I. SUMMARY

1. On September 5, 2001, the Inter-American Commission on Human Rights (hereinafter the "IACHR" or "Commission" or "Inter-American Commission") received a petition lodged by Dr. Marcelo Rossi Nobre and Dr. Hélio Pereira Bicudo (hereinafter the "petitioners"), alleging violation of rights recognized by the American Convention on Human Rights (hereinafter the "Convention" or "American Convention") on the part of the Federative Republic of Brazil (hereinafter "Brazil" or the "Brazilian State" or "State"), an involving an allegedly flawed police inquiry instituted to determine the identity of the author(s) of death threats made against Dr. Pereira Bicudo.

2. The petitioners claimed violations of Article 4 (right to life), Article 5 (right to humane treatment), Article 7 (right to personal liberty), Article 8 (right to a fair trial), Article 11 (right to privacy) and Article 13 (freedom of thought and expression) of the American Convention, all in combination with its Article 1(1) (duty to respect and ensure the rights recognized in the Convention).

3. The State reported that it was unable to offer any technical observations on the two briefs issued by the Public Prosecutor's Office on the matter, which it attached.

4. In this report, the Commission examines the available information based on the American Convention and concludes that in its judgment, the petition was not lodged within six months

from the date on which the party alleging violation of his rights was notified of the final judgment, as required under Article 46(1)(b) of the Convention. The Commission decides to notify the State and the petitioners of this report, to publish this decision and include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

5. The petition was received at the Inter-American Commission on September 5, 2001. Processing of the petition began on September 19, 2001, when the State was asked to provide information on the facts alleged by the petitioners. The State was given two months to reply. When no reply from the State was forthcoming, the petitioners filed a request on March 19, 2002, asking that the treatment of the petition's admissibility be combined with the discussion and decision on the merits, pursuant to Article 37(3) of the Commission's Rules of Procedure.

6. On March 22, 2002, the Commission decided to combine its treatment of the petition's admissibility with its discussion on the merits, and to open Case 12,397. That same day, the Commission asked the petitioners to supply, within two months, any additional observations they might have concerning the merits. The petitioners presented their observations on the merits on April 15, 2002. Those observations were forwarded to the Brazilian State on May 6, 2002, with the request that it send its observations on the merits within two months.

7. On October 15, 2002, during its 116th regular session, the Commission held a hearing at which both parties were present and where they supplied additional information. There, the Commission made a formal offer of its services to the parties, with a view to reaching a friendly settlement. However, the Commission's offer was not taken up because of disagreement between the parties.

8. The State supplied additional information on January 23, 2003. The petitioners presented their observations on May 13, 2003, which were then forwarded to the Brazilian State.

III. POSITIONS OF THE PARTIES

A. The petitioners

9. The petitioners explained that Dr. Hélio Bicudo was elected a Federal Deputy in 1990 and then re-elected in 1994. They added that during that period he authored important bills and proposed constitutional amendments that would have introduced changes in the structure of the Police, the judicial branch of government and the prison system. Salient among these was Bill Number 3320 of 1992, which narrowed the jurisdiction of the states' military criminal courts so that they would no longer be competent to prosecute and punish crimes committed by military police in the course of discharging their police functions.

10. The petitioners went on to report that in May 1993, when discussion of this bill got underway, Dr. Hélio Bicudo and other lawmakers received anonymous letters containing insults and threats. In the alleged victim's case, the petitioners presented two letters: one undated, in which a supposed sergeant in the Military Police claimed that Dr. Bicudo hated the Military

Police and went on to hurl invectives against the alleged victim and his family.[FN2] The second letter was postmarked June 14, 1993, and read verbatim as follows:

... If only those criminal thugs whose human rights you so bravely defend would break into your home, force you to watch as they raped your wife, your daughter and your granddaughter right before your eyes, all the while holding a gun to your head, leaving you helpless to do anything....[FN3].

[FN2] See Police Inquiry, pp. 15 and 16.
[FN3] See Police Inquiry, p. 53.

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11. They explained that subsequent to these threats, a member of the São Paulo Military Police alerted Dr. Bicudo that while at the Officers Club, he had overheard a conversation among colonels in the São Paulo Military Police in which it was suggested that an "accident" or "assault" might befall Dr. Bicudo, to prevent passage of the aforementioned bills. The petitioners alleged that the alleged victim did not reveal the officer's name because he was not authorized to do so. Given the facts, the petitioners alleged, on June 23, 1993 Dr. Bicudo wrote to the Speaker of the Chamber of Deputies and to the São Paulo Secretary of Public Safety concerning the threats he had received. As a result, the Governor of the state of São Paulo ordered protection for the alleged victim in the form of a police patrol in the vicinity of his residence.

12. The petitioners reported that in the first half of June 1993, the watchman saw a black Kadett car circle Dr. Bicudo's residence and stop nearby, as the strangers inside the vehicle observed activity at the residence. The petitioners alleged that the federal police agents sent to investigate the incident commented that the behavior was typical of the Military Police's secret agents.

13. The petitioners asserted that on September 8, 1993, Dr. Bicudo received a letter sent by a major in the Military Police who asked that his identity not be revealed for fear of reprisals. Attached to the letter was a document that appeared to be a memorandum from the office of the coordinator of military intelligence of the São Paulo State Military Police. The document contained details of an operation named "Hélio Bicudo" and bore the signature and stamp of the Military Police. It read as follows:

Launch operation "ALFA 3" today for the established "target".

As planned, there can be no mistakes; the mission has to be aborted if the agents are followed.

The "accident" must look like a common crime committed by a teenager.

The decision from above is that the "deed" should be done before October 5.

Encode this PB.[FN4]

[FN4] See Police Inquiry, p. 27.

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14. The petitioners reported that based on this document and the facts previously narrated, on September 15, 1993 Dr. Hélio Bicudo filed a request with the São Paulo State Public Prosecutor's Office asking that a police inquiry be opened to investigate these facts. Police Inquiry (hereinafter referred to as the "IPL" or "Inquiry" or "Police Inquiry") No. 42.071/93-8 was opened in the First Precinct of the São Paulo Homicide Division on October 1, 1993. However, once a number of procedures were conducted, the Report filed by the Precinct in charge of the investigation concluded that the identity of the persons behind the threats could not be established. On December 27, 1994, therefore, the Public Prosecutor's Office requested that the IPL be closed. The presiding judge closed the inquiry by a ruling dated January 3, 1995.

15. Dr. Hélio Bicudo filed a request with the Prosecutor General of the State Public Prosecutor's Office. In response, on May 18, 1995 the Prosecutor General appointed another prosecutor to the case. The latter proceeded to file a request with the court seeking to have the files of the inquiry reopened. He also requested twelve procedures aimed at identifying the authorship of the threats. On May 25, 1995 the court ordered the IPL reopened.

16. The petitioners alleged that despite the Prosecutor's repeated requests for measures to be taken to identify the authors of the threats, the competent authorities did not act upon the requests and did not duly carry out the procedures.

17. The petitioners further alleged that the authorities' refusal to fully carry out the procedures requested by the Prosecutor was a violation of the police authorities' duty to conduct procedures requested by the Public Prosecutor's Office. They also asserted that as a consequence of the police authorities' refusal to carry out the requested measures, the prosecutor was taken off the case and the prosecutor originally assigned to the case was put on the case again. The latter repeated his earlier request that the files on the case be closed on the grounds that evidence to warrant further investigation was lacking. The inquiry was closed again by a court decision of August 22, 1996. The petitioners reported that on January 11, 2001, Dr. Hélio Bicudo filed another request with the Prosecutor General seeking to have the investigations reopened, but that request was denied on March 24, 2001 on the grounds that the principle of the natural prosecutor had to be preserved.

18. In conclusion, the petitioners argued that the competent authorities did not want to investigate. They alleged that the inquiry did not follow the clues to the identity of those behind the threats and that once the IPL and the requests for investigatory procedures were closed, not one of those procedures was carried out. The petitioners further claimed that the State's disinterest in conducting a serious and in-depth investigation of the case violated the alleged victim's right to the truth.

B. The State

19. The State presented its observations for the first time during the October 15, 2002 hearing, where it reported that the Public Prosecutor's Office had issued two briefs on the instant case and that the State was unable to make any technical observations on them. It went on to say that it did not have the competence to assess opinions given by the Public Prosecutor's Office, as the latter was an independent office with its own constitutional mandate. The State argued that it respected the decisions issued by the Public Prosecutor's Office. On January 23, 2003, the State sent the Commission a copy of the records in the police inquiry, which included the briefs from the Public Prosecutor's Office arguing in favor of closing the case for lack of new evidence and in keeping with the principle of the natural prosecutor.

IV. ADMISSIBILITY

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

20. The Commission is competent ratione personae to examine the complaint because the person named as the alleged victim in the petition is an individual whose Convention-recognized rights the Brazilian State undertook to respect and ensure. The facts reported in the complaint are alleged to be the work of agents of the State.

21. The Commission is competent ratione materiae because the allegations concern violations of Convention-recognized rights, namely: the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8), the right to privacy (Article 11) and freedom of thought and expression (Article 13), as well as the duty to respect and ensure the rights established in the Convention (Article 1(1).

22. The Commission is competent ratione temporis in that the facts alleged date back to September 15, 1993, when the duty to respect and ensure the rights recognized in the Convention was already incumbent upon the Brazilian State, which ratified the Convention on September 25, 1992.

23. The Commission is competent ratione loci because the facts alleged purportedly occurred in the state of São Paulo, in the Federative Republic of Brazil, which has ratified the American Convention.

B. Exhaustion of local remedies

24. Under Article 46(1)(a) of the Convention, for the Commission to consider a petition admissible, the remedies under domestic law must first have been pursued and exhausted in accordance with generally recognized principles of international law. The exceptions to this rule are set forth in Article 46(2) of the Convention.

25. The petitioners initially argued that the alleged victim had exhausted the local remedies available for investigation and punishment of the crimes alleged to have been committed against Dr. Bicudo, because the decision of first instance was final and not subject to appeal. The State then filed preliminary objections relating to the failure to exhaust local remedies.

26. The IACHR observes that the original petition was received on September 5, 2001. The decision to close IPL No. 42,071/93-8 was handed down by District Judge Francisco José Galvão Bruno on January 3, 1995. While it is true that the Police Inquiry was reopened on May 25, 1995, Judge Francisco José Galvão Bruno ultimately ruled, for a second time, in favor of closing the IPL, in a decision delivered on August 22, 1996.

27. The IACHR has in the past established that, in Brazil, the closing of a Police Inquiry is final, there being no remedy by which to appeal such a decision.[FN5] In fact, under Brazilian Law, specifically, the Brazilian Criminal Procedural Code, there is no remedy against a court ruling to close a police inquiry.

[FN5] IACHR, Report N° 37/02, Admissibility, Case 12,001, Simone André Diniz, Brazil, October 9, 2002, paragraphs 25 to 27.

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28. Under Brazilian criminal law, the only circumstance under which an inquiry may be reopened is the emergence of fresh evidence related to the case, in accordance with Article 18 of the Brazilian Criminal Procedural Code and Statement of Case Law 524 of the Federal Supreme Court.[FN6] In other words, although the closing of a police inquiry may not be res judicata since a decision to reopen the inquiry may be revisited if fresh evidence emerges, the IACHR considers that the six-month period must be counted from the date of notification of the August 22, 1996 ruling in favor of closing the police inquiry, which was the final judgment against which there was no recourse.

[FN6] The Statement of Case Law 524 clears up any possible ambiguity in the Criminal Procedural Code as follows: "When, at the request of the prosecutor, the judge orders a police inquiry closed, no criminal action may be instituted unless new evidence is produced."

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29. The petitioners themselves alleged and recognized that the lower court ruling was definitive (see paragraph 25 supra). However, the petitioners pointed to the denial of the request to reopen the inquiry –Official Document No. 5,042/01 issued by the Prosecutor General of the São Paulo Public Prosecutor's Office on March 19, 2001, as the final decision on the case. As for this argument, the Commission finds that the request and its subsequent refusal by the Head of the State Public Prosecutor's Office ought not to be taken into account for purposes of calculating the six-month time period to which Article 46(1)(b) of the Convention refers.

30. The request that Dr. Bicudo made of the Prosecutor General of the São Paulo Public Prosecutor's Office on January 11, 2001 was based on the failure to solve the facts or the poor quality of the police inquiry that was closed.[FN7] The request made of the Head of the Public Prosecutor's Office, without any offer of new evidence yet seeking to have the Police Inquiry reopened, was not the proper means to achieve the desired objective. As previously observed, only fresh evidence and a request from the Public Prosecutor's Office to the court could have

gotten the IPL reopened. Therefore, in the instant case, the remedies were effectively exhausted on August 22, 1996.

[FN7] See records of Case 12,397 with the IACHR, Vol. 2. Request to reopen, made of Dr. José Geraldo Brito Filomeno, Prosecutor General of the State of São Paulo, registered in the São Paulo State Public Prosecutor's Office under number 0005042/01 on January 11, 2001.

C. Time period for lodging a petition

31. Under Article 46 (1)(b) of the Convention, a petition must be lodged with the Commission within six months of the date of notification of the decision that exhausted local remedies.

32. In the instant case, by the time the petition was lodged, the six-month time period from the date on which the alleged victim was notified of the August 22, 1996 final court ruling that closed the respective police inquiry had long since expired. Received on September 5, 2001, the petition was lodged more than five years after the aforementioned final ruling, long after the six-month time period had expired. The petition does not, therefore, satisfy the requirement stipulated in Article 46(1)(b) of the American Convention.

V. CONCLUSIONS

33. In this report, the IACHR decides that the internal remedies were exhausted, but the petition was lodged after the deadline stipulated by the American Convention. Once the Commission finds that the case is inadmissible for failure to comply with a Convention requirement, it need not make any finding on the other allegations.

34. The Inter-American Commission finds that the petition is inadmissible under the terms of Article 47(a) of the American Convention. Based on the arguments of fact and of law set forth herein,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition inadmissible.
2. To notify the State and the petitioners of this decision.
3. To publish the present report and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., the 24th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice President; Commissioners: Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez and Florentín Meléndez.

DISSENTING OPINION OF COMMISSION MEMBER SUSANA VILLARÁN

1. In keeping with Article 19 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter the "Commission" or "IACHR"), the undersigned Commission member, Susana Villarán, hereby submits the following explanation of her dissenting vote because she did not concur with the majority decision of the IACHR that declared the present case to be inadmissible.

2. It is my view that there were grounds for admitting the complaint and for a subsequent ruling on the merits finding that the State's international responsibility was engaged by its violation of Dr. Hélio Bicudo's right to humane treatment and his right to judicial protection, recognized, respectively, in Articles 5 and 25 of the American Convention on Human Rights (hereinafter the "American Convention"), in the terms established in Article 1(1) thereof

I. ADMISSIBILITY

3. The Commission decided to declare the petition inadmissible on the grounds that the six-month period provided for in Article 46(1)(b) of the American Convention had expired. That articles states that a petition must be "lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment."

4. The IACHR found that the August 22, 1996 decision handed down by Judge Francisco José Galvão Bruno, wherein he ordered that the police inquiry be closed, was the final decision. The majority reasoned that the six-month time period for lodging a complaint began as of that date because the effect of that final judgment had been to exhaust domestic remedies. The Commission did not, therefore, concur with the petitioners' arguments to the effect that the six-month time period should have been counted from March 19, 2001, the date on which the Prosecutor General with the São Paulo Public Prosecutor's Office issued his decision to deny the victim's January 11, 2001 request to have the inquiry reopened.

5. The undersigned considers that inasmuch as the State did not file an objection asserting that the six-month time period had expired, the Commission could reasonably assume that the State tacitly waived its right to invoke that argument in its defense.

6. The Commission's Executive Secretariat received the petition on September 5, 2001, and on September 20, 2001 began to process the case, giving the State two months in which to respond to the complaint. The State did not respond. On May 6, 2002, the IACHR again asked the State to present its observations on the merits. No response from the State was forthcoming. In fact, the State never addressed this case until October 15, 2002, when it appeared for the Commission hearing. But not then or at any time thereafter did the State file an objection claiming that the time period for lodging the petition had expired.

7. The jurisprudence constante of the Inter-American Court of Human Rights is that the silence of the State can be construed as tacit waiver of its right to file the objection or argument of failure to exhaust domestic remedies.

8. While there is no long-standing, jurisprudence constante that also holds that the State's silence can be presumed to signify tacit waiver of its right to make the objection or argument that the statutory time period has expired, I would make the case that the Commission could indeed presume such a waiver.

9. In the Neira Alegría Case, when addressing the subject of the inadmissibility of petitions filed after the six-month time period had expired, the Inter-American Court wrote that "since that period depends on the exhaustion of domestic remedies, it is for the Government to demonstrate to the Commission that the period has indeed expired."[FN8] The Court went on to state that "Here, again, the Court's earlier decision regarding the waiver of non-exhaustion of domestic remedies is relevant: (...) this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it."[FN9]

[FN8] IACtHR, Neira Alegría et al. Case, Preliminary Objections, Judgment of December 11, 1991, paragraph 30 (Original text in Spanish).
[FN9] Idem. (citations omitted).

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10. With the foregoing in mind, the undersigned would contend that inasmuch as the State did not file an objection claiming that the statutory time period had expired, it would have been reasonable to assume that in the petition under study, the State tacitly waived its right to make that objection. On that basis, I believe that the IACHR should have found in favor of the petition's admissibility.

II. THE FACTS ESTABLISHED

11. As to the merits of the case, the undersigned contends that the following are the facts established in the instant case and are based on the petitioners' allegations, Brazil's failure to answer the allegations at the proper point in the proceedings, the copies of the judicial records and other evidence on file, the criteria used by the inter-American human rights system to assess evidence, and the absence of other persuasive evidence that might cause the Commission to conclude otherwise.

12. Mr. Hélio Bicudo was elected a Federal Deputy in 1990 and elected to a second term in 1994. During his time in office in the Chamber of Deputies, he was a member of the Constitution and Justice Committee and Vice Chairman of the Human Rights Committee. During that time, he authored a number of bills and proposed constitutional amendments, among them a proposal to demilitarize the police and a bill withdrawing the military courts' jurisdiction to investigate and prosecute crimes committed by military police in the performance of their police functions.

13. During the first half of 1993, Mr. Hélio Bicudo received at least two anonymous letters containing threats. One of the letters read as follows: "If only those criminal thugs whose human rights you so bravely defend would break into your home, force you to watch as they raped your wife, your daughter and your granddaughter right before your eyes, all the while holding a gun to

your head, leaving you helpless to do anything."[FN10] After those threats, Mr. Bicudo was told that colonels in the São Paulo Military Police were talking about an accident or an assault upon Mr. Bicudo, to halt passage of the bills he had introduced in Congress. The witness Luiz Eduardo Rodrigues Greenhalgh stated the following in this regard:

...in May of this year, the witness was contacted by a major in the Military Police (...), who told the witness of a meeting in Tobias de Aguiar Batallion, attended by Military Police officers and public prosecutors from the Jury Court. They were discussing the bill that Deputy Hélio Bicudo had introduced in the Chamber of Deputies. Under that bill, the military courts would lose their jurisdiction to prosecute cases of homicide committed by Military Police, who would instead be tried by the regular courts. At that meeting ... [it was decided that] they would also make direct threats against the deputy, as a form of pressure...[FN11]

[FN10] See police inquiry, p. 53.
[FN11] See police inquiry, p. 84.

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14. In June 1993, Mr. Bicudo reported these threats, in writing, to the Speaker of the Chamber of Deputies and to the São Paulo Secretary of Public Safety.[FN12]

[FN12] See police inquiry, p. 20.

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15. Also in June 1993, a suspicious car was seen circling Mr. Bicudo's residence. The guard at Mr. Bicudo's residence made note of the license plate and gave the information to police. As a result, the Governor of the State ordered that a protective police patrol be stationed at Mr. Bicudo's residence. In its June 19, 1993 edition, the newspaper Folha de São Paulo, published a news item titled "Governor will provide police protection to deputy's family":

Yesterday, the Governor of São Paulo, Luis Antonio Fleury Filho (PMDB), decided to provide police protection to Federal Deputy Hélio Bicudo (PT-SP) and his family. According to Maria do Carmo Bicudo, the deputy's daughter, her father has been receiving death threats ever since he introduced a bill under which the military courts would no longer have jurisdiction to prosecute military police charged with crimes against civilian victims; such cases would instead be prosecuted by the regular courts. The Chamber of Deputies approved the bill, which was sent to the Senate (...). The Governor instructed Secretary of Public Safety Michel Temer to take measures to protect Bicudo and his family. The Metropolitan Police Commandant, Colonel Oscar Francisco de Sales Jr., was also advised. An MP patrol car was sent to the Bicudo residence yesterday...[FN13]

[FN13] Folha de São Paulo, June 19, 1993, pp. 3-10.

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16. On September 8, 1993, Mr. Bicudo received a letter sent by a São Paulo Military Police major. Attached was a document that came from the Office of the Coordinator of Military Police Intelligence of São Paulo. This document, which was signed and bore the seal or stamp of the Office of the Military Police of São Paulo (henceforth "signed and stamped plan"), read as follows:

1. Subject matter: Operation Hélio Bicudo
2. From: Office of the Coordinator of Military Intelligence
3. Importance: -1-
4. Circulation: CH. SEC.
5. Attachment: Route of "target's" itinerary
6. Reference: ----- x -----

Launch operation "ALFA 3" today for the established "target".

As planned, there can be no mistakes; the mission has to be aborted if the agents are followed.

The "accident" must look like a common crime committed by a teenager.

The decision from above is that the "deed" should be done before October 5.

Encode this PB. [FN14]

[FN14] See police inquiry, p.27.

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17. On September 15, 1993, Dr. Hélio Bicudo filed an application with the São Paulo State Public Prosecutor's Office asking that a Police Inquiry be instituted to look into the facts in question. On October 1, 1993, Police Inquiry No. 975/93 was opened in Precinct One of the São Paulo Homicide Division, aimed at "full clarification of the facts reported (…), i.e., serious anonymous threats made against Federal Deputy Hélio Pereira Bicudo."

18. The police magistrate in charge of the case requested a number of measures, including enlargement, to the maximum size, of the signature that appears on the document supposedly originating from the Office of the Coordinator of Police Intelligence of the São Paulo State Military Police; the deposing of persons involved in the case;[FN15] a list of the black Chevrolet "Kadet" vehicles bearing the license plate number reported by the guard at the residence of the alleged victim; investigation of the persons found to be owners of vehicles similar to the one described; an inquiry to determine whether any such persons or members of their families had ever been or were then members of the Military Police; and an investigation in the division for registering and licensing Military Police vehicles to ascertain whether there was a list of secret plates bearing the number given by the guard at the alleged victim's residence.[FN16] All these measures were taken.

[FN15] The investigation interviewed Dr. Hélio Pereira Bicudo; his daughter, Mrs. Maria do Carmo Bicudo Barbosa; Mrs. Jackson Rony Fernandes, a Federal Police agent who was on the alleged victim's case when the incident involving the disappearance of his dog occurred; Mr. José Justino de Melo, the guard at the alleged victim's residence; Mr. Luiz Eduardo Rodrigues Greenhalgh and Mr. Luiz Aylton Casertani, São Paulo State Military Police officers.
[FN16] See police inquiry, pp. 31-177.
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19. On December 2, 1994, the police magistrate prepared a report on the crime alleged and sent it to the presiding judge. In that report, the police magistrate explained that "despite the measures taken, the investigation did not identify the person(s) who are making or who made the threats against Deputy Hélio Bicudo." Having learned the results of the investigation, on December 27, 1994 the Public Prosecutor's Office requested that the case be closed on the following grounds:

The dedicated police authority was careful to probe the police inquiries; unfortunately, however, the investigative work did not identify the author(s) of the crimes.

However difficult it is, one has to face the fact that the identity of the author(s) of the crimes is still unknown.

n any event, the information in the case file indicates that the threats came to an end once this inquiry was launched.

Inasmuch as the authorship is unknown, the only option available is to close this case.[FN17]

[FN17] See police inquiry, p. 192.
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20. The presiding judge ordered the case closed on January 6, 1995, for the reasons cited by the representative of the Public Prosecutor's Office.

21. On May 18, 1995, in response to a request from Dr. Hélio Bicudo, the São Paulo State Prosecutor General assigned another prosecutor to the case. That prosecutor then filed a request asking that the case be reopened. The inquiry was reopened on May 25, 1995, whereupon the prosecutor decided to undertake new investigative measures to compile additional evidence in an attempt to identify the author(s) of the threats made against Mr. Bicudo.

22. In so doing, the prosecutor requested the following of the Commandant of the São Paulo Military Police:

1. That private citizen Francisco Profício, former member of the Military Police and at the time of these events head of the Military Police's Intelligence Service, be deposed; his address is Rua Morgado de Matheus, Vila Mariana, in this city;

2. That handwriting samples be taken to compare them with the signature that appears on the document at page 27;
3. That private citizen Luiz Perine, retired police officer and former member of the military police magistrate's office, be deposed so that he can give his story and to compile handwriting material for the purpose mentioned above;
4. That inquiries be made to determine the identity of the police captain whose given name was "Ronaldo R." and who at the time was working directly with Francisco Profício and might therefore have knowledge of the criminal plot to kill the Deputy;
5. That photocopies be secured of the files of the secret inquiry conducted by the Office of the Magistrate of the Military Justice system, then under military judge advocate Paulo Roberto Marafanti, and the inquiry conducted by the Office of the Military Police Magistrate, including the measures taken;
6. That a letter be sent to Prosecutor Stella Renata Kullman Viera de Souza, honorable officer of the First Military Justice Court, asking that she explain the measures being taken in the proceedings underway in the military justice system with respect to the same kinds of threats being experienced during that period;
7. Also, that a letter be directed to the military police with a view to establishing whether intelligence service resources were ever used for trips to Brasília-DF, including on the dates on which the vote on the bills intended to eliminate the military justice system's jurisdiction to prosecute certain crimes was being discussed;
8. That the military police magistrate's office provide a list of the military police vehicles and the prefixes and numbers that appear on the plates of the vehicles used by the Military Police, and a list of and duty rosters for those members of the Military Police on the date the black vehicle was seen in the vicinity of the victim's residence;
9. That the magistrate's office furnish photographs of the military police personnel, the intelligence service personnel, and their superiors, for identification by members of the victim's family;
10. That the intelligence service provide the names of its members, including those who were assigned to positions of trust with the executive branch, as there are reports that a captain with that agency served as an advisor to now President Fernando Henrique Cardoso, who was then a cabinet minister;
11. That the service records of the members of the Intelligence Service and of the Military Police Magistrate's Office, going back to 1990, be compiled;
12. That Francisco Profício and Luiz Perine explain the language and codes that appear at page 27 of the case file.

23. On November 29, 1995, the General Commandant of the São Paulo State Military Police, Colonel Claudionor Lisboa, refused the request, claiming that he could not expose his agents for the following reasons (answering, in order, each of the requests asked of the São Paulo Military Police):

1. To the request that Francisco Profício be deposed, the General Commandant replied that the person in question was an officer in good standing of the São Paulo Military Police and was head of Military Intelligence for the State of São Paulo. He would not, therefore, decline to make himself available to the court when and if necessary.

2. Colonel Claudionor Lisboa alleged that handwriting samples did not have to be taken, since the signature in question was the "actual abbreviated signature [rubrica]" of Colonel José Francisco Profício, copied and forged onto the document to give it the appearance of the genuine article." [FN18] However, Colonel Claudionor Lisboa did not say whether that any technical test had been conducted to support his theory.
3. As for the request that former police official Luiz Perine be deposed, Colonel Claudionor Lisboa explained that as Perine had been a member in good standing of that institution, and Deputy General Commandant of the Military Police of the State of São Paulo, he would not refuse to make himself available to the courts when and if necessary. Colonel Lisboa added that a test of this Colonel's handwriting was superfluous, since the signature shown was known not to be his, but rather that of Colonel Profício.4. In the matter of a police officer by the name of Ronaldo R, Colonel Lisboa alleged that at the time of the assassination plot, no officer by that name was working with Colonel Profício. Colonel Lisboa also added that should the prosecutor provide some document containing more and better details about this person, Colonel Lisboa could have an inquiry conducted and perhaps identify him. The Colonel did not affix any document to support his assertion. However, the Background File contains a document with the criminal record of a Ronaldo João Roth, which shows that he was several times indicted on charges of murder and of being an accomplice. He was never convicted.
5. Colonel Lisboa argued that the matter of the photocopies of the proceeding that the Military Police Magistrate secretly conducted came under the jurisdiction of the State Military Justice system. However, in the matter of the measures that the Military Police Magistrate's Office took in this case, General Commandant Colonel Claudionor Lisboa replied that the Military Magistrate's Office did not conduct an investigation because the supposed "Search Request" was obviously specious.
6. While this request was directed to Prosecutor Stella Renata Kullman Vieira de Souza, the Colonel pointed out that the threats made against Dr. Hélio Bicudo were investigated through an inquiry conducted by the Military Police Magistrate's Office and that the inquiry was now with the Public Prosecutor's Office and being prosecuted before specialized courts. In 1995, when the threats resumed, an inquiry was launched that was still in progress in the Military Police Magistrate's Office at the time of Colonel Claudionor Lisboa's letter of reply.
7. As for the request that an investigation be conducted to determine whether military intelligence resources had been used for trips to Brasília, the Colonel explained that the military police never used public funds to finance trips. The work involved in advising the National Congress on legislation (trips, hotel expenses and the like) was, he asserted, financed with contributions made by officers and enlisted men to establish an administrative fund for the representative and associative entities. The pertinent accounting reports were made available to those entities upon request.
8, 9 and 10. These questions were requests to identify the vehicles of all members of the service, including superiors, and the members of the intelligence service. To explain his refusal to answer these requests, Colonel Claudionor Lisboa stated that to do so would seriously imperil all members of the institution, as it would necessitate penetration of the Police Intelligence Data System. This would be a violation of the Rules for Safeguarding Confidential Matters [Regulamento para Salvaguarda de Assuntos Sigilosos – RSAS] created by Federal Decree No. 79,099/77. Those rules establish penalties for anyone who compromises the security of the Intelligence system and the personnel used in its activities. According to the Colonel, this regulation is echoed in the 1988 Federal Constitution, Article 5, paragraph XXXIII (All persons

have the right to receive, from public agencies, information of private interest to such persons or of collective or general interest, which shall be provided within the time period that the law stipulates, under penalty of liability, except for information whose secrecy is vital to the security of society and the State). The Colonel underscored the fact that under Article 41 of Federal Decree No. 88,777/83, regulating the Federal Statute of the Military Police, the State Forces are part of the Army's Intelligence System, to which the Military Police is subordinate.

Colonel Claudionor Lisboa alleged that Dr. Hélio Bicudo went first to the Brazilian press with a copy of the supposed document. The original of the document was never tested for authenticity. But having made this claim, the Colonel closes the very same paragraph by saying the following: "In fact, when subjected to technical analysis the 'document' in question was found to have been crudely assembled"[FN19] with the intent of affecting reputable persons, especially MP Colonel José Francisco Profício, and particularly to discredit the Military Police in the public's eye. He added that while there were those who disagreed with Dr. Hélio Bicudo, no one in the institution had ever committed unlawful acts against him or anyone else.

Emphasis was placed on Prosecutor Marco Antônio Ferreira Lima's lack of impartiality. The General Commandant of the Military Police filed two complaints against him, although only one of them ended up in a court case. However, the Colonel did not say whether the case was concluded or whether the prosecutor was penalized in any way. He also mentioned a document on that case, which was an appendix to that reply.[FN20] According to the Colonel, the modus operandi used by Prosecutor Marco Antônio Ferreira Lima "was always based on unfounded criticism offensive to the military forces."[FN21]

The Colonel was emphatic in requesting that the new information presented by the alleged victim - Dr. Hélio Bicudo – and used as the basis for reopening the inquiry, be sent to him through formal channels. He went on to state the following:

..."The new information must be reported to me through formal channels so that, armed with that information, I might decide whether or not to open the Military Police Inquiry (IPM). If that new information is evidence of a military crime, it cannot be withheld from this Command, as the latter would thereby be prevented from discharging its duty because it did not have knowledge of a crime alleged to have been committed."[FN22]

The Colonel then explained that the Office of the Military Police Magistrate would be ready to assist "Dr. Hélio Bicudo or any other witness when he or she wants to visit to make the necessary identifications of photographs or persons, and view duty rosters and vehicle assignments, and make visual identification of those vehicles."[FN23] He added that lawmakers, attorneys, members of the Public Prosecutor's Office and judges assigned to the matter could be present during the visit.

11. A document was attached that concerned the request for the criminal records of Ronaldo João Roth, Luiz Perine and Francisco Profício,. The matter of Ronaldo João Roth has already been addressed under item 4 above. Luiz Perine does not have a criminal record. Francisco Profício does not appear in the records of the Secretariat for Public Safety, according to a document that appears in the formal request.

12. A document on the cryptographic analysis showed that the text sent to be decoded using the São Paulo State Military Police methods was clear and legible to anyone. It did not require decoding. It was further noted that the text of the document presented for examination was not done according to the rules set forth in the Information Manual (Office of the President of the Republic – National Information Service, Second Volume, Brasilia/1996), which concerns the intelligence and counter-intelligence procedures used by the São Paulo State Military Police.

[FN18] Memorandum No. 8541/01/95, November 29, 1995. p. 07/08, item 5(b). From the General Commandant of the São Paulo State Military Police, Colonel Claudionor Lisboa.
[FN19] Memorandum No. 8541/01/95, November 29, 1995. p. 05, item 1(g). From the General Commandant of the São Paulo State Military Police, Colonel Claudionor Lisboa.
[FN20] He indicated annex 5 – attachment one. Memorandum No. 8541/01/95, November 29, 1995. p. 06, item 2. From the General Commandant of the São Paulo State Military Police, Colonel Claudionor Lisboa.
[FN21] Memorandum No. 8541/01/95, November 29, 1995. p. 06, item 2. From the General Commandant of the São Paulo State Military Police, Colonel Claudionor Lisboa.
[FN22] Memorandum No. 8541/01/95, November 29, 1995. pp. 06/07, item 3. From the General Commandant of the São Paulo State Military Police, Colonel Claudionor Lisboa.
[FN23] Memorandum No. 8541/01/95, November 29, 1995. p. 07, item 4. From the General Commandant of the São Paulo State Military Police, Colonel Claudionor Lisboa.

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24. After this reply was received, the Public Prosecutor's Office, rather than insist that the evidentiary measures be taken, opted instead to remove the prosecutor from the case, citing reasons of jurisdictional competence. In his place, the Public Prosecutor's Office appointed the very same prosecutor who had originally asked that the investigation be closed and who, rather than press to have the measures requested by the previous prosecutor carried out, simply reiterated his request that the inquiry be closed. As a result of this, the Police Inquiry was closed for a second time on August 26, 1996. Hélio Bicudo's January 11, 2001 request to have the investigation reopened was denied.

25. Summarizing, in his capacity as a Federal Deputy, Mr. Hélio Bicudo introduced a bill that would have narrowed the jurisdiction of the military courts so that they would no longer be competent to prosecute and try human rights violations committed by military personnel. Because of this, specific threats were made against him and his family. As for the source of the threats, there is reasonable evidence to suggest that the threats came from agents of the State. Nevertheless, the judicial inquiries conducted were ineffective in identifying the author(s) of the threats and, as a consequence, those responsible were never punished.

III. THE MERITS

A. THE CONTEXT OF THE INSTANT CASE

26. Before entering into the merits of the instant case, it is important to note that Mr. Hélio Bicudo is a well-known and respected person in human rights circles, having held a number of posts both in Brazil and abroad. In fact, he was a member of the Inter-American Commission on Human Rights from 1998 to 2001.

27. At the time of the events in the present case, Mr. Bicudo was serving as a Federal Deputy in the Brazilian Congress. The facts established in this case are that Mr. Bicudo was threatened because of a bill that he had introduced in the Brazilian Congress, a bill that would have taken

away the military courts' jurisdiction to prosecute and punish human rights violations committed by military personnel.

28. On this matter, the Commission has previously stressed that the jurisdiction given to military courts to prosecute human rights violations is contrary to the American Convention. The IACHR did an in-depth examination of the Brazilian law that gives the military courts jurisdiction, and concluded that in practice this created a situation of impunity in Brazil. The IACHR also examined the history of this legislation and found that until 1977, the prevailing criterion in Brazil was 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.[FN24]

[FN24] IACHR, Report N° 32/04, Case 11.556 (Corumbiara), Brazil, par. 266.

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29. The Commission itself had previously stressed the fact that the military courts' competence to investigate and punish human rights violations

… leads to an extreme situation of impunity, which has triggered various initiatives in the Chamber of Deputies to eliminate the special military jurisdiction for prosecution of crimes committed by the military police in the performance of their public order duties. In this regard, Hélio Bicudo, who was a Federal Deputy at the time, submitted a bill which would return to the regular justice system the authority to prosecute crimes committed by or against state military police officers in the performance of their police duties.[FN25]

[FN25] Idem, par. 270.

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30. The Commission had earlier also found that "the impunity of crimes committed by state, military or civil police breeds violence, establishes perverse chains of loyalty between police officers out of complicity or false solidarity, (…)",[FN26] and has recommended the following to the Brazilian State:

Conferring on the ordinary justice system the authority to judge all crimes committed by members of the state "military" police.

Transferring 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.[FN27]

[FN26] IACHR, Report on the Situation of Human Rights in Brazil, 1997, par. 94.
[FN27] Id, par. 95.

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31. Finally, the Commission had previously pointed out that Brazilian law on the subject 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.[FN28]

[FN28] IACHR, Report N° 32/04, Case 11,556 (Corumbiara), Brazil, par. 275.

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32. Taking these factors into account, I believe that there are reasonable grounds to conclude that members of Brazil's Military Police did in fact try to intimidate Mr. Bicudo, who at the time was a Federal Deputy, their intention being to try to block or delay passage of a bill that was intended to reduce the degree of the impunity that the military police in Brazil had enjoyed vis-à-vis the human rights violations they committed.

B. RIGHT TO HUMANE TREATMENT

33. Article 5 of the American Convention, titled "Right to Humane Treatment", provides that "Every person has the right to have his physical, mental, and moral integrity respected."

34. For its part, Article 1(1) of the American Convention reads as follows:

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.

35. Article 1 contains the general duties incumbent upon the States Parties in the area of human rights. The first is to respect the rights and freedoms recognized in the American Convention, and the second is to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. The Inter-American Court of Human Rights explained that as a consequence of that duty to ensure the exercise of the rights recognized in the American Convention, States have an obligation 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."[FN29]

[FN29] IACtHR, Velásquez Rodríguez Case, Judgment of July 29, 1988, par.166 (Original Spanish).

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36. Hence, based on the provisions of the aforementioned Convention, the State's obligation to "respect" the right to humane treatment implies, inter alia, that the State must refrain from harming, through its agents, the physical, mental, and moral integrity of all persons subject to its jurisdiction.

37. As for the duty to "ensure" the right to humane treatment, the sense of Articles 5 and 1(1) of the American Convention, read in combination, is that States Parties to the American Convention are obliged to prevent, investigate and punish violations of that right, and to provide compensation to the victim when the responsible parties are agents of the State.

Violation of the obligation to respect Hélio Bicudo's right to humane treatment

38. As for the State's obligation to respect the right to humane treatment, it has been established in the instant case that in May 1993 Mr. Bicudo received anonymous letters threatening him and that he was subsequently told that colonels in the São Paulo Military Police were talking about Mr. Bicudo having an accident or being assaulted, all as a way to slow congressional passage of the bills he had introduced. It has also been established that on September 8, 1993, the victim received a letter from a major in the São Paulo Military Police, to which was affixed a document from the Office of the Coordinator of the Intelligence Service of the São Paulo Military Police. That document, which -as previously noted- was signed and bore the seal or stamp of the São Paulo Military Police, concerned an "accident" that would befall Mr. Bicudo.

39. The Inter-American Court of Human Rights has held that "the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered "psychological torture."[FN30]

[FN30] IACtHR, Maritza Urrutia v. Guatemala, Judgment of November 27, 2003, par. 92 (Original: Spanish).

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40. In a similar finding the Inter-American Court wrote that "International jurisprudence has been developing the notion of psychological torture. The European Court of Human Rights has established that the mere possibility of the commission of one of the acts prohibited in Article 3 of the European Convention is sufficient to consider that said article has been violated, although the risk must be real and imminent. In line with this, to threaten someone with torture may constitute, in certain circumstances, at least "inhuman treatment. That same Tribunal has decided that, for purposes of determining whether Article 3 of the European Convention on Human Rights has been violated, not only physical suffering, but also moral anguish, must be considered. Having examined communications received from individuals, the United Nations Human Rights Committee has classified the threat of serious physical injury as a form of "psychological torture."[FN31]

[FN31]IACtHR, Cantoral Benavides Case, Judgment of August 18, 2000, para. 102 (Espanhol original, tradução livre).

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41. In the instant case, the various verbal and written threats that agents of the State made against Mr. Bicudo and his family and the very real danger that those threats would be carried out because of Mr. Bicudo's parliamentary activity and the bill introduced in the National Congress to narrow the jurisdiction of the military courts, created fear and moral anguish in Mr. Bicudo because of the very real possibility that an attempt might be made upon him or some member of his family.

42. It is my considered opinion that these actions, perpetrated by agents of the Brazilian State, created a situation that constituted a violation of Mr. Bicudo's mental and moral integrity.

43. Based on these considerations, in my opinion the Commission's finding should have been that Brazil violated, to the detriment of Dr. Hélio Bicudo, the State's obligation to respect the right to humane treatment recognized in Article 5 of the American Convention, by virtue of the threats that agents of the State targeted at Mr. Bicudo.

Violation of the duty to ensure Hélio Bicudo's right to humane treatment

44. As previously noted, the duty to ensure Mr. Hélio Bicudo's right to humane treatment meant that the Brazilian State was to have conducted a serious investigation into the threats that Mr. Bicudo received.

45. An investigation of threats of human rights violations must be a serious undertaking. Indeed, on the subject of the standards of seriousness that States must adhere to when investigating and punishing violations of human rights, the Inter-American Court has written that:

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.[FN32]

[FN32] IACtHR, Velásquez Rodríguez Case, supra note 22, par. 177 (Original: Spanish).

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46. Concerning the States' duty to conduct a serious investigation, the Inter-American Commission wrote that:

... the 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.[FN33]

[FN33] IACHR, Report N° 55/97, Case 11,137 (Juan Carlos Abella et al.), Argentina, par. 412 (Original: Spanish). On the same subject, see also, for example: IACHR, Report N° 52/97, Case 11.218 (Arges Sequeira Mangas), Nicaragua, paragraphs 96 and 97.

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47. In my opinion, these standards also apply to investigations into threats to violate human rights. An immediate, exhaustive, serious and impartial investigation of threats of human rights violations is one way to prevent violation of the threatened human right, and the lack of such an investigation engages the State's international responsibility vis-à-vis its duty to ensure the exercise of the threatened human right.

48. Applying these considerations to the instant case, Mr. Hélio Bicudo began receiving anonymous letters in May 1993; later he was told that colonels in the Military Police were allegedly talking about him having an accident or of being assaulted; a suspicious vehicle was seen circling his residence; and finally, on September 8, 1993, Mr. Bicudo received a copy of a plan signed and stamped by the São Paulo Military Police, with the details of an accident that was to befall him, apparently before October 5.

49. Rarely does one find a plan detailing human rights violations that bears the signature and the stamp of the Military Police. While it is true that it is not within the Commission's competence to dictate what steps a criminal investigation should take, even the most elementary considerations would dictate that a serious inquiry into a threat of this nature should involve, inter alia, a search aimed at comparing the handwriting of the signature on the threatening document with the handwriting of certain members of the Office of the Coordinator of Military Intelligence (the reputed source of the signed and sealed plan) and at determining whether the stamp or seal was legitimate and whether the paper and lettering were those normally used by the Military Police.

50. However, in the instant case one finds that on October 1, 1993, Police Inquiry No. 975/93 was opened in Precinct One of the São Paulo Homicide Division for "full clarification of the facts reported (…), i.e. serious anonymous threats made against Federal Deputy Hélio Pereira Bicudo" and that after conducting several routine procedures that were unlikely to have produced a suitable result, the Inquiry was closed on January 6, 1995, without having identified the person(s) behind the threats that Mr. Bicudo received.

51. On May 18, 1995, another prosecutor was assigned to the case and requested that new probatory measures be taken. These included deposition of the head of the intelligence service of the São Paulo Military Police, the taking of handwriting samples to compare them with the signature that appeared on the signed and stamped plan, deposition of members of the Military Police who might have had some part in these matters, and copies of the records of a secret internal investigation that the Military Police had conducted into these events.

52. However, the Military Police for all practical purposes refused to carry out the measures requested by the prosecutor. Instead, the Military Police did its own analysis of the relevance of each measure, and in the end concluded, once and for all, that the probatory measures would not be carried out.

53. This scenario is striking: the Office of the Public Prosecutor requests evidence from the Military Police and the Military Police itself decides whether the requested evidence is pertinent.

54. While some evidence requested by the Public Prosecutor's Office would have been problematic, such as identification of the license plates and vehicles belonging to military intelligence and the intelligence service agents (supra par. 22), I believe that the answer from the Military Police should have been to ask the Public Prosecutor's Office to partially amend its request or even to challenge the request with the regular court authorities. However, the Military Police should never have endowed itself with the authority to decide unilaterally whether evidence requested of it by the public authority empowered to do so is or is not pertinent.

55. Furthermore, the Military Police refused to cooperate not only in the matter of the complex requests, but also with respect to all the other important and elementary evidence that the Public Prosecutor's Office was seeking in its efforts to solve the case.

56. For example, the Public Prosecutor's Office requested handwriting samples to examine the signature on the document containing the threat made to Mr. Hélio Bicudo (supra par. 22). The Military Police, however, answered that any comparison of handwriting samples was unnecessary since the signature on the document was the actual signature of the Colonel who was Chief Colonel of the Military Police, and had been copied and forged onto the document in question (supra par. 23).

57. At the same time, however, the Military Police stated that it had not launched any investigation into what it described as a "forgery" of the signature of its highest authority.

58. The Military Police ultimately refused to cooperate with the investigation into threats attributed to its some of its members, whose crimes went unpunished. In a case in which the Ministry of National Defense invoked State secrecy as its reason for refusing to cooperate with the investigation of a homicide committed by military personnel, the Inter-American Court of Human Rights observed that the "refusal by the Ministry of National Defense to supply all the documents requested by the courts, resorting to official secret, constitutes an obstruction of justice." [FN34]

[FN34] IACtHR, Myrna Mack Chang Case, Judgment of November 25, 2003, par. 182 (Original: Spanish).

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59. Furthermore, the prosecutor who asked the Military Police to compile this evidence was removed from the case and replaced by the very same prosecutor who had originally requested that the case be closed. Rather than insist upon the important evidentiary measures that the Military Police had either refused or prohibited, this prosecutor again asked that the Police Inquiry be terminated. As a result, the Inquiry was closed for a second time on August 26, 1996. The application filed by Mr. Hélio Bicudo on January 11, 2001, seeking to have the case reopened, was denied on March 24, 2001.

60. Eleven years have passed since the events in this case, yet the Brazilian State has never conducted a serious investigation into the threats that Mr. Hélio Bicudo received in 1993.

61. Based on these considerations, in my view the IACHR ought to have concluded that by failing to conduct a serious investigation into the threats that Mr. Hélio Bicudo received, the Brazilian State violated, to his detriment, the right to humane treatment recognized in Article 5 of the American Convention, from the standpoint of its duty to ensure that right.

C. RIGHT TO JUDICIAL PROTECTION

62. Article 25(1) of the American Convention reads as follows:

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

63. Article 25 requires that States Parties provide effective judicial remedies to victims of human rights violations to determine whether a human rights violation has occurred and provide redress.[FN35] This article of the Convention embodies the principle recognized in the international law of human rights on the effectiveness of the procedural instruments or means designed to guarantee the protected rights.[FN36] The Court held that a remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.[FN37]

[FN35] IACtHR, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, par. 24.
[FN36] IACtHR., Velásquez Rodríguez Case, supra note 22, par. 138.
[FN37] IACtHR, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights). supra note 28, par. 24.

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64. Applying this reasoning to the instant case, in my view the investigation launched by the Office of the Public Prosecutor could have been an adequate remedy with regard to the violations of the right to humane treatment that Mr. Hélio Bicudo suffered; had it been a serious investigation, it could have led to the identification and punishment of those responsible for the threats. However, the investigation was not, in practice, an effective remedy because of the lack of seriousness that attended it.

65. Based on these facts, my conclusion is that the Commission ought to have held that the Brazilian State violated, to the detriment of Mr. Hélio Bicudo, the right to judicial protection recognized in Article 25 of the American Convention, as it failed to provide the victim with an effective judicial remedy to solve the case of the threats he received and give him redress.

IV. CONCLUSIONS

66. Based on these considerations of fact and of law, in my opinion the Commission ought to have declared the case admissible and should have held the State responsible for violation, to the detriment of Mr. Hélio Bicudo, of the rights to humane treatment and to judicial protection, recognized, respectively, in Articles 5 and 25 of the American Convention, all in keeping with Article 1(1) thereof.

(Signed): Susana Villarán, First Vice-President; Santiago A. Canton, Executive Secretary.