I. SUMMARY

1. On October 7 and 10, 1997, the Center for Justice and International Law (CEJIL), the Subcommittee on Blacks of the Human Rights Committee of the Ordem dos Advogados do Brasil (OAB/SP: Brazilian bar association), and the Instituto do Negro Padre Batista submitted to the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") a petition against the Federative Republic of Brazil (hereinafter "Brazil," "the State," or "the Brazilian State"). The petition alleged a violation of Articles 1, 8, 24, and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), and, in light of Article 29 of that same instrument, Articles 1, 2(a), 5(a)(I), and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "the Racism Convention"), to the detriment of Ms. Simone André Diniz.

2. The petitioners alleged that the State did not guarantee the full exercise of the right to justice and due process of law, failed to pursue domestic remedies to look into the racial discrimination suffered by Ms. Simone André Diniz, and therefore breached its obligation to ensure the exercise of the rights provided for in the American Convention.

3. The State provided information alleging that the Judiciary had already handed down a ruling on the subject matter of this complaint, and that, according to the government, the case did not make out any human rights violation.

4. The Commission concludes that the State is responsible for the violation of the rights to equality before the law and judicial protection, and the right to a fair trial, enshrined respectively at Articles 24, 25, and 8 of the American Convention. The Commission also decides that the State breached its obligation to adopt provisions of domestic law in the terms of Article 2 of the American Convention, and also violated the obligation imposed by Article 1(1) to respect and ensure the rights enshrined in the Convention. Finally, the IACHR makes the relevant recommendations to the Brazilian State.

II. PROCESSING BEFORE THE COMMISSION AND FRIENDLY SETTLEMENT

5. On October 7 and 10, 1997, the IACHR received a complaint against the Brazilian State. On April 10, 1998, the IACHR notified the State and gave it 90 days to respond. On May 12, 1998, the State sent a note setting forth considerations on the case and undertaking to send pertinent information in due course. On October 2, 1998, the petitioners sent a fax requesting the inclusion of the Instituto do Negro Padre Batista as co-petitioner in the complaint. On November 3, 1998, the IACHR sent the Government a note in which it reiterated the request for information made April 10, 1998, and gave the State 30 days to answer. On December 9, 1998, the Brazilian Government submitted its observations on the complaint.

6. In 2002, the Commission published Admissibility Report No. 37/02, in which it determined that it was competent to analyze the merits issues.[FN1] On December 20, 2002, the petitioners requested an extension of the period for sending observations on the merits of the case. On January 6, 2003, the Commission gave the petitioners an additional two months to submit observations. On February 20, 2003, the petitioners requested a one-month extension of the deadline for submitting their observations.

[FN1] IACHR, Admissibility Report N° 37/02, Simone André Diniz, published in the 116th session of the IACHR.

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7. On February 26, 2003, the Commission gave the petitioners a one-month extension, and at the same time sent the petitioners copies of the Government's responses of May 12 and December 8, 1998. On May 5, the Commission acknowledged receipt of the observations sent by the petitioners on the merits of the case, on March 5 and April 5, 2003. On May 8, 2003, through a communication sent to both parties, the Commission placed itself at their disposal to pursue a friendly settlement; it set a deadline of 30 days for initiating that process. On May 14, 2003, the Commission gave the Brazilian government 60 days to send in its observations on the petitioners' communication.

8. On July 14, 2003, the Brazilian State sent its observations; at the same time, it expressed interest in pursuing a friendly settlement. On July 16, 2003, the Commission set a deadline of 15 days for the petitioners to submit their observations. On August 15, 2003, the Commission acknowledged receipt of the petitioners' submission expressing their interest in pursuing a friendly settlement, as proposed by the Brazilian State. On September 8, 2003, the IACHR sent

the Brazilian State a copy of the submission sent by the petitioners and gave it 30 days to express its views.

9. On December 12, 2003, the Commission acknowledged receipt of a communication sent by the petitioners on November 7, 2003, by which they expressed that they were no longer interested in pursuing a friendly settlement, given the absence of any proposal by the State; at the same time, they asked the IACHR to approve a report on the merits. On December 12, 2003, the Commission forwarded to the State the petitioners' communication of November 7. The Brazilian government, in a note of January 15, 2004, requested a hearing for the 119th session of the IACHR. In a note of January 29, 2004, the State requested that the case be removed from the hearings schedule. In a note of February 11, 2004, it asked that it be postponed until the 120th session of the Commission.

III. THE PARTIES' POSITIONS

A. The petitioners' position

10. The petitioners alleged in the first part that the Brazilian State violated the rights of Ms. Simone André Diniz provided for at Articles 1(1), 8, 24, and 25 of the American Convention, and, in light of Article 29 of that instrument, Articles 1, 2(a), 5(a)(I), and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. In addition, the petitioners asked that Brazil be found responsible for violating the above-mentioned rights, and that the Commission recommend to the State that it proceed to investigate the facts, compensate the victim, and publicize the decision in the instant case so as to prevent future discrimination based on color or race.

11. According to the petitioners, on March 2, 1997, Ms. Aparecida Gisele Mota da Silva took out a classified ad in the newspaper A Folha de São Paulo, which enjoys wide circulation in the state of São Paulo, expressing her interest in hiring a domestic employee in which she indicated her preference for a white person.[FN2] Once she saw the ad, student and domestic employee Simone André Diniz called the number indicated, introducing herself as a candidate for the job. When she spoke with Maria Tereza, the person assigned by Ms. Mota da Silva to handle phone calls from applicants, she was asked about the color of her skin. When she answered that she was black, she was informed that she did not meet the requirements for the job.

[FN2] The ad in question indicated as follows: "domestic (female). Home. Live_in. W/ exp. All routine, care for children, with documentation. And ref.; Pref. White, without children, single, over 21. Gisele" ("doméstica. Lar. P/ morar no empr. C/ exp. Toda rotina, cuidar de crianças, c/docum. E ref.; Pref. Branca, s/filhos, solteira, maior de 21a. Gisele").

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12. The petitioners adduced that Ms. Simone Diniz denounced the racial discrimination suffered and the racist ad to the Subcommittee on Blacks of the Ordem dos Advogados do Brasil, São Paulo Section, and, accompanied by her attorney, reported the crime to the then-Police Unit for Race Crimes. On March 5, 1977, police inquiry was opened as number 10,541/97-4[FN3] to

look into the violation of Article 20 of Law 7716/89, which defines the practice of race-based discrimination or prejudice as a crime.[FN4] The police office in charge of the inquiry took testimony from all the persons involved: the alleged perpetrator of the violation and her husband, the alleged victim and witness, and the woman who answered the phone call from Ms. Simone Diniz.

[FN3] Copy of said police inquiry is annexed to the record.
[FN4] Law 7716/89, Article 20: "practice, induce, or incite, by mass media or publication of any nature, discrimination or prejudice on grounds of race, color, ethnicity, religion, or national origin. Penalty: 2 to 5 years imprisonment and a fine." (A copy is in the record.)

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13. According to the petitioners, on March 19, 1997, the police officer prepared a report on the criminal complaint and sent it to the judge. The Public Ministry was informed of the inquiry – only the Public Ministry has standing to begin a public criminal action. The Public Ministry issued a statement on April 2, 1997, asking that the proceeding be archived, reasoning

... it was not possible to find in the record that Aparecida Gisele has engaged in any act that could constitute the crime of racism, provided for in Law 7,716/89..." and that there was "... no basis for the complaint" in the record.[FN5]

[FN5] Public Ministry of the State of São Paulo, I.P. (Police Inquiry) No. 10,541/97-4, Request to Archive of
April 2, 1997.

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14. The petitioners reported that the judge handed down a judgment to archive on April 7, 1997, based on the reasons set forth by the member of the Public Ministry.[FN6]

[FN6] Judiciary of São Paulo, I.P. No. 10,541/97, Judgment of April 7,1997.

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15. The petitioners alleged that the police inquiry had indicia of sufficient and adequate evidence for the criminal complaint based on a violation of Article 20, header, of Law 7,716/89, as the perpetrator of the criminal offense and the fact that it happened were shown. In addition, they argued that the mere publication of the discriminatory ad already constituted a crime punishable under Article 20(2) of the same law, there being in these facts sufficient grounds for the Public Ministry to have initiated the criminal action.

16. Moreover, according to the petitioners, the Public Ministry would not have been able to base itself on the alleged fact, not proven, that Ms. Aparecida apparently had had a negative experience with a black employee who mistreated her children. These facts, according to the petitioners, did not authorize Ms. Aparecida to discriminate against another black domestic

employee. The mere fact that she is married to a black man did not release her of liability or make her less guilty of the offense.

17. Finally, they adduced that "even though the Public Ministry gave its opinion in favor of archiving the police inquiry, the judge was not obligated to accept it. If he did so, it was because he too failed to act diligently to assess the facts."

18. The petitioners alleged that the Brazilian State undertook to carry out the provisions of the Racism Convention and accordingly to "condemn racial discrimination" and "to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." In addition, they reported that under the Racism Convention, Brazil undertook "to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law...." "The right to equal treatment before the tribunals and all other organs administering justice."

19. In addition, they said that Brazil undertook to guarantee "everyone within its jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

20. The petitioners alleged that in the Brazilian system of criminal procedure, the judgment to archive a police inquiry is non-appealable, unless new facts arise that authorize and justify reopening the investigation. Still according to the petitioners, that decision kept Ms. Simone from proving before the criminal courts that Ms. Aparecida Gisele engaged in racial discrimination; and bringing a civil action for moral injury, which would have been possible had the perpetrator been convicted, was no longer an option. Those acts violated her right of access to justice. By the same token, Ms. Simone was denied the right to be treated equally before the courts, in relation to those victims whose accusations were being investigated and reported by the Public Ministry to determine responsibilities.

B. The State's position

21. The State, in a brief dated May 12, 1998, indicated that it would forward any relevant information it received on the case in timely fashion. Even so, it declared that "a reading of the petition does not necessarily lead to the perception that in their communication to the Commission the petitioners have clearly established a foundation for the alleged violation of the American Convention on Human Rights and the Convention on the Elimination of All Forms of Racial Discrimination."

22. In effect, the Brazilian Government noted that "the 'automatic' processing of manifestly unfounded petitions could cause unnecessary discomfort, in addition to diverting the scant available material and human resources of the Commission and the member States to process petitions that should be declared inadmissible ab initio."

23. In addition, the State recalled that "Article 47(c) of the American Convention on Human Rights, as well as Article 41(c) of the Commission's Rules of Procedure determine that the Commission should declare inadmissible any petition which, based on the presentation by the petitioner or the State, is groundless or out of order. The principle of pro homine, which governs systems for the international protection of human rights – and according to which the States bear the burden of proof – only makes sense in a context of plausible and well-grounded allegations. Otherwise, there is a risk of undermining the system's transparency and juridical security."

24. The State insisted that the facts alleged in the instant case did not constitute a human rights violation. It said that "the police inquiry was conducted in keeping with Brazilian law and archived by the competent judicial authority based on the opinion of the Public Ministry after testimony was heard from the persons involved."

25. In its response of July 14, 2003, in which it agreed to pursue a friendly settlement, the State reported that it intended to answer the allegations made by the petitioners in the course of pursuing a friendly settlement, whereupon it described how the promotion of racial equality has evolved in Brazil. In this context, it emphasized that:

The Brazilian Government does not deny the existence and scope of the racial problem in Brazil: both in internal discussions with interested sectors of civil society and in the reports submitted to international monitoring bodies, the Brazilian State recognizes the nature of the problem and has shown signs of its determination to overcome it, with the active collaboration of society.

IV. ANALYSIS OF THE MERITS

A. Facts established

26. From its analysis of the information and arguments available and pronouncements by the parties and documents attached, the Commission considers that the following facts have been established:

27. On March 2, 1997, Ms. Aparecida Gisele Mota da Silva published the following classified ad in the newspaper A Folha de São Paulo: "domestic (female). Home. Live_in. W/ exp. All routine, care for children, with documentation. And ref.; Pref. White, without children, single, over 21. Gisele"

28. Ms. Simone André Diniz, a black woman, in order to apply for the job advertised, called the phone number indicated in the ad, whereupon she was attended to by a woman who works with Aparecida Gisele Mota da Silva, by the name of Maria Tereza, who asked her the color of her skin. Upon answering that she was black, Simone André Diniz was informed that she did not meet the job requirements.

29. Ms. Simone André Diniz, feeling that she was the victim of racism based on the color of her skin, reported the incident with the Police Unit for Investigating Race Crimes, e?) on March 2, 1997.

30. The police inquiry was opened as number 10,541/97-4, to look into the crime of racism established at Article 20 of Law 7,716/89, which provided: “practice, induce or incite, by the mass media or by publication of any nature, discrimination or prejudice on the basis of race, color, ethnicity, religion, or national origin. Penalty: imprisonment of 2 to 5 years and fine.”

31. In the police inquiry, Simone André Diniz testified that she had learned of the ad when she sought employment through the classified ads in the newspaper A Folha de São Paulo. When she called the number indicated, she was rejected because she’s black, as indicated in her declaration, which states in part:

When questioned in the proper form, the victim testifies at folio 06 that she sought employment when a friend came across the ad – folio 04 of the record, showing indignation. That she telephoned the number in the ad, and it was when they asked her to indicate the color of her skin. That on answering black, the response was that she didn’t meet the requirements for the job.

32. Her colleague Paula Ribeiro da Silva testified in the record of the same police inquiry; she confirmed that both were seeking employment and that Simone called the number announced and that the person who received her call, first name Maria, said that black candidates could not apply to that job, as per her statement transcribed below:

“... that she was with her friend Simone, looking through the classifieds in the newspaper Folha de São Paulo when she saw an add for a Domestic employee, in which it said pref. White. That her friend called there, and was asked about the color of her skin, and once she said she was black, she heard that she did not meet the requirements for the job.[FN7]

[FN7] Report of Police Inquiry 10,541/97-4, prepared by Police Delegate Roberto Krasovic, who answered for the Police Unit for Race Crimes.

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33. Ms. Gisele Silva also testified, confirming that she had published an add saying that she was seeking a domestic employee, preferably white. She said that the preference was based on the fact of having had a black domestic employee who had mistreated her children.

34. Gisela Silva’s husband, Mr. Jorge Honório da Silva, also gave testimony confirming the statements made by his wife.

35. The final report of the policy inquiry was sent to the Public Ministry March 19, 1997.

36. On April 2, 1997, the Public Ministry of the state of São Paulo issued an opinion calling for the archiving of the case, for lack of foundation for making the complaint.

37. The Judge of the Department of Police Inquiries, on April 7,1997, received and adopted as his own rationale the pronouncement of the Public Ministry, and decided to archive the case.

A. Analysis of the International Responsibility of the State for the act of a private person

38. The Commission would like initially to rule on the international responsibility of the Brazilian state in relation to the facts analyzed here.

39. In the international jurisdiction, the parties and the subject matter of the dispute are, by definition, different from those in the domestic jurisdiction.[FN8] Based on the case-law of the Inter-American Court,[FN9] in the instant case, the Commission has powers not to investigate and punish the individual conduct of private persons, but to establish the international responsibility of the State for violating the rights enshrined in Articles 8(1), 24, and 25 of the American Convention.

[FN8] I/A Court H.R., Cesti Hurtado Case. Preliminary Objections. Judgment of January 26, 1999. Series C No. 49, para. 47.
[FN9] I/A Court H.R., Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 73. See also Cesti Hurtado Case. Preliminary Objections. Judgment of January 26, 1999. Series C No. 49, para. 47.

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40. As this same Court has emphasized,[FN10] the aim of international human rights law is to give the individual means of protection of the human rights recognized internationally vis-a-vis the state, and all those who act in its name. It is a basic principle of international human rights law that every state is internationally responsible for each and every act or omission of any of the branches of government or entities in violation of internationally recognized rights.

[FN10] I/A Court H.R., Case of 19 Merchants (Colombia), judgment published July 5, 2004, para. 181, Series C, No. 109.

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41. One must bear in mind that there is an obligation to respect human rights as between private persons. The Inter-American Court, from the first contentious cases it decided, has been describing the application of the effects of the American Convention to third persons (erga omnes), having noted that:

Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[FN11]

[FN11] I/A Court H.R., Velásquez Rodríguez Case (Honduras), Judgment of July 29, 1988, Series C, No. 4, para. 172.

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42. The Court also made clear this obligation of respect and guarantee of human rights vis-a-vis third persons was also based on the notion that the states determine their own internal legal order, which regulates relationships as among private persons, and, therefore, private law, which they must also uphold, to ensure that human rights are respected in those relationships with third persons, for otherwise the State may become responsible for the violation of rights.[FN12]

[FN12] I/A Court H.R., OC-18/03, Legal Status and Rights of Undocumented Migrants, September 17, 2003, Series A, No. 18, para. 147.

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43. Therefore, even though the instant case deals with a relationship between private persons – in this case, Simone André Diniz and Aparecida Gisele Mota da Silva – the Brazilian State is under an obligation to ensure that in that relationship the human rights of the parties are respected, so as to prevent the occurrence of a violation, and, in the event of a violation, to diligently investigate, prosecute, and punish the violator, in the terms required by the American Convention.

B. Analysis of the Right to Equality before the Law and Non-Discrimination

1. Brief summary of the racial situation in Brazil

44. The Commission would like to begin by citing its own conclusions with respect to the situation of Afro-Brazilians, which it took stock during its on-site visit to Brazil in 1995. In the course of that visit, the Commission was informed that in Brazil, in general, Afro-Brazilians are in a vulnerable situation as subjects of human rights, and particularly is situated differently in terms of power as compared to the white population. To this day differences persist such even a minimum standard of equality has been attained; in many cases this discrimination translates into patterns in which human rights are undermined, especially the rights to equality, non-discrimination, and dignity.[FN13]

[FN13] IACHR, Report on the Situation of Human Rights in Brazil, Ch. IX, A, OEA/Ser.L/V/II.97 Doc. 29 rev. 1, September 29, 1997.

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45. In the persistent context of profound structural inequality that affects Afro-Brazilians,[FN14] research by the IPEA has shown the over-representation of poverty among Brazilian blacks, to an extent that has remained stable over time.[FN15] According to the research, in 1999 blacks accounted for 45% of the population of Brazil, yet they accounted for 64% of the poor and 68% of the indigent population. As the research study concluded, “being born black in Brazil is related to a greater likelihood of growing up poor.”

[FN14] CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Brazil. 12/03/2004, CERD/C/64/CO/2, para. 12.
[FN15] IPEA - Instituto de Pesquisa Econômica Aplicada, Texto para Discussão N 807, Desigualdade Racial no Brasil – Evolução das Condições de Veda na Década de 90, Ricardo Henriques, 2001.

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46. In the area of education, in all regions of Brazil illiteracy among blacks is much higher than among whites.[FN16] According to IBGE data from 1999, 21% of the Afrodescendant population was illiterate, compared to 8% for the white population. Nonetheless, 22.7% of whites and 41% of Afrodescendants are functionally illiterate in Brazil, functional literacy being defined by UNESCO as a mastery of reading writing, math, and science equivalent to at least a fourth-grade education.

[FN16] CERD, Brazil Report, CERD/C/431/Add.8, para. 233.

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47. Data on infant mortality show that for every 1,000 black or mixed (mestiço) children 62 die before their first birthday, whereas mortality for white children was 37 of 1,000.[FN17]

[FN17] IBGE PNAD, 1996.

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48. Research on the Brazilian criminal justice system[FN18] describes the differential access of whites and blacks to the criminal justice system. In the city of São Paulo, which in 1980 had a population that was 72.1% white and 24.6% black (pretos and pardos), a larger percentage of black defendants were convicted (68.8%) than white defendants (59.4%) when charged with the same crime. And a larger proportion of whites were acquitted than blacks, 37.5% compared to 31.2%, respectively.

[FN18] Discriminação Racial e Justiça Criminal em São Paulo, Sergio Adorno, 1995.

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49. Similarly, blacks are convicted of crime at a much greater rate than their share of the population in the municipality of São Paulo. This is not so in the case of whites facing criminal charges. The proportion of whites convicted of crime is less than their share of the same population. The research study concluded that this context “suggests a certain ‘elective affinity’ between race and punishment.”

50. In addition, police violence in Brazil disproportionately victimizes pretos and pardos. The Commission learned that in Brazil[FN19] racial profiling leads to a large number of illegal

detentions, and that the black population is more closely watched and more frequently approached by the police; this issue is the subject of a recommendation by the Commission in its he general report on Brazil, and in a report on the merits.[FN20]

[FN19] Relatório sobre a Situação dos Direitos Humanos dos Afro-brasileiros, presented in the 114th regular session of the IACHR.
[FN20] See note 14 supra, Ch. IX, and IACHR, Report on the Merits No. 23/03, Nérida Fonseca v. Brazil, approved in the 117th session of the IACHR.

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51. In effect, according to another survey,[FN21] "in Rio de Janeiro, the profile of most of the children and youths assassinated, of a total of 265 investigations, is poor, male, black and mulatto." In another study conducted by ISER,[FN22] it was shown that "the influence of race on the use of lethal police force may be the source of more serious human rights violations in Brazil."

[FN21] IBASE.
[FN22] Instituto Superior de Estudos da Religião, Cano, Ignácio: The report evaluates data that includes all the incidents in the city of Rio de Janeiro, from January 1993 to July 1996, in which civilians were killed or wounded by firearms in confrontations with the police. The victims are classified by official sources in three categories: white, mixed (pardo), and black. The study showed that pardo and black civilians are targets of lethal police action much more often that their percentages in the overall population.

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52. After evaluating more than 1,000 homicides committed by the police of Rio de Janeiro from 1993 to 1996, the report concluded that race is a factor that influences the police – consciously or unconsciously – when they shoot to kill. The darker the person's skin, the more susceptible he or she is to becoming a victim of lethal police violence." It concluded saying that police violence is discriminatory, as it affects blacks in greater numbers and with greater violence. In effect, in its report to the CERD the Brazilian government recognized the lethal nature of police action in Brazil when the victim was not white.[FN23]

[FN23] See note 17 supra, para. 408.

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53. Inequality in the labor market also affects the Afro-Brazilian population. Sociologists consider employment as the best indicator of social analysis. According to Telles,[FN24] through employment analysis, racial inequality is seen in terms of the advantage or disadvantage of one group over another across an array of different occupations.

[FN24] Telles, Edward, Racismo à Brasileira, Uma Nova Perspectiva Sociológica, 2003, p. 236, p. 204.

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54. According to research by INSPIR,[FN25] which collected information on workers' wages in six metropolitan areas of Brazil, the wages of black workers are below those of non-black workers across the board. According to the research, this is the result of a combination of factors, such as early entry to the labor market, placement of black workers in the less dynamic sectors of the economy, disproportionate numbers of blacks employed in relatively unskilled informal positions.

[FN25] See note 17, supra, para. 246.

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55. Research by IBGE done in 1999 showed that 5.7% of the employed white population were employers, as compared to 1.3% for blacks and 2.1% for mestiços. In addition, 5.7% of the employed white population were domestic employees, compared to 13.4% for blacks and 8.4% for mestiços.[FN26]

[FN26] Id. IBGE, Síntese dos Indicadores Sociais, 1999.

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56. In another research project on discrimination in the labor market, two aspects stand out:[FN27] (1) racial discrimination was a permanent and daily practice that guaranteed economic and symbolic privileges for white workers, and (2) integration at the workplace was not hindered by blacks, but by whites who blocked blacks' entry to and mobility in the labor market.

[FN27] Race in Contemporary Brazil: From Indifference to Inequality, edited by Rebecca Reichmann, The Pennsylvania State University Press, University Park, Silent Conflict: Discriminatory Practices, Maria Aparecida Silva Bento, p. 114.

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57. Regarding discrimination in recruitment, the same research project found that "the discrimination was described in personnel recruitment and selection in all types of work, be it for domestic, general services, or professional workers. Testimony taken during the research project indicated that racial identity was evaluated in hiring, even though it was not an official practice."

58. To illustrate, in two complaints of racial discrimination in recruitment, through help-wanted ads published in the newspaper A Folha de São Paulo, the public prosecutor asked that the inquires be archived. The first case involved an ad for an administrative assistant who was an "well-groomed blond or Japanese woman [loura ou japonesa, com boa aparência]." The parties involved denied responsibility for the ad; this argument was accepted by the Public Ministry.

The second case sought a waiter who was “experienced and white.” Here the Public Ministry established that the ad was discriminatory but did not determine who was responsible for it, which explains why it was archived.[FN28]

[FN28] Racusen, Seth, “A Mulatto cannot be Prejudiced”: The Legal Construction of Racial Discrimination in Contemporary Brazil. June 2002, p. 288. Information reported by Geledes – Instituto da Mulher Negra to the author of the work cited.

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59. In another case of discrimination in recruitment, also in São Paulo 1994, the ad placed in the newspaper sought an attorney who was “highly presentable” (“boa apresenatação”). The investigation was not able to identify the individual at the law firm who had the ad placed. In addition, the firm argued that since it did not hire any attorney who answered the ad, it had not committed any crime. This is why the Public Ministry suggested archiving the matter.

2. Evolution of the Legal Framework for Fighting Racism in Brazil

60. The Commission knows that the vulnerability of Afro-Brazilians has a historical dimension that persists due to situations such as what happened, for example, to Simone André Diniz, and which lead to the differences in access to basic rights, such as, for example, access to justice, education, work, etc.

61. The Commission recognizes that Brazil, mindful of that reality and in keeping with international treaties on the subject,[FN29] has put in place a legal order for protection from and guarantees against racial prejudice and discrimination, such as criminalizing such conduct.[FN30]

[FN29] Brazil ratified the International Convention on the Elimination of All Forms of Racial Discrimination, in which the states undertake to prohibit and eliminate racial discrimination at Articles 2(d), 4, and 5.

[FN30] In this connection, the Commission wishes to make it clear that the criminalization of racism and racial discrimination is an effective means of combating this type of human rights violation and is in harmony with Article 2 of the American Convention, and consistent with Articles 2 and 4 of the Racism Convention and with paragraphs 66, 84, and 89 of the Durban Program of Action.

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62. In the second half of the 20th century the Brazilian government promulgated Law No. 1390/51, known as the Afonso Arinos Law, which criminalized the practice of prejudice based on color or race as a misdemeanor, punishable by imprisonment (up to one year) and a fine.

63. Even though it was the first statute to criminalize racism, according to scholars,[FN31] that law had a merely symbolic effect, since it dealt with the problem as a misdemeanor, with limited penalties that did not deter its practice. In addition, in its almost 38 years on the books it

was practically a dead letter; its inapplicability stemmed not from the lack of specific cases of racism, or the refusal of potential victims to report cases, but mainly from the technical flaws of the law itself, which, through a purportedly complete listing of the conduct covered, did not encompass the full array of different forms of racist conduct.[FN32]

[FN31] Crimes resulting from discrimination or prejudice on grounds of race, color, ethnicity, religion, or national origin. Leon Fredja Szklarowsky, published in the Revista Jurídica Jus Navegandi.
[FN32] O crime de racismo na legislação penal brasileira passado, presente e futuro. Eliezer Gomes da Silva and Ivonei Sfoggia.

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64. Finally, defining practices arising from prejudice based on race or color as a misdemeanor (contravenção) limited the scope of the law, as it covered only those acts that it limited, explicitly curtailing the right of a citizen to recur to the justice system on grounds of color- or race-based prejudice.

65. In addition, at that time, when cases of racism came up the courts would generally re-characterize them as misunderstandings.

66. To illustrate this assertion, we note a judgment of the Court of Appeals of São Paulo, which acquitted a defendant accused of having prohibited a black student from entering a club, arguing that his conduct did not make out a violation of the law, but instead was simply a misunderstanding between him and the club's directors.[FN33] According to the decision, it was a question of an individual unknown in the city who did not identify himself right away as part of a student caravan. At issue was the interpretation of Article 4 of Law 1390/51, concerning the refusal, due to prejudice based on race or color, to allow someone to enter a public establishment for entertainment or sports.

[FN33] Information drawn from the article "Crimes resultantes de discriminação ou preconceito de raça, cor, etnia, religião ou procedência nacional." Leon Fredja Szklarowsky, published in the Revista Jurídica Jus Navegandi.

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67. Later, the 1988 Constitution distinguished this crime in one's own establishment among the individual and collective rights and duties, under the title dedicated to fundamental rights and guarantees, Article 5(XLII), where racism went from being considered a crime and, due to its seriousness, was non-bailable (the criminal could not benefit from a reduction of imprisonment to a lesser measure) and imprescriptible (the state is not limited by the passage of time in its ability to prosecute the perpetrator of the crime), subject to a prison sentence. At Article 4(VIII) of its Constitution, Brazil also repudiated terrorism and racism as a principle governing its international relations.

68. As a result of this constitutional status of the prohibition on racism, Law 7716/89 was adopted,[FN34] regulating and defining crimes resulting from prejudice based on race and color. This law was later amended by laws 8081/90, 8882/94, and 9459/97, which expanded its purpose, refining some articles and suppressing others, and including the punishment of crimes resulting from discrimination or prejudice on grounds of ethnicity, religion, or national origin.

[FN34] Better known in Brazil as the Lei CAO, or CAO Law, in reference to its author, Deputy Carlos Alberto de Oliveira.

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69. Law 9459/97, in particular, modified Article 20 of Law 7716/89 to make it a crime to practice, induce, or incite discrimination or prejudice, and further determining that such conduct, using the mass media, would aggravate the crime. In addition, it modified Article 140 of the Criminal Code to include the criminal conduct of injuria racista, or racist defamation or actionable words, punishing such cases of injuria that entail the use of elements referring to race, color, ethnicity, religion, or origin.

3. Problems Enforcing the Anti-Racism Law in Brazil

70. Notwithstanding the evolution of the criminal law framework for fighting racial discrimination in Brazil, the Commission is aware that impunity is still prevalent in race crimes. When it published its report on the human rights situation in Brazil, the Commission called attention to the difficult enforcement of Law 7716/89, and to the way in which the Brazilian judiciary tended to be permissive with the practice of racial discrimination; it was very rare for a white person to be convicted of discrimination.[FN35] In effect, if one analyzes racism based on what's happening in the courts, one might get the false impression that discriminatory practices are not to be found in Brazil.

[FN35] See note 14, supra, para. 26.

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71. In addition, the Committee that oversees the UN Racism Convention, in its final observations on the report submitted by Brazil, made clear its concern over the widespread occurrence of discriminatory offenses and the failure to enforce domestic legislation put in place to fight race crimes.

72. On that occasion, the Committee recommended to the Brazilian State that it collect statistical data on investigations opened and sanctions imposed and it recommended that the government improve training and awareness-raising programs regarding the existence of and approaches to race crimes for persons involved in the administration of justice, including judges, prosecutors, attorneys, and police.[FN36]

[FN36] See note 15, supra, para. 18.

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73. The petitioners note that most reports of racial prejudice and discrimination do not result in criminal proceedings, and of the few that do, very few perpetrators of such crimes are convicted.

74. Even in the case of São Paulo, where there was a police unit for race crimes, not all the crimes were investigated, nor were all the complaints processed. In practice, the lack of a diligent, impartial, and effective investigation, the prosecutor's discretion when it comes to handing down indictments, and the definition of the crime, which requires that the perpetrator, after engaging in a discriminatory act, expressly state that his or her conduct was motivated by racial discrimination, are factors that contribute to the denial of justice in race crimes and impunity.

75. In another research study, of 300 incident reports analyzed from 1951 to 1997, in the cities of Rio de Janeiro, São Paulo, Salvador, and Porto Alegre, only 150 were considered a crime by the police officers, so as to warrant a police inquiry. Of these 150 situations, in only 40 were criminal charges brought by the Public Ministry against the person discriminating. And of these only nine – five in São Paulo and four in Rio Grande do Sul – went as far as a verdict.[FN37]

[FN37] Racismo Cordial, Hedio Silva.
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76. According to Telles, impunity in cases of racism reflects the weakness of the specific legislation, the ineffectiveness of the criminal justice system in Brazil, and the ill-will of the representatives of the justice system when it comes to analyzing them.

First, when it comes to convicting someone of racism, Brazil's anti-racism laws require that the accused have acted with racist intent. In addition, the courts show a lack of seriousness when it comes to dealing with this type of crime. Judges avoid imposing the stiff sentences established by the Constitution on those convicted of racism. Judges and prosecutors, as well as all other members of Brazilian society, see alleged incidents of racism as harmless, and are not willing to put the offenders behind bars for a type of conduct that is common in Brazilian society.[FN38]

[FN38] Telles, Edward, Racismo à Brasileira, Uma Nova Perspectiva Sociológica, 2003, p. 264.
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77. Since late 1995 the Commission has received information describing the ineffectiveness of the anti-racism law in Brazil, given its brevity, which revealed a segregationism that did not reflect racism in Brazil, and the reluctance of members of the judiciary to enforce it. According to that information, the Commission can identify at least three causes of the ineffective enforcement of Law 7716/89 in Brazil, which it will now do.

Need to prove racial hatred or intent to discriminate

78. The Commission concluded that Law 7716 "made little progress if any on the racial discrimination front since it was excessively ambiguous and superficial, requiring that for an act of racial discrimination to occur the individual who committed the act to state expressly that his conduct was motivated for reasons of racial discrimination."[FN39] If it did not do so, it would be his word against that of the person who suffered the discrimination.

[FN39] See note 14 supra, para. 13. Emphasis added.

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79. Racusen[FN40] systematically examined several complaints of racism and racial discrimination in Brazil, and, according to him, Brazilian judges require direct evidence of the unequal treatment in which the discriminatory act not only offends someone based on his or her race, but also demonstrates the discriminatory motive. Accordingly, in a possible criminal action, most of the judges need to confirm three things: (1) direct evidence of the discriminatory act, (2) direct evidence of the discrimination by the offending party against the offended party, and (3) evidence of the relationship of causality between the two.

[FN40] Racusen, Seth, "A Mulatto cannot be Prejudiced": The Legal Construction of Racial Discrimination in Contemporary Brazil, June 2002, p. 93.

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80. In Racusen's view, the requirement that all those elements be present to prove a racist act is a very high "evidentiary" standard that is difficult to attain. Accordingly, an offender would be able to reply to any of those three elements by responding that he is not prejudiced, does not have a prejudiced view of the offended person, or that such a view did not constitute a motive. Instead of inferring causality from the chronological order in which the events unfolded, or logic, Brazilian judges generally examine the discriminatory comment by the offender narrowly, requiring direct evidence of causality.

81. Placing that legal practice in context, he found that Law 7716/89 inherited from the Afonso Arinos Law the concept of racial discrimination as a "prejudice based on race or color" that requires, in order to prove it, the explicit practice of racism and the intent on the part of the offending party to discriminate against the victim.[FN41]

[FN41] Material published by the newspaper A Folha de São Paulo, August 23, 1998, São Paulo section. Statement by Carlos Moura, Executive Secretary of the Inter-ministerial Working Group for Dignifying the Black Population (GTI: Grupo de Trabalho Interministerial de Valorização da População Negra), an organ established by the federal government of Brazil.

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82. Still according to Racusen,[FN42] the law defines prejudice. Brazilians at times used the terms “prejudice,” “discrimination,” “racism,” and “inequality” interchangeably. Prejudice has many meanings in Brazil: hatred, intolerance, pre-conceived notions about a person, and verbal deprecation. The expression of hatred, as an explicit crime of hatred of groups, of Nazi inspiration, is the easiest form of prejudice analyzed by the courts. But the notion of prejudice also refers to veiled mistreatment by a perpetrator who acts on the basis of pre-conceived notions, which is a very different kind of prejudice and one that Brazilian courts have a hard time grasping.

[FN42] Racusen, Seth, “A Mulatto cannot be Prejudiced”: The Legal Construction of Racial Discrimination in Contemporary Brazil, June 2002, p. 31.

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83. The standard applied by the Brazilian judiciary even led the Brazilian government to assert before the CERD that there are decisions that do not punish racial discrimination because of the insufficiency of evidence or malicious fraud, which is considered a subjective element of the crime. Finally, it requires that “racial hatred” be proven, which is hard to do.[FN43]

[FN43] See note 17 supra, para. 172.

Institutional Racism

84. The Commission is aware that institutional racism is an obstacle to the applicability of the anti-racism law in Brazil. “From the stage of testimonial evidence, to the police inquiry, and the decision of the judiciary, there is prejudice against blacks. The three levels are incapable of recognizing racism against blacks.”[FN44]

[FN44] Material published by the newspaper A Folha de São Paulo, August 23, 1998, São Paulo section. Statement by Carlos Moura, Executive Secretary of the Inter-ministerial Working Group for Dignifying the Black Population (GTI: Grupo de Trabalho Interministerial de Valorização da População Negra), an organ established by the federal government of Brazil.

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85. According to the petitioners, this unequal treatment accorded race crimes in Brazil, whether in the investigative or judicial phase, reflects the distinction with which police and justice officers treat complaints of racial discrimination: Most of the time when they receive such complaints, they argue failure to describe all the elements of the crime, and difficulty proving discriminatory intent (as the perpetrator denies that he or she wanted to discriminate against the victim) as reasons not to process the complaint.

86. An effort is also made to downplay the attitude of the aggressor, making it appear that it was nothing more than a misunderstanding. Rarely are cases reported, and of these, most get

bogged down in the police unit, where the officers minimize the action of the offending party, characterizing the underlying incident as just a joke, or a misunderstanding. Of the complaints that reach the inquiry stage, many are downgraded to mere injuria.[FN45]

[FN45] O Racismo no Brasil _ Uma Análise do Desenvolvimento Histórico do Tema e da eficácia da Lei como Instrumento de Combate a Discriminação Racial. Claudia Margarida Ribas Marinho.

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87. This practice has the effect of indirect discrimination, to the extent that it stands in the way of the right of a black citizen to be free from discrimination, and the enjoyment and that same citizen's exercise of the right to accede to justice to have the violation remedied. In addition, it has a negative impact on the Afrodescendant population in general. That was precisely what happened to Simone André Diniz, when she sought judicial protection to have the violation of which she was the victim remedied.

88. According to Telles,[FN46] conscious and explicit racism, in the form of racial insults, despite being reprehensible, plays a lesser role in maintaining racial inequality than the subtle individual and institutional practices commonly characterized as "institutional racism." According to the same author, in Brazil these practices derive from thinking by which the racial hierarchy is part of the natural order, and likely causes more harm than the less common and more widely disseminated racial insults.

[FN46] See note 25 supra, p. 236.

Downgrading of Racism to Generic or Racist Injuria

89. The perpetrator of injuria racista in Brazil enjoys impunity in most cases. According to attorneys of Afro-Brazilian organizations, the fact that insulto racial is not covered by Law 7716/89 creates a hindrance to the administration of justice, as injuria, according to the Brazilian Criminal Code, is a crime of private action, and so opening an investigation depends on the initiative of the victim. Yet most victims of racism in Brazil are poor and have no way to hire an attorney.[FN47]

[FN47] Material published by the newspaper A Folha de São Paulo, August 23, 1998, São Paulo section. Statements by the coordinators of Geledes and the Curia.

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90. According to Racusen,[FN48] from1993 to 1995, the Specialized Police Unit for Race Crimes in São Paulo classified as crimes of injuria 75% of the complaints it took in; only 18% were classified under Law 7716. Of the allegations categorized as injuria, 20% were investigated

and 3% resulted in judicial proceedings. According to Racusen, an allegation of injuria was nine times more unlikely to reach a Brazilian court than one classified as racial discrimination.

[FN48] See note 29 supra, p. 227.

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91. The organization CEAP reported that most of the complaints of racial discrimination it received in the city of Rio de Janeiro were classified as injuria.[FN49]

[FN49] Id., p. 174.

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92. The reasons set forth above, which serve as a filter for channeling racism complaints either through Law 7716/89 or through Article 40 of the Criminal Code, led the Brazilian government to inform the CERD that Brazilian case-law is inconsistent and mixed on the question of racial discrimination.[FN50] In effect, there are decisions that do not punish racial discrimination based on the lack or insufficiency of evidence of malicious deceit (fraude maliciosa), which is considered a subjective element of the crime. The last point requires that "racial hatred" be proven, a difficult task.

[FN50] See note 17 supra, para. 172.

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93. As regards downgrading of racial discrimination to injuria racista, the Brazilian government, in its report to the CERD, informed its members that:

Despite the fact that Law No. 7716/89, in criminalizing acts arising from prejudice based on race or colour, represented a clear step forward, one of the major criticisms of the text centred on the fact that it did not include, within the definition of those acts considered criminal, crimes involving defamation of a discriminatory nature. In not addressing, within Law No. 7716/89, defamatory acts founded in racial discrimination (name_calling, denigrating acts, verbal abuse), these were ultimately legally classified, not as racism, but as defamation in the generic sense (e.g. insult, libel). However, while racism is punishable by a prison term of one to five years, libel is punishable by a prison term of six months. In addition, defamatory crimes are only prosecuted by means of private criminal actions (whose statutes of limitation expire in six months), while crimes of racism are prosecuted by means of public criminal actions. As to prescription, while racism is imprescriptible, crimes of defamation are prescribable within a short period of time (two years in the case of libel or slander).[FN51]

[FN51] See note 17 supra, para. 58.

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94. Even with the subsequent creation of the crime of injuria racista,[FN52] which is associated with elements such as race, color, ethnicity, religion, or origin, the government goes further and notes that even though the law has drawn a distinction between generic injuria and cases of injuria based on discrimination (on grounds of race, color, origin, ethnicity, or religion), assigning it a more severe penalty, that law is weaker than the treatment prescribed for the crimes of racism prohibited by Law 7716/89. Moreover, when a particular type of conduct is reduced from racism to defamation, the victim is forced to bring an action within the short term of the remaining six months, as it is a crime that can be prosecuted only by private action. As a result the crime goes unpunished.[FN53]

[FN52] Law that amended Law 7716/89 and added the crime of injuria racista to the Brazilian Criminal Code.
[FN53] See note 17 supra, para. 173.

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4. Violation of the Right of Simone André Diniz to Equality and Non-discrimination

95. According to the petitioners, the archiving of the complaint lodged by Simone André Diniz represents a general situation of inequality in access to justice and impunity when it comes to reporting racially-motivated crimes. In effect, that situation revealed the ineffectiveness of Law 7716/89, as it was not enforced by the Brazilian authorities, giving rise to a situation of unequal access to justice for victims of racial prejudice and racism.

96. These factors, according to the petitioners, and the information shown above, have resulted in the suspension of investigations, partial investigations, and the archiving of inquiries for alleged lack of foundation for presenting the complaint.

97. The Commission already held that every victim of a human rights violation must be assured of a diligent and impartial investigation, and, if there are indicia as to who committed the crime, the pertinent action should be initiated so that a judge with jurisdiction, in the context of a fair trial, can determine whether the crime occurred, as with every crime brought to the attention of the authorities.

98. As this has not happened with the complaints of racial discrimination lodged by Afrodescendants in Brazil, the Brazilian State has flagrantly violated the principle of equality enshrined in the American Declaration and the American Convention, which it undertook to respect, and which dictates that all persons are equal before the law and have the right to equal protection of the law, without discrimination.

99. First, the Commission understands that excluding a person from access to the labor market on grounds of race is an act of racial discrimination. In this respect, the Commission takes into consideration that Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides: “the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition,

enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

100. The IACHR understands that Article 24 of the American Convention is violated, in conjunction with Article 1(1), if the State allows such conduct to remain in impunity, validating it implicitly or giving its acquiescence. Equal protection before the law requires that any expression of racist practices be dealt with diligently by the judicial authorities.

101. In the specific case of Simone André Diniz, there was an ad that excluded her, based on her racial status, from a job. When she lodged a complaint with the judicial authorities they proceeded to archive the case, even though the perpetrator herself verified that she had the ad published.

102. The archiving of the case was not an isolated event in the Brazilian justice system; rather, the Commission has shown that it reflects a purposeful and explicit pattern of conduct on the part of the Brazilian authorities, when they receive a complaint of racism.

103. In addition, the automatic archiving of racism complaints keeps the judiciary from considering whether there was malicious or deceitful intent (dolo). As shown above, the absence of racial motivation has led to the non-enforcement of Law 7716/89, either by the automatic archiving of complaints in the inquiry phase or by judgments of acquittal. In the instant case it was by archiving the police inquiry. The fact that Gisela Silva had told the police inquiry that she had no intent to discriminate racially, or that she had reasons for preferring a white domestic employee, did not justify archiving; the defense of no racial motivation should have been argued before and analyzed by the judge, in the context of a regular criminal proceeding.

104. The Brazilian State undertook to respect and ensure the human rights of all persons living under its jurisdiction, in keeping with Article 1 of the American Convention. According to the Inter-American Court:

States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.[FN54]

[FN54] I/A Court H.R., OC-18/03, Legal Status and Rights of Undocumented Migrants, September 17, 2003, para. 104.

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105. In addition, the Inter-American Court established that:

Article 24 of the Convention protects the principle of equality before the law. Thus, the general prohibition of discrimination set forth in Article 1(1) 'extends to the domestic law of the States

Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.'[FN55]

[FN55] I/A Court H.R., OC-17/02, Juridical Status and Human Rights of the Child, August 28, 2002, Series A No. 17, para. 44, and OC-4/84, January 19, 1984, Series A No. 4, para. 54.

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106. Accordingly, the states should ensure, in their domestic legal order, that every person has access to a simple and effective remedy to protect him or her in the determination of his or her rights, without discrimination.

107. The Commission emphasizes to the Brazilian government that the failure of the public authorities to go forward diligently and adequately with the criminal prosecution of the perpetrators of racial discrimination and racism creates the risk of producing not only institutional racism, in which the judiciary is seen by the Afrodescendant community as a racist branch of government, but is also grave because of the impact on society, insofar as impunity encourages racist practices.

108. The Commission would like to conclude saying that it is of fundamental importance to foster a legal awareness capable of making the effort to combat racial discrimination and racism effectively, for the judiciary should respond effectively insofar as it's an essential tool for controlling and fighting racial discrimination and racism.

109. In view of the unequal treatment the Brazilian authorities accorded the complaint of racism and racial discrimination lodged by Simone André Diniz, which reveals a widespread discriminatory practice in the analysis of these crimes, the Commission concludes that the Brazilian State violated Article 24 of the American Convention in respect of Simone André Diniz.

D. Analysis of the right to judicial guarantees and judicial protection

110. In view of the facts established, the Commission is of the opinion that the investigation into the crime of racism to the detriment of Simone André Diniz, even though a policy inquiry was opened, was not adequate and effective, considering that no criminal action was brought to try the person responsible for the wrongful act, nor were appropriate sanctions imposed, nor was any reparation made to the victim for the harm suffered, as mandated by Law 7716/89.

111. As a result, after the proceeding was archived, Simone André Diniz was unable to have access to justice through an effective remedy to protect her right not to be subject to racist acts, as, pursuant to Brazil's criminal procedure, the decision to archive the record of the police inquiry is unappealable.[FN56]

[FN56] Once the police inquiry is archived by the court at the request of the prosecutor, the criminal action cannot be initiated without new evidence (Súm. No. 524/STF), reiterated case-

law of the Code of Criminal Procedure, Antonio Claret Maciel dos Santos, Editora Rideel, 1st. edition, p. 29, Brazilian Code of Criminal Procedure, Article 18 read together with Article 28.
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112. The State, in turn, defended itself by alleging that there was no violation of the American Convention, since the police inquiry was opened, in which statements were taken from the parties involved, and that it was subsequently archived by the proper judicial authority based on an opinion of the Public Ministry, so justice had been administered.

113. Following that understanding, the Commission considers that the State failed in it duty to administer justice in the case of Simone André Diniz, who suffered discrimination based on her color, when it failed to carry out its conventional obligation to effectively and adequately investigate, prosecute, and punish the violation, and to seek to restore the right violated, as will now be shown.

114. According to the petitioners, the complaint of racism lodged by Simone André Diniz, even though it began to be treated judicially through the police inquiry, never ripened into the pertinent criminal action, the only one capable, once the investigation has begun and the evidence collected, to determine whether there was racism, since the Brazilian justice system, in a decision that could not be appealed, decided to archive the police inquiry based on its finding that there was no basis for a criminal action pursuant to Law 7716/89.

115. In this regard, the substantial aspect of the dispute before this Commission is not whether there was a conviction in the domestic courts for the violation committed to the detriment of Simone André Diniz, but whether the domestic procedures made it possible to ensure access to justice in keeping with the standards in the Convention. To this end, it is necessary to analyze whether the facts alleged by Simone did or did not include indicia of racism within the scope of Law 7716/89, so as to inquire whether there was a denial of justice.

116. The Commission should point out that the article in the International Convention on the Elimination of All Forms of Racial Discrimination requires that the states criminalize practices of racism defined in Article 1 of the Convention. The CERD has insisted on the importance of criminalizing such conduct. The Brazilian government ratified that Convention on March 27, 1968, which is why, in light of the Convention against Racial Discrimination in conjunction with Article 29 of the American Convention, it is obligated to comply with it.

117. In effect, as the petitioners alleged and as is established in the instant case, Ms. Aparecida Gisele Mota da Silva took out a help-wanted ad in a large-circulation daily in which she express her preference for employing as a domestic employee a white person, and the victim, on applying, was rejected for being black. Those facts were declared and admitted by both women in their statements, and were corroborated by witnesses.[FN57]

[FN57] Even though it is argued here that the statements are only valid when ratified before a judge, the statements made in the police inquiry, having met the legal requirements, are evidence indicating that the crime was committed, aimed at providing the elements of a criminal act, and

the identity of the perpetrator sufficient for bringing a criminal action. Curso Completo de Processo Penal, Paulo Lúcio Nogueira, Editora Saraiva, 7th edition, p. 37.

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118. According to the petitioners, the violation in question in the instant case was defined at Article 20 of Law 7716/89, with subsequent modifications through Laws 8081/90 and 8882/94, which added that article so as to define in the heading a new form of criminal conduct: "practicing, inducing, or inciting, through the mass media or by publication of any sort, discrimination or prejudice based on race, color, ethnicity, religion, or national origin," punishable by imprisonment of two to five years and a fine.

119. This crime can only take place when the conduct is through the mass media or a publication of any type. In addition, there was a relationship of causality. As it was a formal crime, or one of mere conduct, i.e. accelerated consummation, whether it was committed was independent of the effects it could produce, i.e. there was no need to see the result for the crime to be consummated. Acting on the preference would suffice.

120. The petitioners also alleged that once the police inquiry was concluded,[FN58] it was forwarded to the Public Ministry so that it could initiate the pertinent criminal action, as Law 7716/89 defines crimes in respect of which the Public Ministry can bring the action. Accordingly, based on the principle of obligation, it was sufficient for the inquiry to include indicia of the identity of the perpetrator and that the crime had actually been committed for the Public Ministry to have standing and to be obligated to file the respective criminal complaint.[FN59]

[FN58] In Brazil, the police inquiry is the full set of steps taken by the judicial police with a view to investigating a criminal infraction and the identity of its perpetrator, for the person entitled to bring the criminal action to be able to go into court seeking to have the law enforced in the specific case. And it is also through the inquiry that the indicia needed to file the complaint are collected. Curso Completo de Processo Penal, Paulo Lúcio Nogueira, Editora Saraiva, 7th edition, p. 37 ff.

[FN59] Curso Completo de Processo Penal, Paulo Lúcio Nogueira, Editora Saraiva, 7th edition, pp. 58 and 63.

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121. Notwithstanding the existence of these indicia, the Public Ministry asked that the record of the police inquiry be archived, for it was of the view that it was not shown that Ms. Aparecida Gisele Mota da Silva had engaged in any act that could have constituted the crime of racism provided for in Law 7716/89. The judge in the matter adopted the opinion of the Public Ministry and decided to archive the case.

122. The Commission is aware that Brazil's law on criminal procedure provides that the Public Ministry may ask that a criminal complaint be archived when no elements are found that might indicate the occurrence of a crime, and the judge, despite not being required to do so,[FN60] may decide to archive it. Nonetheless, that decision cannot be inconsistent with

Brazil's constitutional command that guarantees that the Judiciary will consider any harm or threat to a right.[FN61] And one may not breach the command of the Convention that assures for every person not only the right to an effective remedy but also the right to develop the possibilities of a judicial remedy.

[FN60] Brazilian Code of Criminal Procedure, Article 28.
[FN61] The Brazil's Constitution provides at Article 5(XXXV): "the law shall not exclude consideration by the Judiciary of any harm or threat to a right."

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123. The analysis of the documents submitted in the instant case, in light of those standards, will lead to the conclusion that the administrative investigation carried out by the Brazilian Civilian Police contained sufficient indicia to authorize opening the legal proceeding in the terms of Law 7716/89, because the criminal proceeding was the adequate means for ensuring, to the greatest extent possible, that the dispute would be resolved fairly, so as to determine whether or not there has been racism.

124. The Commission emphasizes that one of the purposes of the State is to administer justice. In effect, the Brazilian State is obligated not only by international instruments that it ratified, but also by its own Constitution, to administer justice to its citizens whenever the judicial protection of the State is invoked.[FN62]

[FN62] Id.

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125. The domestic duty to investigate, prosecute, and punish racially-motivated crimes is added to the international obligation acquired upon ratifying treaties on the subject that place the right to be free from discrimination in a group of peremptory norms of international human rights law that are absolute, non-derogable, and not subject to any modification.

126. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by Brazil and used here as an interpretive guide, establishes a standard that specifically ensures victims of racial discrimination protection and an effective remedy before the domestic courts, in the following terms:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

127. The European Court of Human Rights, when analyzing a case involving a violation of the right to life of a person who belonged to an ethnic minority, ruled that when there is suspicion that racial motivation induced a violation, it is especially important that the official investigation

be firm and impartial, in view of the need to reaffirm continuously society's condemnation of ethnic and racial hatred, and to maintain minorities' trust in the ability of the authorities to protect them from the threat of racist violence.[FN63]

[FN63] European Court of Human Rights, Nachova et al. v. Bulgaria, judgment of February 26, 2004, para. 157.

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128. In the instant case, notwithstanding that the facts involve a matter between private persons, by virtue of its international commitment to prevent and fight racial discrimination, the Brazilian State was under an additional obligation to take all measures necessary for establishing whether the facts alleged by Simone André Diniz entailed racism and racial discrimination.

129. The obligation of states to respect the rights and freedoms recognized in the Convention imposes an obligation on the State to prevent violations or to address them in the terms required by the Convention. It is known that in the instant case a police inquiry – an administrative procedure – was opened to look into possible racism.

130. Nonetheless, having initiated a police inquiry does not relieve the State of its responsibility for having denied Simone André Diniz access to justice. This is because the police inquiry, as a merely informational brief, was not the adequate and effective legal remedy for prosecuting, punishing, and making reparation for a report of a human rights violation, in keeping with the standards of the Convention. In this case, the adequate legal means would be a public criminal action, brought by the Public Ministry, which would give the judge the authority, once he had indicia that the crime occurred, to prosecute the perpetrator of the violation and possibly to convict him, which did not happen in the instant case.

131. The decision of the Brazilian courts to archive the case meant the victim could no longer invoke the judicial protection of the State to enforce Law 7716/89, considering that, as noted by the petitioners and verified by this Commission, no appeal could be taken from the decision to archive the matter, and reopening the police inquiry would only be possible if there were new facts, according to Articles 18 and 28, read together, of the Brazilian Code of Criminal Procedure, and seconded by firm case-law.[FN64]

[FN64] See note 58 supra.

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132. Archiving the matter not only made it impossible for the victim to seek criminal judicial protection, possibility of obtaining civil reparation for the moral injury. This is so because in the Brazilian judiciary, even though there is independence in the procedures and even though the victim is required to prove the harm suffered in a civil action, archiving a criminal complaint renders unviable any claim for reparation for moral injury by way of a civil action.

133. Based on the analysis of the facts alleged herein, one notes the non-enforcement of Law 7716/89, by reason of the denial of an effective remedy for bringing before the judiciary for its consideration the injury to the right to be free from discrimination. The Court has repeatedly indicated that not affording the injured person the right to access to justice violates the standards of the Convention:

The lack of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it. Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective. Recourses are illusory when it is shown that they are ineffective in practice, when the Judiciary lacks the necessary independence to take an impartial decision, or in the absence of ways of executing the respective decisions that are delivered. They are also illusory when justice is denied, when there is an unjustified delay in the decision and when the alleged victim is impeded from having access to a judicial recourse.[FN65]

[FN65] I/A Court H.R., Ivcher Bronstein Case, Judgment of February 6, 2001, Series C No. 74, paras. 136-137, Case of Five Pensioners, Judgment of February 28, 2003, Series C No. 98, para. 136, Case of the Mayagna (Sumo) Community of Awas Tingni, Judgment of August 31, 2002, Series C No. 79, para. 113.

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134. In view of the foregoing, the Commission is of the view that the Brazilian State violated Articles 8(1) and 25 of the American Convention, in conjunction with Article 1(1), to the detriment of Simone André Diniz for failing to initiate the relevant criminal action for looking into the complaint of racial discrimination that she suffered.

V. ACTIONS TAKEN SUBSEQUENT TO REPORT N° 83/04

135. The Inter-American Commission approved Report on the Merits N° 83/04 on case 12.001 (Simone André Diniz) on October 28, 2004, at its 121st meeting.[FN66]

[FN66] When approving that report, Commissioner, Dr. Evelio Fernández Arévalos, and then Commissioner, Dr. José Zalaquett, recorded explanations for their votes, transcribed below.

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136. On January 18, 2005, this report on the merits was sent to the Federal Republic of Brazil, and the country was given two months from the date the report was sent to implement the Commission's recommendations.

137. In a note dated February 15, 2005, the petitioners asserted that the Inter-American Court of Human Rights was not competent ratione temporis to hear this case.

138. In a note dated April 12, 2005, the State of Brazil asked for a 90-day extension for implementing the recommendations and on April 18, 2005 the Commission granted its request. On June 27, 2005, the State submitted its response, detailing the measures taken to implement the recommendations in the above-mentioned report on the merits.

139. The IACHR wishes to note that, given the specific circumstances of this case, including the petitioners' position regarding the subject, the date on which the events took place, the dates when the police inquiry was initiated and archived, all of which occurred prior to December 10, 1998, the date when Brazil accepted the contentious jurisdiction of the Inter-American Court of Human Rights, the Inter-American Commission, in accordance with the provisions of its Rules of Procedure, decided not to submit this case to be heard by the Inter-American Court of Human Rights.

140. In accordance with Article 51.1 of the American Convention on Human Rights, what the Commission must determine at this stage in the process is whether or not the State has settled the matter. In its response, the State of Brazil first mentioned the steps taken by the Special Secretariat for the Promotion of Racial Equality (SEPPIR) of the Office of the President, and the Sao Paolo State Secretariat for Justice and Citizenship to conduct negotiations with the victim and the petitioners on defining the reparation terms.

141. The state asserted the absence of a causal link between recommendations 1, 3 and 4 [see below, paragraph 146(1)(3)(4)] and the petitioners' case, with the understanding that it would be preferable to leave it up to the judgment of the parties to define the content of reparation. With respect to recommendation 2 [see below, paragraph 146(2)], the State indicated its willingness to publicly acknowledge international responsibility for the damage done to the victim upon the conclusion of the case.

142. As for recommendations 5, 7 and 10 [see below, paragraph 146(5)(7)(10)], the State described governmental programs, activities of public agencies at the federal and state (São Paulo) level, bills under discussion in the Congress and laws already promulgated that are related in some way to the promotion of racial equality and human rights education for civil servants involved in public safety and justice. With respect to recommendation 6 [see below, paragraph 146(6)], the State emphasized that under the Brazilian Code of Criminal Procedure the police inquiry initiated by the victim, Simone André Diniz, could not be reopened unless new evidence emerged. It emphasized that the victim could have brought private criminal action subsidiary to public criminal action, in accordance with ordinary law and relevant constitutional guarantees.

143. With respect to recommendations 8 and 9 [see below, paragraph 146(8)(9)], the State mentioned the call for a National Conference to Promote Racial Equality, mobilization of SEPPIR and units of the Office of the President of the Republic to promote public discussion and conduct studies on racial inequality in Brazil. Finally, regarding recommendations 11 and 12 [see below, paragraph 146(11)(12)], it mentioned the efforts of the Public Ministry at the federal and state level to combat racial discrimination as well as the partnership between public agencies and

private companies to develop a project to disseminate audiovisual and printed materials on Afro-Brazilian culture.

144. On September 1, 2005, the State asked for clarification regarding the third recommendation of report on the merits No. 83/04 ("Grant financial assistance to the victim so that she can begin or complete higher education), and the resulting suspension of the other procedural phases up to submission of the response. The Commission provided clarification on January 19, 2006, in which, based on the information provided by the State and the position of the victim and the petitioners, it decided to continue analysis of this case.

VI. CONCLUSIONS

145. Based on the factual and legal considerations presented above, the Inter-American Commission again concludes that the State of Brazil is responsible for violating the right to equality before the law, the right to judicial protection and the right to a fair trial, as enshrined in Articles 24, 25 and 8, respectively, of the American Convention, to the detriment of Simone André Diniz. The Commission also determines that the State violated the duty to adopt domestic law provisions, pursuant to Article 2 of the American Convention, as well as its duty under Article 1.1 to respect and guarantee the rights enshrined in the Convention.

VII. RECOMMENDATIONS

146. Based on the analysis and conclusions in this report, the Inter-American Commission on Human Rights again makes the following recommendations to Brazil:

1. Fully compensate the victim, Simone André Diniz, in both moral and material terms for human rights violations as determined in the report on the merits, and in particular,
2. Publicly acknowledge international responsibility for violating the human rights of Simone André Diniz;
3. Grant financial assistance to the victim so that she can begin or complete higher education;
4. Establish a monetary value to be paid to the victim as compensation for moral damages;
5. Make the legislative and administrative changes needed so that the anti-racism law is effective, in order to remedy the limitations indicated in paragraphs 78 and 94 of this report;
6. Conduct a complete, impartial and effective investigation of the facts, in order to establish and sanction responsibility with respect to the events associated with the racial discrimination experienced by Simone André Diniz;
7. Adopt and implement measures to educate court and police officials to avoid actions that involve discrimination in investigations, proceedings or in civil or criminal conviction for complaints of racial discrimination and racism;
8. Support a meeting with organizations representing the Brazilian press, with the participation of the petitioners, in order to draw up an agreement on avoiding the publicizing of complaints of racism, all in accordance with the Declaration of Principles on Freedom of Expression;

9. Organize government seminars with representatives of the judicial branch, the Public Ministry and local Public Safety Secretariats in order to strengthen protection against racial discrimination or racism;
10. Ask state governments to create offices specializing in the investigation of crimes of racism and racial discrimination;
11. Ask Public Ministries at the state level to create Public Prosecutor's Offices at the state level specializing in combating racism and racial discrimination;
12. Promote awareness campaigns against racial discrimination and racism.

VIII. Facts after sending the report to State/ Report will come out

147. On March 29, 2006, the Inter-American Commission on Human Rights wrote to the State of Brazil to inform it that this report had been approved during its 124th regular session. It also asked the Government to report, within one month of the transmittal of its communication, what measures had been adopted to implement the Commission's recommendations and to solve the situation that gave rise to the complaint, pursuant to Article 45.2 of the Rules of Procedure of the IACHR.

148. On September 6, 2006, the petitioners reported that the State had done nothing to comply with the Commission's recommendations and that they therefore requested that the report be published pursuant to Article 51.3 of the American Convention on Human Rights.

149. In light of the above and given the absence of a reply by the State to Report 10/06, the Commission decides, in accordance with Article 45.3 of its Rules of Procedure, to ratify its conclusions, reiterate the recommendations made in this report, publish it, and include it in its annual report to the General Assembly of the Organization of American States. Pursuant to the rules established in the instruments that govern it, the Commission will continue to evaluate the measures adopted by the Government of Brazil with regard to the aforementioned recommendations until they are duly implemented.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 21st day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President; Florentín Meléndez, Second Vice-president; Freddy Gutiérrez, Paolo Carozza and Víctor Abramovich, members of the Commission.

EXPLANATION OF THE VOTES OF COMMISSIONERS JOSÉ ZALAQUETT AND EVELIO FERNÁNDEZ ARÉVALOS REGARDING REPORT ON THE MERITS N° 83/04

We Commissioners, José Zalaquett and Evelio Fernández Arévalos, concur with the majority decision of the Inter-American Commission in this case with respect to the substantive violation of the right to equality before the law, enshrined in Article 24 of the American Convention on Human Rights, as well as the failure on the part of the Brazilian State to meet its obligation to guarantee the rights enshrined in the American Convention, as referred to in Article 1(1) of that treaty.

With respect to the violation of Articles 8(1) and 25 of the American Convention, as it relates to Article 1.1 of that treaty, referred to in paragraphs 134 and 135 above, the decision of the majority of the Commission is based on the fact that the Brazilian State did not initiate the respective criminal action to investigate the discrimination experienced by the victim, Mrs. Simone André Diniz.

In this respect, we note that in response to the complaint that the victim filed with the Police Office for Investigation of Racial Crimes on March 2, 1997 (supra, § 29), the Brazilian State initiated a police inquiry (police inquiry number 10.541/97-4, mentioned at § 30 supra), at the end of which the Office of the Public Ministry, on April 2, 1997, asked that the proceedings be archived, as it felt that it had not been determined that the subject of the complaint, Mrs. Aparecida Gisele Mota da Silva, had committed actions that could constitute the crime of racism as provided under Law 7716/89. Subsequently, the competent judge, through a decision dated April 7, 1997, ordered that the proceedings be archived (supra, § 37). Our opinion in this respect is that, in the context of the specific factual and legal circumstances in this case, the actions of the Brazilian police, the Public Ministry and the Judicial Branch taken as a whole do not constitute a response that would amount to a violation of Articles 8, 25 and 1(1) of the American Convention."

October 2004