, 2003 during the 118th Ordinary Period of Sessions of the IACHR there was a working meeting between the IACHR and the concerned parts. In this working meeting the Brazilian Government asked the petitioners to present negotiating points that would be dealt with the Secretariat for the Promotion of Social Equality.

157. On October 30, 2003, the Commission transmitted this report to the Brazilian State, in accordance with Article 51(1) of the American Convention and granted a month for the State to comply with the aforementioned recommendations. By the end of that deadline, the Commission had not received a reply from the State concerning such recommendations. Considering the absence of a reply and the information received during the working meeting the Commission finds that the State has not complied with the aforementioned recommendations.

158. Taking into account the preceding considerations and in accordance with Articles 51(3) of the Convention and 45 of its Rules of Procedure, the Commission decides to ratify the conclusions and reiterate the recommendations of paragraph 155, publish this report and include it in its Annual Report to be sent to the General Assembly of the OAS. The Commission, in order to fulfill its mandate, will continue to evaluate the measures taken by the Brazilian State regarding the aforesaid recommendations until they are completely complied with.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C. on the 11th day of the month of March, 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners: Evelio Fernández Arévalos; Freddy Gutiérrez and Florentín Meléndez.