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Institution: Inter-American Court of Human Rights
Title/Style of Cause: Damiao Ximenes-Lopes v. Brazil
Doc. Type: Judgement (Preliminary Objection)
Decided by: President: Sergio Garcia-Ramirez;
Vice President: Alirio Abreu-Burelli;
Judges: Oliver Jackman; Antonio A. Cancado Trindade; Cecilia Medina-Quiroga; Manuel E. Ventura-Robles; Diego Garcia-Sayan
Dated: 30 November 2005
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In the case of Ximenes-Lopes,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court”, “the Court” or “the Tribunal”), pursuant to Articles 37, 56 and 58 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), [FN1] delivers the following Judgment on the Preliminary Objection raised by Brazil (hereinafter “the State” or “Brazil”).

[FN1] This judgment is delivered in accordance with the Rules of Procedure adopted by the Inter-American Court of Human Rights at its 49th Regular Session by Resolution dated November 24, 2000, which came into effect on June 1, 2001, and in accordance with the partial amendment adopted by the Court at its 61st Regular Session by Resolution dated November 25, 2003, effective as of January 1, 2004.

I. INTRODUCTION OF THE CASE

1. On October 1, 2004, pursuant to the provisions of Articles 50 and 61 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Court an application against the State originating in petition No. 12.237, received by the Secretariat of the Commission on November 22, 1999.

2. The Commission filed the application for the Court to determine whether the State was responsible for violating the rights enshrined in Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, to the detriment of Mr. Damião Ximenes-Lopes, for the alleged inhuman and degrading hospitalization conditions of Damião Ximenes-Lopes, a person with mental disability,

in a health center that operated under the Brazilian Single Health System called Casa de Repouso Guararapes (Guararapes Rest Home); the alleged beating and attack on his personal integrity by officials of the Casa de Repouso (Rest Home); his death while confined for psychiatric treatment; as well as the alleged lack of investigation and the failure to enforce the right to a fair trial that were characteristic of the case and that derived in the impunity in which the case still is. The Commission further stated that the events in the instant case were even more serious given the situation of vulnerability in which persons with mental disability are, as well as the State's special obligation to provide protection to individuals in the care of health centers operating under the Brazilian Single Health System. Consequently, the Commission requested the Court that the State be ordered to adopt the reparation measures specified in the application and to reimburse legal costs and expenses.

II. JURISDICTION

3. The Court has jurisdiction to hear the instant case pursuant to Article 62(3) of the Convention as Brazil has been a State Party to the American Convention since September 25, 1992 and accepted the contentious jurisdiction of the Court on December 10, 1998.

III. FIRST PRELIMINARY OBJECTION (Failure to exhaust domestic remedies)

4. Article 46(1)(a) of the Convention provides that in order to decide on the admissibility of a petition or communication filed with the Inter-American Commission pursuant to Articles 44 or 45 of the Convention, it is necessary for all domestic remedies to have been pursued and exhausted, in accordance with generally recognized principles of international law, [FN2] which means that such remedies must not only formally exist, but also be adequate and effective, as derived from the exceptions set forth in Article 46(2) of the Convention. [FN3]

[FN2] Cf. Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, para. 48; Case of Tibi, supra note 7, para. 48; and Case of Herrera-Ulloa. Judgment of July 2, 2004. Series C No. 107, para. 80.

[FN3] Cf. Case of the Serrano-Cruz sisters. Preliminary Objections, supra note 7, para. 134; Case of Tibi, supra note 7, para. 50; and Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53.

5. The Court has already established clear criteria that must be observed when raising the preliminary objection of failure to exhaust domestic remedies. Firstly, based on generally recognized principles of international law, to which the rule regarding exhaustion of domestic remedies refers, the respondent State may, either expressly or implicitly, waive the right to raise this objection. Secondly, for the objection of failure to exhaust domestic remedies to be held timely, it must be raised at the admissibility stage of the proceeding before the Commission; that is, before any consideration on the merits of the case; otherwise, the State is presumed to have implicitly waived its right to avail itself of it. [FN4]

[FN4] Cf. Case of the Moiwana Community, *supra* note 8, para. 49; Case of the Serrano-Cruz sisters. Preliminary Objections, *supra* note 7, para. 135; and Case of Tibi, *supra* note 7, para. 49.

6. The State has reasserted the preliminary objection it raised for the first time in when answering the application, based on the lack of exhaustion of domestic remedies.

7. In their written comments as well as at the public hearing, the Commission and the representatives argued that the preliminary objection raised by the State was not in order.

8. The State and the Commission expressly requested the Court to rule on the preliminary objection and the representatives did not object to such request.

9. The Court reaffirms, as indicated in its constant precedents, that the objection of failure to exhaust domestic remedies must be raised before the Commission in a timely manner. [FN5] In this case, it has not been shown that the State has been prevented or precluded from raising said objection before the Commission. The Court will further address this issue in its judgment on the merits, reparations and legal costs.

[FN5] Cf. Case of the girls Jean and Bosico. Judgment of September 8, 2005. Series C No. 130, paras. 60 and 61; Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, para. 49; and Case of the Serrano-Cruz sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, para. 135.

10. Based on the foregoing, this Court considers appropriate to continue holding the public hearing convened by the Court's Order dated September 22, 2005 for which purpose its will receive the statements of the witnesses and the reports by the expert witness as well as the written closing arguments on the merits, possible reparations and legal costs in the instant case.

THEREFORE,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

in accordance with Article 24 of the Statute of the Court and Articles 37 and 56 of the Rules of Procedure of the Court,

DECIDES:

1. To dismiss the preliminary objection concerning the lack of exhaustion of domestic remedies raised by the State.
2. To continue holding the public hearing convened by the Order of the Inter-American Court of Human Rights dated September 22, 2005, as well as to proceed with all the other procedural steps related to the merits, possible reparations and legal costs in the instant case.

3. To notify the State, the Inter-American Commission on Human Rights and the representatives of the alleged victim and his next of kin of the instant Judgment.

Judge A.A. Cançado Trindade informed the Court of his Concurring Opinion, which accompanies this Judgment.

Done in Spanish and Portuguese, the Spanish version being authoritative, in San José, Costa Rica, on November 30, 2005.

Sergio García-Ramírez
President

Alirio Abreu-Burelli
Oliver Jackman
Antônio A. Cançado Trindade
Cecilia Medina-Quiroga
Manuel E. Ventura-Robles
Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I completely agree with the instant Judgment of the Inter-American Court on the preliminary objection, which reflects its jurisprudence constante and the thesis I have been supporting for more than two decades [FN1], that is, that within the scope of International Human Rights Law, the preliminary objection of non-exhaustion of the domestic remedies is of pure admissibility, to be filed by the respondent government in limine litis, without which an implied waiver on the part of the respondent government is presumed.

[FN1] A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, Cambridge University Press, 1983; A.A. Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional*, 2nd. ed., Brasília, Editora Universidade de Brasília, 1997.

2. I record that I am writing this Opinion, as usual, under the merciless pressure of time, and I state what I have just expressed in the fruitful public hearing on the preliminary objection which took place before this Court only ten minutes ago: my real satisfaction with the statements of the acting parties (the government which filed the objection —reus in excipiendo fit actor— the Inter-American Commission on Human Rights and the petitioners' Representatives), in the sense of the need for a deeper reflection regarding the improving of the proceedings under the American Convention on Human Rights, and a better understanding of the role of the Commission under the Convention.

3. My position on the matter is very clear, and it is so recorded in the Protocol to the American Convention on Human Rights, that I allowed myself to introduce in the name of the Inter-American Court before the competent organs of the Organization of American States (OAS) in 2001 [FN2], which consecrates the direct access to international justice by the human being, the automatically compulsory jurisdiction of the Inter-American Court, the jurisdictionalization of the Inter-American system of protection and the retention, within the scope of the latter, at present, of the role of prosecutor of the Inter-American Commission.

[FN2] A.A. Cançado Trindade, Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección, vol. II, 2nd. ed., San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-1015.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary