

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF HERZOG *ET AL.* V. BRAZIL

JUDGMENT OF MARCH 15, 2018

(Preliminary objections, merits, reparations and costs)

In the case of *Herzog et al.*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:¹

Eduardo Ferrer Mac-Gregor Poisot, President
Eduardo Vio Grossi, Vice President
Humberto Antonio Sierra Porto, Judge
Elizabeth Odio Benito, Judge
Eugenio Raúl Zaffaroni, Judge, and
L. Patricio Pazmiño Freire, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, “the American Convention” or “the Convention”) and to Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers this judgment structured as follows:

¹ Judge Roberto F. Caldas, a Brazilian national, did not take part in the deliberation of this judgment, in accordance with the provisions of Articles 19(2) of the Court’s Statute and 19(1) of its Rules of Procedure.

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I INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On April 22, 2016, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Court the case of Vladimir Herzog *et al.* v. the Federative Republic of Brazil (hereinafter “the State” or “Brazil”). According to the Commission, the case refers to the presumed international responsibility of the State for the situation of impunity of the arbitrary detention, torture and death of the journalist Vladimir Herzog on October 25, 1975, during the military dictatorship. This impunity was allegedly the result, *inter alia*, of Law No. 6,683/79 (Amnesty Law) promulgated during the Brazilian military dictatorship. The presumed victims in this case are Clarice Herzog, Ivo Herzog, André Herzog and Zora Herzog.

2. *Procedure before the Commission.* The processing of the case before the Inter-American Commission was as follows:

a) *Petition.* On July 10, 2009, the Commission received the initial petition lodged by the Center for Justice and International Law (CEJIL), the Inter-American Foundation for the Defense of Human Rights (FIDDH), the “Santos Días” Center of the Archdiocese of São Paulo and the “No More Torture” Group of São Paulo, and it became case No. 12,879.

b) *Admissibility Report.* On November 8, 2012 the Commission adopted Admissibility Report No. 80/12 (hereinafter “Admissibility Report”).

c) *Merits Report.* On October 28, 2015 the Commission adopted Merits Report No. 71/15 (hereinafter “the Merits Report”), under Article 50 of the American Convention.

i) *Conclusions.* The Commission concluded that the State was internationally responsible for:

- a. The violation of the rights recognized in Articles I, IV, VII, XVIII, XXII and XXV of the American Declaration.
- b. The violation of the rights recognized in Articles 5(1), 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument.
- c. The violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter also “the ICPPT”).

ii) *Recommendations.* Consequently, the Commission made the following recommendations to the State:

- a. Determine, through the ordinary courts, the criminal responsibility for the arbitrary detention, torture and murder of Vladimir Herzog, with a thorough and impartial judicial investigation of the facts in accordance with due legal process, in order to identify those responsible for such violations and impose criminal sanctions on them, and publish the results of the investigation. When complying with this recommendation, the State shall take into account that these crimes against humanity are not subject to amnesties or statutes of limitations.
- b. Take all necessary measures to ensure that Law No. 6,683/79 (Amnesty Law), as well as other provisions of criminal law, such as statutes of limitations, *res judicata*, the principle of non-retroactivity and *ne bis in idem*, do not continue to represent an obstacle for the criminal prosecution of serious human rights violations, such as those of the instant case.
- c. Grant reparation to the next of kin of Vladimir Herzog, including physical and psychological treatment, holding events of symbolic importance that guarantee the

non-repetition of the crimes committed in this case, and the acknowledgement of State responsibility for the arbitrary detention, torture and murder of Vladimir Herzog and the suffering of his relatives.

- d. Grant adequate reparation for both the pecuniary and the non-pecuniary aspects of the human rights violations.

3. *Notification to the State.* The Merits Report was notified to the State in a communication dated December 22, 2015, in which the State was granted two months to provide information on compliance with the recommendations. The State reiterated the information presented at the merits stage before the Commission and added some elements related to a proposal for pecuniary compensation. However, the Commission noted that the State did not provide information on re-opening the investigation into this case.

4. *Submission to the Court.* On April 22, 2016, the Commission submitted the case to the Court in relation to the facts and human rights violations described in the Merits Report, "due to the need to obtain justice," and because "they involve matters of inter-American public order."² Specifically, the Commission submitted to the Court the State's acts and omissions that occurred, or continued to occur, after December 10, 1998, the date on which the State accepted the Court's jurisdiction.³

5. *Requests of the Inter-American Commission.* Based on the above, the Inter-American Commission asked this Court to conclude and declare the international responsibility of Brazil for the violations described in the Merits Report that occurred after the State had accepted the jurisdiction of the Court, and to require the State, as measures of reparation, to comply with the recommendations included in the said report (*supra* para. 2).

II PROCEEDINGS BEFORE THE COURT

6. *Notification of the State and the representatives.* The case was notified to Brazil and to the representatives of the presumed victims (hereinafter "the representatives") on June 13, 2016.

7. *Brief with motions, pleadings and evidence.* On August 16, 2016, the representatives⁴ presented their brief with motions, pleadings and evidence. In this brief, they agreed with the Commission's considerations concerning the provisions that had allegedly been violated and, in addition, alleged violations of the obligation to ensure the rights to personal integrity and to freedom of expression (Articles 5 and 13 of the Convention), in relation to Articles 1(1), 8 and 25 of this instrument, and Articles 1, 6 and 8 of the ICPPT, to the detriment of Vladimir Herzog, due to the failure to investigate his torture to date. They also alleged the violation of the rights to judicial guarantees and judicial protection recognized in Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2 of this instrument, of the members of Mr. Herzog's family. Additionally, they asked the Court to declare the violation of the right to the truth, established

² The Inter-American Commission appointed Commissioner Francisco Eguiguren, the Executive Secretary at the time, Emilio Álvarez Icaza L. and the Special Rapporteur for Freedom of Expression, Edison Lanza, as delegates, and the Deputy Executive Secretary, Elizabeth Abi-Mershed, and the Executive Secretariat's lawyers Silvia Serrano Guzmán, Ona Flores and Tatiana Teubner as legal advisers. Subsequently, the Commission appointed Paulo Abrão as Executive Secretary.

³ These acts and omissions included: (1) violations of the American Convention and the Inter-American Convention to Prevent and Punish Torture derived from the action of the State authorities during Proceeding No. 2008.61.81.013434-2, which culminated in the closing of the investigation in January 2009. The reason for this closure was the application of the Amnesty Law, and also of the statute of limitations and *res judicata*; (2) the action of the State authorities in the context of Public Civil Action No. 2008.61.00.011414-5; (3) the effects on the personal integrity of the family members as a result of the situation of impunity and denial of justice described in the Merits Report.

⁴ The Center for Justice and International Law (CEJIL) represents the presumed victims in this case.

in Articles 5, 8, 13 and 25, together with Article 1(1) of the Convention, to the detriment of the family members, owing to the false version of suicide, and the concealment and denial of information on the case. They also alleged the violation of the right to personal integrity, recognized in Article 5 of the American Convention, of the members of Vladimir Herzog's family. The presumed victims requested, through their representatives, access to the Victim's Legal Assistance Fund of the Inter-American Court (hereinafter "the Court's Legal Assistance Fund" or "the Fund"). Lastly, the representatives asked the Court to require the State to adopt various measures of reparation and reimburse certain costs and expenses.

8. *Brief with preliminary objections and answering the brief with motions, pleadings and evidence.* On November 14, 2016, the State⁵ presented its brief filing preliminary objections and answering the submission of the case, and with observations on the brief with motions, pleadings and evidence (hereinafter "the answer" or "the answering brief"), in accordance with Article 41 of the Court's Rules of Procedure. The State filed nine preliminary objections and acknowledged the responsibility of its agents for the violation of Article 5 of the Convention with regard to the members of Vladimir Herzog's family as a result of his arbitrary detention, torture and death. However, it contested the other violations that had been alleged.

9. *Observations on the preliminary objections and on the State's acknowledgement of responsibility.* On January 9, 2017, the Commission and the representatives submitted their observations on the State's acknowledgement of responsibility and on the preliminary objections.

10. *Access to the Legal Assistance Fund.* In an order of the acting President of the Court of February 23, 2017, the request submitted by the presumed victims, through their representative, to access the Victim's Legal Assistance Fund of the Court was declared admissible.⁶

11. *Public hearing.* On April 7, 2017, the acting President of the Court issued an order⁷ in which he called the parties and the Commission to a public hearing on the preliminary objections and eventual merits, reparations and costs, and to receive the final oral arguments and observations of the parties and of the Commission, respectively. In addition, he required that the statements of one presumed victim, one witness, and two expert witnesses proposed by the representatives and the State be received during the hearing. Also, in this order, he required affidavits from two presumed victims and eight expert witnesses proposed by the parties and the Commission. The public hearing was held on May 24, 2017, during the 118th regular session of Court that took place in San José, Costa Rica.⁸

⁵ The State designated Fernando Jacques de Magalhães Pimenta as its Agent for this case and Flávia Piovesan, Pedro Saldanha, Maria Cristina Martins dos Anjos, Boni de Moraes Soares, João Guilherme Fernandes Maranhão, Gustavo Campelo, Silvio José Albuquerque e Silva, Andrea Vergara da Silva, Daniela Ferreira Marques, Rodrigo de Oliveira Moraes, Luciana Peres, Ana Flávia Longo Lombardi and Mariana Carvalho de Ávila Negri as its deputy agents.

⁶ *Case of Herzog et al. v. Brazil. Victim's Legal Assistance Fund.* Order of the acting President of the Inter-American Court of Human Rights of February 23, 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/vladimir_herzog_fv_17es.pdf.

⁷ *Case of Herzog et al. v. Brazil.* Order of the acting President of the Inter-American Court of Human Rights of April 7, 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/herzog_07_04_17.pdf.

⁸ There appeared at this hearing: (a) for the Inter-American Commission: the Special Rapporteur for freedom of expression, Edison Lanza, and the legal advisers Silvia Serrano Guzmán and Selene Soto Rodríguez; (b) for the representatives of the presumed victims: Viviana Krsticevic, Beatriz Affonso, Alejandra Vicente, Helena Rocha, Erick Curvelo, and (c) for the State: Fernando Jacques de Magalhães Pimenta, Elias Martins Filho, Idervânio Costa, Alexandre Reis Siqueira Freire, Fernanda Menezes Pereira, Bruna Mara Liso Gabliardi, Luciana Peres, Bruno Correia Cardoso, Claudia Giovannetti Pereira dos Anjos and Sávio Andrade Filho.

12. *Amici curiae*. The Court received five *amici curiae* briefs presented: (1) by the Research Group on Transitional Justice and the Right to Truth and to Remembrance at the Pontificia Universidade Católica do Rio Grande do Sur (PUC-RS),⁹ on the right to the truth and on the setbacks in the process of transitional justice in Brazil; (2) jointly, by the Human Rights and Environmental Law Clinic of the Universidade do Estado do Amazonas and the Research Group on Human Rights in Amazonia,¹⁰ on the non-compliance with the Convention of the amnesty laws promulgated during the transition periods following the Latin American dictatorships, which prevented obtaining the truth and justice in cases of gross and systematic human rights violations; (3) the Center for Studies on International Human Rights Systems at the Universidade Federal do Paraná (UFPR),¹¹ on the right to the truth; (4) the Article 19 Organization,¹² on the serious violations of the right to freedom of expression in its collective dimension, and (5) the National Human Rights Commission of Mexico,¹³ on the standards for the protection of journalists, with special emphasis on the chilling effect of threats and physical violence against journalists.

13. *Final written arguments and observations*. On June 26, 2017, the representatives and the State forwarded their respective final written arguments with annexes, and the Commission presented its final written observations.

14. *Observations of the parties and the Commission*. On June 27, 2017, the Court's Secretariat forwarded the annexes to the representatives' final written arguments to the State and the Commission and asked them to remit any observations they deemed pertinent. In a communication of July 12, 2017, the State sent the observations requested. The Commission did not present observations.

15. *Disbursements from the Legal Assistance Fund*. On November 6, 2017, on the instructions of the acting President of the Court, the Secretariat submitted to the State information on the disbursements made in application of the Victim's Legal Assistance Fund in this case and, as established in Article 5 of the Court's Rules for the Operation of the Fund, granted it a specific time for presenting any observations it deemed pertinent. The State presented its observations in a brief of November 30, 2017, within the accorded time.

16. *Deliberation of this case*. The Court began the deliberation of this judgment on March 15, 2018.

III JURISDICTION

17. The Inter-American Court has jurisdiction to hear this case, in the terms of Article 62(3) of the Convention, because 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.

⁹ The brief was signed by José Carlos Moreira da Silva Filho, Camila Tamanquevis dos Santos, Caroline Ramos, Sofia Bordin Rolim, Andressa de Bittencourt Siqueira da Silva, Ivonei Souza Trinidades, Letícia Vieira Magalhães and Marília Benvenuto.

¹⁰ The brief was signed by Sílvia Maria da Silveira Loureiro, Pedro José Calafate Villa Simões, Emerson Victor Hugo Costa De Sá, Marcelo Phillipe Aguiar Martins, Eduardo Araujo Pereira Junior, Jamilly Izabela de Brito Silva, Breno Matheus Barrozo de Miranda, Caio Henrique Faustino da Silva, Érika Guedes De Sousa Lima and Victoria Braga Brasil.

¹¹ The brief was signed by Melina Girardi Fachin.

¹² The brief was signed by Paula Martins, Camila Marques, Carolina Martins and Raissa Maia.

¹³ The brief was signed by Luis Raúl González Pérez.

IV PRELIMINARY OBJECTIONS

18. In its answering brief, the State filed nine preliminary objections with regard to: **(a)** Lack of jurisdiction *ratione temporis* over facts prior to the acceptances of the contentious jurisdiction of the Court; **(b)** Lack of jurisdiction *ratione temporis* over facts prior to its adhesion to the American Convention; **(c)** Lack of jurisdiction *ratione materiae* in relation to supposed violations of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (ICPPT); **(d)** Lack of jurisdiction *ratione temporis* over facts prior to the entry into force of the ICPPT for the Brazilian State; **(e)** Non-compliance with the time limit for lodging the petition before the Commission with regard to alleged violations of Articles 8(1) and 25 of the American Convention and Article 8 of the ICPPT; **(f)** Failure to exhaust domestic remedies to obtain pecuniary reparation for the alleged violations of Articles 8 and 25 of the American Convention and reparations of any nature for the alleged violation of Article 5(1) of this instrument; **(g)** Lack of jurisdiction *ratione materiae* to review domestic decisions on possible violations of Articles 8 and 25 of the Convention ("fourth instance" objection); **(h)** Lack of jurisdiction *ratione materiae* to examine facts other than those submitted by the Commission, and **(i)** Failure to abide by the Convention due to the Commission's publication of the Merits Report.

19. For the sake of procedural economy, the Court will examine the three preliminary objections filed by the State that refer to the Court's lack of jurisdiction *ratione temporis* together, because they refer to circumstances that are interrelated and require the examination of similar arguments.

A. Preliminary objections regarding the Court's alleged lack of jurisdiction *ratione temporis*

A.1. Arguments of the State, observations of the Commission and of the representatives

20. The **State** indicated that it had formalized its adhesion to the American Convention by the issue of a decree on November 6, 1992, and that it had accepted the contentious jurisdiction of the Court on December 10, 1998. It also indicated that there were two types of acceptance of the Court's jurisdiction and each one had different temporal effects. The first prevented the Court from examining instantaneous acts that occurred prior to its jurisdiction, but allowed it to examine continuing violations. Meanwhile, the second referred to acceptance with temporal limitations, and did not allow the Court to declare responsibility for continuing acts, but only for subsequent and independent violations.

21. The State argued that, by virtue of the principle of non-retroactivity that governs treaty law, violations of a continuing nature, initiated before the acceptance of the Court's jurisdiction, differed from instantaneous violations that did not continue over time. According to Brazil's representatives, the criminal proceedings instituted before December 10, 1998, even if they were still underway, could not generate international responsibility because the facts that would result in the State's responsibility occurred prior to its acceptance of the Court's jurisdiction. According to the State, if the Court accepted the case, it would be considering that it had jurisdiction to examine any act based on a supposed denial of justice.

22. Furthermore, regarding its adhesion to the American Convention, the State indicated that this had occurred on September 25, 1992. Accordingly, the Court should acknowledge its lack of temporal jurisdiction to examine facts that occurred before that date. The State also indicated that it had ratified the Inter-American Convention to Prevent and Punish Torture (ICPPT) on July 20, 1989, and that the facts relating to Vladimir Herzog occurred in 1975,

before Brazil's adhesion to the ICPPT. Consequently, the State argued that the two conventions can only be applied with regard to acts or omissions subsequent to their respective ratification.

23. The **Commission** indicated that, in the letter submitting the case, it had noted that the facts submitted to the Court's consideration were only those that had occurred after December 10, 1998. In this regard, the Commission considered that the preliminary objections were inadmissible because the time frame over which the Court was able to rule had already been fully delimited pursuant to the principle of non-retroactivity and the Court's case law on this matter.

24. In addition, it underlined that the violations of the Inter-American Convention to Prevent and Punish Torture fell within the temporal jurisdiction of the Inter-American Court, because they related to the obligation to investigate and to punish acts of torture derived, precisely, from the autonomous violations of Articles 8 and 25 of the American Convention.

25. The **representatives** indicated that they had not alleged violations based on facts prior to December 10, 1998. They also stressed that the Court had often indicate that it had jurisdiction to examine facts that had initiated prior to the date of acceptance of its jurisdiction if they continued or subsisted after that date.

26. In addition, they argued that the violations based on the failure to investigate and punish the crimes against humanity and the gross human rights violations committed in this case subsisted before and after 1998, and extended up until the present time. Accordingly, they indicated that the facts were characterized as a situation of permanent violation of the obligation to investigate and punish torture.

A.2. Considerations of the Court

27. Brazil ratified the ICPPT on July 20, 1989, and the American Convention September 25, 1992. The Court notes that the international obligations resulting from these instruments acquired full legal force as of those dates. However, the Court points out that it was not until December 10, 1998, that Brazil accepted and declared itself subject to the contentious jurisdiction of the Inter-American Court. In its declaration, it indicated that the Court would have jurisdiction with regard to "facts that were subsequent" to this acceptance.¹⁴ Based on this, and on the principle of non-retroactivity, the Court is unable to exercise its contentious jurisdiction to apply the Convention and to declare a violation of its provisions in relation to alleged facts or conducts of the State that occurred prior to this acceptance of jurisdiction.¹⁵

28. Despite the above, the Court has also found that, during an investigation or a judicial proceeding, independent facts may be brought to light that could constitute specific,

¹⁴ In its acceptance of jurisdiction of December 10, 1998, Brazil indicated that: "[t]he Government of the Federative Republic of Brazil declares that it accepts, indefinitely, as obligatory and *ipso jure*, the jurisdiction of the Inter-American Court of Human Rights, in all cases related to the interpretation or application of the American Convention [on] Human Rights, pursuant to Article 62 of this instrument, subject to reciprocity, and for facts subsequent to this Declaration." OAS, Department of International Law. Multilateral Treaties: American Convention on Human Rights "Pact of San José" (B-32). Signatories and Ratifications. Available at https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm

¹⁵ Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Preliminary objections*. Judgment of November 23, 2004. Series C No. 118, para. 66, and *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010. Series C No. 219, para. 16.

autonomous violations.¹⁶ In that case, the Court has jurisdiction to examine and rule on possible human rights violations relating to an investigation procedure that occurred following the date of acceptance of the Court's jurisdiction, even when the procedure may have started before the acceptance of its contentious jurisdiction.¹⁷

29. The Court observes that both the Commission and the representatives indicated that they are not asking the Court to declare the international responsibility of the State for facts prior to December 10, 1998. Based on the foregoing, the Court has jurisdiction to examine the supposed acts and omissions of the State that occurred after December 10, 1998, both in relation to the American Convention and to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, because they refer to the obligation of the State to investigate, prosecute and punish.

30. Based on the above, the Court reaffirms its consistent case law in this regard and finds that the preliminary objections are partially substantiated.

B. Lack of jurisdiction *ratione materiae* in relation to supposed violations of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture

B.1. Arguments of the State, observations of the Commission and of the representatives

31. The **State** indicated that acceptance of jurisdiction should be based on the State's willingness to submit to the international contentious jurisdiction. Thus, it asserted that it had not accepted the Court's jurisdiction to examine supposed violations of the ICPPT. In the State's opinion, the application of this Convention would violate the *pacta sunt servanda* principle.

32. The State argued that the only indication of the Brazilian State's intentions when accepting the Court's jurisdiction restricted it to cases relating to the interpretation and application of the American Convention. Consequently, it asked the Court to declare that it did not have jurisdiction *ratione materiae* to process and prosecute possible violations of the ICPPT.

33. The **Commission** underscored that the Court's reiterated practice has been to apply the ICPPT in order to establish the scope of State responsibility in cases relating to failure to investigate acts of torture. It indicated that both the Commission and the Court had declared violations of these provisions in similar cases, in the understanding that the third paragraph of Article 8 of the ICPPT contained a general clause on jurisdiction which had been accepted by the States when ratifying or adhering to that instrument. Accordingly, it considered that there was no reason for the Court to deviate from its reiterated practice and asked the Court to declare that this preliminary objection was inadmissible.

34. The **representatives** indicated that, according to the principle of *la compétence de la compétence*, the Court had the authority to determine the scope of its own jurisdiction or competence. They also indicated that, according to inter-American jurisprudence, inter-American human rights treaties do not need to contain specific clauses granting jurisdiction to the Court.

¹⁶ Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Preliminary objections*. Judgment of November 23, 2004. Series C No. 118, para. 84, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, para. 49.

¹⁷ Cf. *Case of Alfonso Martín del Campo Dodd. Preliminary objections*. Judgment of September 3, 2004. Series C No. 113, para. 68, and *Case of Heliodoro Portugal v. Panamá. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 25.

35. They argued that the adoption of a restrictive interpretation of the scope of the Court's jurisdiction would not only run counter to the object and purpose of the Convention, but also impair the practical effects of the treaty and the guarantee of protection that it establishes.

B.2. Considerations of the Court

36. This Court has determined that it is able to exercise its contentious jurisdiction with regard to inter-American instruments other than the American Convention, when they establish a system of petitions that are subject to international supervision in the regional sphere.¹⁸ Thus, the special declaration of acceptance of the Court's contentious jurisdiction pursuant to the American Convention and in accordance with Article 62 of that instrument allows the Court to examine both the violations of the Convention and those of other inter-American instruments that grant it competence.¹⁹

37. Even though Article 8 of the Convention against Torture²⁰ does not explicitly mention the Inter-American Court, this Court has referred to its inherent competence to interpret and apply that Convention.²¹ The said article authorizes submission of a case "to the international fora whose competence has been recognized by th[e] State" attributed with the violation of the said treaty. However, the Court has declared the violation of the above-mentioned treaties in different cases, using a supplementary means of interpretation (the preparatory work) if there could be any ambiguity in the provision.²² Accordingly, in the *case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, the Court referred to the historical reason for that article, which was that, when the Convention against Torture was drafted, there were still some Member States of the Organization of American States who were not parties to the American Convention; thus, by including a general clause on jurisdiction that did not refer expressly and exclusively to the Inter-American Court, it opened up the possibility that a greater number of States would ratify or adhere to the Convention against Torture. When adopting that Convention, it was considered important to attribute competence to apply the Convention against Torture to an international organ, whether this was an existing commission, committee, or court or one created in the future.²³ Accordingly, the Commission and, consequently, the Court have competence to examine and declare violations of that Convention.

38. Based on these considerations, the Court reiterates its consistent case law²⁴ that it is competent to interpret and apply the Convention against Torture and to declare the

¹⁸ Cf. *Case of Las Palmeras v. Colombia. Preliminary objections*, para. 34, and *Case of Favela Nova Brasília v. Brazil*, para. 64.

¹⁹ Cf. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, Merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 37 and *Case of Favela Nova Brasília v. Brazil*, para. 64.

²⁰ With regard to competence, this article establishes that "[a]fter all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State" attributed with the violation of the treaty,

²¹ Cf. *Case of González et al. ("Cotton Field") v. Mexico*, para. 51, and *Case of Favela Nova Brasília v. Brazil*, para. 65.

²² Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, paras. 247 and 248; *Case of González et al. ("Cotton Field") v. Mexico*, para. 51.

²³ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, paras. 247 and 248, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs*, para. 65.

²⁴ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, paras. 247 and 248; *Case of González et al. ("Cotton Field")*, para. 51; *Case of Las Palmeras*, para. 34; *Case of Cantoral Huamani and García Santa Cruz, v. Peru. Preliminary objection, Merits, reparations and costs*. Judgment of July 10, 2007, Series C No. 167, footnote 6, and *Case of Favela Nova Brasília v. Brazil*, para. 66.

responsibility of a State that has agreed to be bound by that Convention and has also accepted the jurisdiction of the Inter-American Court of Human Rights. In this understanding, the Court has already had occasion to apply the Convention against Torture and to assess the responsibility of various States in more than 40 contentious cases in which it was alleged that the Convention had been violated.²⁵ Given that Brazil is a party to the Convention against Torture and has accepted this Court's contentious jurisdiction, the Court has competence *ratione materiae* to rule on the alleged responsibility of the State for violating that instrument in this case. Therefore, the Court rejects the preliminary objection of lack of competence filed by the State.

C. Failure to exhaust domestic remedies to obtain reparations

C.1. Arguments of the State, observations of the Commission and of the representatives

39. The **State** argued that the first requirement for the admissibility of a petition before the inter-American human rights system was the exhaustion of domestic remedies, because the victim may not resort to the protection of the international jurisdiction without, first, having recourse to a domestic remedy that permits the recognition of the violation and its reparation. It asserted that when the victim has only exhausted the domestic remedies to request a declaration of the violation of the right to life of a person murdered by the State, he cannot then resort to the international jurisdiction to request reparation for this violation, because the State could not be caught unaware by a request for pecuniary reparation that it had been unable to examine in the domestic sphere.

40. The State also indicated that, in this case, domestic remedies were available to declare the violations that had been alleged and to obtain the corresponding reparations, and the presumed victims had not exhausted them. It asserted that it had not paid any financial compensation other than that established through the administrative channels, because the presumed victims had not requested compensation before the domestic jurisdiction despite the existence of the appropriate judicial mechanisms to present this claim.

41. Similarly, the State argued that the representatives had justified the failure to exhaust domestic remedies by citing Article 46(2)(b) of the Convention. However, it indicated that although this bore a substantial relationship to the merits of the matter, it could not, of itself, justify the failure to exhaust the domestic jurisdiction.

42. In its answering brief, the State transcribed several rulings of domestic courts in which the State was sentenced to compensate the damage caused by detentions and acts of torture during the military dictatorship, and indicated that the Superior Court of Justice had declared that actions for compensation for facts similar to those of the instant case were not subject to a statute of limitations. Consequently, the State concluded that there was a very favorable environment for granting compensation in this case. It added that, in this case, the victims had received compensation of R\$100,000.00 (an amount that, at the time, was equivalent to approximately US\$100,000.00) and this showed that the State had tried to comply with its obligation to redress the harm caused. The State also argued that, in addition to the administrative request – which had been answered – it had no information on any other request that the victim's next of kin had filed and that had been denied.

43. Regarding the allegations that access was refused to the documentation on the human rights violations that occurred under the military regime, the State indicated that it was

²⁵ See list in *Case of Favela Nova Brasília v. Brazil*, para. 66.

unaware of whether the presumed victims or their representatives had filed an application for *habeas data*, and no evidence had been submitted to prove this.

44. The State argued that the criminal investigation and the prosecution conducted in the ordinary jurisdiction were not the only remedies that should be considered. It indicated that failure to recognize this represented a grave violation of the principle of the subsidiarity of the inter-American system and the State's right to defend itself.

45. The **Commission** noted that, regarding the preliminary objection of failure to exhaust domestic remedies, the Court's case law indicated that this should be filed at the proper procedural moment and that the State must specify clearly the remedies that, in its opinion, were not exhausted. It indicated that the State had not filed the objection of failure to exhaust domestic remedies in its briefs of May and October 2012, and had made no mention of the remedies that should be exhausted when it filed that objection; therefore, it considered that the objection was time-barred. The Commission also indicated that the American Convention did not establish that additional remedies should be exhausted to enable the victims to obtain reparation for facts examined by the pertinent domestic remedies; therefore, an interpretation such as that proposed by the State would not only place a disproportionate burden on the victims, but would be contrary to the provisions of the Convention and the *raison d'être* of both the requirement of exhaustion of domestic remedies and the mechanism of reparation.

46. It argued that the requirement of the exhaustion of domestic remedies related to the facts that were alleged to have violated human rights. The claim for reparations arose from the declaration of the State's international responsibility; consequently, that claim did not depend on the exhaustion of domestic remedies.

47. The **representatives** stressed that the State had not filed the objection of failure to exhaust domestic remedies at the proper time. They also indicated that the State's arguments were inconsistent, because it had also argued that the promulgation of the Amnesty Law prevented the exhaustion of remedies in the domestic jurisdiction. They indicated that the State had indicated that the remedies had been exhausted by the ruling of the Superior Court of Justice of August 18, 1993; thus, in addition to the late filing of the objection, they considered that the State had violated the principle of *estoppel* by adopting a contradictory procedural position.

48. Lastly, they argued that a writ of *habeas data* was not an appropriate remedy to establish responsibilities for the arbitrary detention, torture and execution of Vladimir Herzog. The remedy that met this purpose was the investigation and criminal prosecution that had been repeatedly obstructed by the Brazilian authorities. The representatives argued that the Court should reject the objection of failure to exhaust domestic remedies filed by the State.

C.2. Considerations of the Court

49. The Court has developed clear standards for the analysis of a preliminary objection based on a presumed failure to comply with the requirement of exhaustion of domestic remedies. First, it has interpreted the objection as a means of defense available to the State and, as such, it may be waived either expressly or tacitly. Second, this objection must be filed at the appropriate time so that the State may exercise its right of defense. Third, the Court has asserted that the State that files this objection must specify the domestic remedies that remain to be exhausted and demonstrate that such remedies are applicable and effective.²⁶

²⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 88, and *Case of Favela Nova Brasília v. Brazil*, para. 76.

50. The Court has indicated that Article 46(1)(a) of the Convention establishes that, to determine the admissibility of a petition or communication lodged before the Commission in accordance with Articles 44 or 45 of the Convention, it is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.²⁷

51. Therefore, during the admissibility stage of a case before the Commission, the State must specify clearly the remedies that, in its opinion, remain to be exhausted in order to safeguard the principle of procedural equality between the parties that should govern any proceeding before the inter-American system.²⁸ As the Court has established repeatedly, it is not the task of either the Court or the Commission to identify *ex officio* the domestic remedies that remain to be exhausted, because it is not incumbent on the international organs to rectify the lack of precision of the State's arguments.²⁹ Furthermore, the arguments that give content to the preliminary objection filed by the State before the Commission at the admissibility stage should correspond to those submitted to the Court.³⁰

52. The Court notes that these requirements have not been met in this case. In other words, the State has presented different arguments at the admissibility stage before the Commission and in the preliminary objection filed before the Court.³¹ The Court also notes that, in its first communication to the Commission, the State did not file this objection and its submission to the Court is time-barred.

53. Based on the foregoing, the Court rejects the objection filed by the State considering it inadmissible.

D. Failure to comply with the time limit for lodging a petition before the Commission

D.1. Arguments of the State, observations of the Commission and of the representatives

54. The **State** indicated that the American Convention established that the petition must be lodged before the Commission six months after the exhaustion of the domestic remedies. Exceptionally, when this time limit is not applicable, the petition must be lodged within a reasonable time. Brazil argued that, in this case, the reasonable time was not observed or, subsidiarily, the period of six months, with regard to the presumed violations derived from the supposed lack of a criminal prosecution.

55. According to the State, in this case, the Commission applied the exception to prior exhaustion of domestic remedies established in Article 46(2)(a) of the American Convention, under the assumption that the Amnesty Law constituted a situation of absence of due process of law for the protection of the rights supposedly violated and, on this basis, then examined the reasonable time. The State argued that, at that point of the analysis of admissibility, the Commission had set to one side its examination of the main facts concerning the victim's

²⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 85, and *Case of Favela Nova Brasília v. Brazil*, para. 77.

²⁸ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 28, and *Case of Favela Nova Brasília v. Brazil*, para. 78.

²⁹ Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary objection, Merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of Favela Nova Brasília v. Brazil*, para. 78.

³⁰ Cf. *Case of Reverón Trujillo v. Venezuela*, para. 23, and *Case of Favela Nova Brasília v. Brazil*, para. 78.

³¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 88.

arbitrary detention, torture and death, to consider the objections to the Amnesty Law as the central element of the petition, and therefore asked the Court to conduct a control of the legality of the Commission's action.

56. Second, the State argued that it was not valid to calculate the reasonable time from the date on which the Amnesty Law was promulgated because this would entail the Court exercising its contentious jurisdiction in the abstract. It added that, even if that date was taken into consideration, 30 years had passed between the promulgation of the Law and the lodging of the petition before the Commission. Third, it argued that it was not appropriate to consider the attempts to open an investigation and the procedures to obtain measures of reparation as a temporal framework to calculate the reasonable time. Fourth, it added that the alleged continuing nature of the impunity of the facts did not allow a time frame to be established, and this prevented any analysis of the reasonable time. It also indicated that, since August 28, 1979, there had been no domestic remedy to investigate the violations suffered by Vladimir Herzog, and that these had been instantaneous rather than continuing.

57. It also argued that Brazil had ratified the American Convention in 1992 and, as of that time, the petitioners were able to lodge their case before the Commission. The State indicated that, in the absence of domestic remedies, the six-month rule established in Article 46 of the Convention was not applicable, but the obligation to lodge the petition within a reasonable time did apply.

58. Brazil considered that the criteria used by the Commission to consider a reasonable time were "extremely" flexible and varied based on casuistic considerations. It emphasized that, in the case *sub judice*, the violations had been of an instantaneous nature and that 30 years had passed between the time the facts occurred and the lodging of the petition. In the State's opinion, this did not constitute a reasonable time.

59. Lastly, the State considered it inappropriate that the last attempt to re-open the investigation in this specific case should be used as a date for calculating the reasonable time. It indicated that the purpose of the claim filed before the Public Prosecution Service in 2007 was the failure of the Union to present actions for reimbursement (to collect compensation) against the perpetrators of the damage under Law No. 9140 of 1995. That claim was not limited to the case of Vladimir Herzog and did not seek to incriminate anyone; to the contrary, according to the State, it recognized that the criminal actions had extinguished due to the application of statutory limitations. Therefore, the State's representatives argued that, what happened in 2008, had not been a closing of the investigation and, consequently, the reasonable time should not be calculated from that last date. Finally, it indicated that, in the Merits Report, the Commission had failed to identify clearly the criteria used to assess the reasonable time and that it was obliged to identify the date from which this was calculated.

60. The **Commission** noted, first, that the State had asked the Court to conduct a control of the legality of the analysis of the six-month period. It indicated that it had full autonomy in the exercise of its powers under the Convention, and a review of matters relating to admissibility should only be conducted in exceptional circumstances when the following elements are present: (i) a procedural error; (ii) that is considered very serious; (iii) that affects the right of defense of the party citing it, and (iv) that specific prejudice has been proved. The Commission considered that none of these elements were present in this case.

61. Second, the Commission considered that the exception to the requirement of exhaustion of domestic remedies established in Article 46(2)(a) of the Convention was applicable, because the six-month period was inapplicable. The Commission reiterated its considerations in the Admissibility Report, in which it had argued that, in cases that

presumably involved criminal offenses that could be prosecuted *ex officio* in Brazil – arbitrary detention, torture and extrajudicial execution – the appropriate and effective remedy was a criminal investigation and a trial before the ordinary system of justice. The Commission also noted that the Amnesty Law was “an obstacle to the criminal prosecution of those responsible” for the violations perpetrated against the presumed victim and, therefore, determined that the petition was admissible because Brazil’s domestic laws did not establish the appropriate legal proceedings to protect the rights allegedly violated. The Commission also argued that numerous actions had been taken at the domestic level in 2008 and 2009, so that lodging the petition in 2009 was reasonable.

62. Based on the above, the Commission asked the Court to deny the State’s request to conduct a control of legality on this point, because the State had not proved the existence of the presumptions for this control to take place. It also asked the Court to establish that its analysis, in the Admissibility Report, of the requirement of opportune submission of the petition complied with the conventional and regulatory framework and, consequently, to declare this preliminary objection inadmissible.

63. The **representatives** underlined that the Court’s consistent case law had determined the inadmissibility of the objection relating to the six-months’ time limit if the State argued the failure to exhaust domestic remedies, owing to the intrinsic contradiction between these arguments. They also stressed that the Inter-American Commission had autonomy and independence to examine the individual petitions submitted to its consideration in the exercise of its mandate under the Convention.

64. In addition, they argued that, according to the Court’s rulings, a review of the procedure before the Commission would only have been admissible if one of the parties had proved that there had been a grave error or failure to observe the admissibility requirements in a way that violated the interested party’s right of defense. The representatives emphasized that the burden of proof lay with the party alleging this as they must prove a real prejudice to their right of defense; thus, a mere complaint or difference of opinion with regard to the Commission’s actions was insufficient.

65. The representatives underscored that the reasonableness of the time is a decision of the Commission and, to this end, it took into account the date of the facts and the specific circumstances of the case. They emphasized the incompatibility of the Amnesty Law with the American Convention, in addition to the impunity that reigned under this Law in relation to the human rights violations that occurred during the military regime: reasons that had led the Commission to conclude that the petition had been lodged within a reasonable time.

D.2. Considerations of the Court

66. The State asked the Court to conduct a control of the legality of the proceedings before the Commission. However, in the Court’s opinion, in this case the request corresponded to a preliminary objection that questioned the admissibility of the petition owing to the presumed failure to comply with the requirement established in Article 46(2)(a) of the American Convention.³² The Court will therefore examine the arguments of the parties in light of these circumstances.

³² Article 46.- “1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; [...]

67. First, the Court must assess whether, during the admissibility stage of the case before the Commission, the arguments that substantiate the preliminary objection filed by the State corresponded to those submitted to the Court.³³

68. In this case, during the admissibility stage, the State presented two briefs to the Commission, one on May 30, 2012, and the other on June 18, that year. In both briefs it presented similar arguments on the time limit for lodging the initial petition. Subsequently, in its answering brief during the proceedings before the Court, the State again referred to the said preliminary objection. Accordingly, the Court notes that the arguments that substantiate the preliminary objection filed by the State before the Commission during the admissibility stage correspond to those submitted to this Court; it will therefore proceed to analyze their content.

69. The Court notes that the State recognized that no remedies were available to the victims owing to the Amnesty Law.³⁴ In other words, there is no dispute between the parties on this point. Thus, the six-month rule is inapplicable; therefore, the Court must verify whether the time that passed before the petitioners had recourse to the Inter-American Commission was reasonable. In this regard, the Court notes that a dispute does exist between the parties concerning the relevant date for calculating this reasonable time.

70. The Court observes that although, on August 16, 1993, police investigation No. 487/92 before the São Paulo state justice system was officially concluded (*infra* paras. 140 to 145), on December 4, 1995, Law No. 9,140/1995 was promulgated creating the Special Commission on Political Deaths and Disappearances (CEMDP) (*infra* paras. 146 to 151) and this Commission issued its final report in 2007. The Court also notes that it was based on the result of this report that a complaint was filed before the Federal Public Prosecution Service that initiated proceedings No. 2008.61.81.013434-2. The closure of these proceedings on January 9, 2009 (*infra* paras. 152 to 160), was the reason that the initial petition was finally lodged before the Inter-American Commission on July 10 that year.

71. In this case, the Court notes that the presumed violation that constituted the reason for lodging the petition was the impunity of the torture and death of Vladimir Herzog. Based on the foregoing, it is the Court's opinion that the petitioners had reasonable expectations that the State would rectify this situation of impunity following the return to democracy and, above all, following the final report of the Special Commission created by Law No. 9,140/1995. Consequently, the Court considers that the specific circumstances of this case, in particular the impact of the Amnesty Law on the possibility of investigating and prosecuting Mr. Herzog's death, the issue of the CEMDP report in 2007, and the actions initiated by the Federal Public Prosecution Service are, taken as a whole, actions that could have contributed to end the impunity and, therefore, are relevant facts that allow it to be determined that the initial petition was lodged within a reasonable time. Consequently, the petition was admissible and, therefore, the Court decides to reject the preliminary objection presented by the State.

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

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated."

³³ Cf. *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 29, and *Case of Favela Nova Brasília v. Brazil*, para. 78.

³⁴ See answering brief of the State, para. 161 (merits file, folio 372).

E. Lack of jurisdiction *ratione materiae* to review domestic decisions on possible violations of Articles 8 and 25 of the American Convention (fourth instance objection)

E.1. Arguments of the State, observations of the Commission and of the representatives

72. The **State** indicated that the purpose of the inter-American human rights system is not to review the merits of the conclusions reached by the domestic authorities in the legitimate exercise of their competences. Therefore, assuming the role of the domestic authorities and acting as if they were a court of appeal falls outside the competence *ratione materiae* of the Commission and of the Court.

73. It reiterated that the proceedings opened in 2008 were not an appropriate domestic remedy to calculate the reasonable time for lodging the petition before the Commission. It added that, even if it was accepted that the said remedy had been appropriate and, therefore, the petition had been lodged within a reasonable time, observance of *res judicata* and the application of statutory limitations to the criminal action – both protected by the Convention – prevented an examination of the merits of the matter.

74. The State recalled that the judicial ruling adopted in 1992 preceded the developments in the Inter-American Court's case law with regard to the non-applicability of statutory limitation to criminal actions in similar cases, and argued that requiring a judicial reinterpretation of past rulings based on jurisprudential theses that did not exist at the time would undermine the scope of judicial guarantees.

75. Lastly, the State argued that, during the judicial investigation that concluded in 1992, in addition to hearing testimony and also the statements of the presumed victims, several procedures were conducted and numerous pieces of evidence were collected. Therefore, even though no criminal conviction resulted, there was no lack of diligence and the investigation was not suspended without evidentiary measures being taken. Moreover, pecuniary reparation was awarded in accordance with the Court's case law in the case of *Gomes Lund et al.*

76. The **Commission** noted that the State's argument did not constitute a preliminary objection, because it did not refer to matters of competence or to the admissibility requirements established in the Convention. Therefore, the matter could not be decided as a preliminary objection, and this was the same situation in the case of the amount of the reparations, as they were both matters of substance.

77. The Commission argued that, in this case, the Court was called on to examine, among other matters, whether the domestic proceedings undertaken for the facts of the case constituted an appropriate and effective means to achieve judicial protection taking into account the rights that had been violated. Also, the method of reparation and the eventual need for the Court to establish supplementary reparations went beyond a preliminary objection and was also a matter of substance.

78. Consequently, the Commission asked the Court to establish that the State's position concerning the lack of competence to review domestic decisions did not constitute a preliminary objection and, therefore, was inadmissible.

79. The **representatives** characterized the State's position as a fourth instance objection. In this regard, they argued that, for this to be the case, it would have been necessary that the Court had been asked to review an internal decision of the State owing to an incorrect assessment of the evidence, the facts or domestic law. They argued that, in this case, the

Court was not being asked to exercise such functions over internal decisions issued by the State's judicial organs. To the contrary, in this case, they were asking the Court to declare the international responsibility of the Brazilian State for errors and obstructions by different State agents that violated the obligation to guarantee the rights to physical integrity, freedom of expression, access to justice, and judicial guarantees recognized in the American Convention.

E.2. Considerations of the Court

80. First, the Court recalls that, regardless of whether the State defines an assertion as a "preliminary objection," if the Court must begin to consider the merits of the case when analyzing it, it is no longer preliminary in nature and cannot be analyzed as such.³⁵

81. The Court also reiterates that the international jurisdiction is of a subsidiary and complementary nature³⁶ and, therefore, it does not perform the functions of a court of "fourth instance." Moreover, it is not a high court or court of appeal to decide any disagreements between the parties on elements concerning the evaluation of the evidence or the application of domestic law in relation to aspects that do not directly concern compliance with international human rights obligations.³⁷

82. The Court finds that the State's arguments could be considered a fourth instance objection; however, for this objection to be admissible, "the applicant must require the Court to review the ruling of a domestic court owing to an incorrect evaluation of the evidence, the facts or domestic law, without, at the same time, alleging that the said ruling violated international treaties for which the Court has competence."³⁸ The Court has also considered that, when assessing compliance with certain international obligations, there may be an intrinsic interrelationship between the analysis of international law and domestic law. Consequently, determination of whether the actions of the State's judicial organs constitute a violation of its international obligations may result in the Court having to examine the respective domestic proceedings to establish their compatibility with the American Convention.³⁹

83. In this case, neither the Commission nor the representatives have requested a review of domestic decisions in relation to the evaluation of evidence or facts or the application of domestic law. The Court considers that the analysis, pursuant to the American Convention and international law, of the arguments of the parties with regard to whether the domestic judicial proceedings were appropriate and effective and whether the appeals were processed and decided correctly is a matter to be examined at the merits stage. In addition, at that stage, it will be necessary to analyze whether the payment made to repair the pecuniary

³⁵ Cf. *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of the Hacienda Brasil Verde Workers v. Brazil*, para. 72.

³⁶ The Preamble to the American Convention states that the international protection should be considered as "reinforcing or complementing the protection provided by the domestic law of the American states." See also, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 31; *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 26; *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61, and *Case of García Ibarra et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 17, 2015, para. 17.

³⁷ Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, Merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 16, and *Case of Favela Nova Brasília v. Brazil*, para. 56.

³⁸ Cf. *Case of Cabrera García and Montiel Flores v. Mexico*, para. 18, and *Case of Tarazona Arrieta et al. v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of October 15, 2014. Series C No. 286, para. 22.

³⁹ *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, para. 222, and *Case of Favela Nova Brasília v. Brazil*, para. 56.

damage was sufficient and whether any acts or omissions occurred that violated the guarantees of access to justice and that could generate the State's international responsibility. On this basis, the Court rejects this preliminary objection.

F. Alleged failure to abide by the Convention owing to the Inter-American Commission's publication of the Merits Report

F.1. Arguments of the State, observations of the Commission and of the representatives

84. The **State** indicated that the Commission had published the complete text of preliminary Merits Report No. 71/2015 of October 28, 2015, on its website before submitting the case to the Court. The State considered that this circumstances violated Article 51 of the Convention, because the Convention authorized the Commission to issue a final report and eventually publish this, or to submit a case to the Court's jurisdiction. It also indicated that the Commission was not authorized to publish this report before submitting the case to the Court. Therefore, the State asked that the Court declare that the Commission had violated Articles 50 and 51 of the Convention and that it should remove the said report from its website.

85. The **Commission** noted that the State's allegation did not constitute a preliminary objection because it did not refer to matters of competence, or to the admissibility requirements established in the Convention. It also argued that the Merits Report issued under Article 50 of the American Convention was preliminary and confidential in nature. When the Commission opted for one of the options indicated in Article 51, the report was no longer preliminary and confidential. In addition, the publication of the report on its website was the Commission's consistent practice and did not infringe any provision of the Convention or the Rules of Procedure, as declared in recent judgments with regard to Brazil. Consequently, the Commission asked the Court to reiterate its considerations on this point in previous cases and to reject this preliminary objection.

86. The **representatives** indicated that the preliminary objection filed by the State was contradictory because it required the Court to determine a violation of an international human rights treaty that prejudiced it, disregarding the fact that it was the State itself that signed international human rights treaties, thereby acquiring the obligation to ensure the enjoyment of the rights and freedoms to every person subject to its jurisdiction. They also asserted that the argument submitted did not constitute a preliminary objection and should therefore be rejected.

87. Notwithstanding the foregoing, they argued that it was necessary that the State substantiate that the Commission's action constituted a grave error and prejudiced its right of defense.

F.2. Considerations of the Court

88. The Court notes that the State's arguments are identical to those presented in its preliminary objection in the cases of the Hacienda Brasil Verde Workers, Favela Nova Brasília and the Xucuru Indigenous People.⁴⁰ In the judgments in these cases, the Court made a detailed analysis of the State's arguments and concluded that the State had not proved its allegation that the respective Merits Report had been published in a way that differed from the way described by the Commission or contrary to the provisions of the American

⁴⁰ Cf. *Case of the Hacienda Brasil Verde Workers v. Brazil*, paras. 23 to 27; *Case of Favela Nova Brasília v. Brazil*, paras. 24 to 28, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 5, 2018. Series C No. 346, para. 24.

Convention. The Court's considerations in those cases also apply to the instant case because, once again, the State has failed to prove that the Merits Report was published in a way that differed from that described by the Commission or contrary to the provisions of the American Convention. Consequently, the Court finds that Brazil's allegation is inadmissible.

G. Lack of jurisdiction of the Court to examine facts introduced by the representatives

G.1. Arguments of the State, observations of the Commission and of the representatives

89. The **State** filed a preliminary objection in which it indicated that the representatives of the presumed victims were not permitted to introduce new facts that differed from those presented by the Commission in its Merits Report, even though they could present legal claims distinct from those presented by the Commission. It indicated that, in this case, the concealment of the military files and the denial of access to those documents had not been included in the Commission's Merits Report and, therefore, the representatives' request that the Court declare the violation of the right to the truth had no factual basis.

90. The State also argued that the Commission's Merits Report had made no mention of the supposed violation of the right to the truth or to the public civil action that was being processed at this time. Consequently, the State considered that, in this case, the Court should recognize its lack of competence *ratione materiae* to examine facts that are not included in the Admissibility Report or in the brief submitting the case to the Court.

91. In this regard, **the Commission** noted that the State's allegations did not constitute a preliminary objection; rather they disputed matters of substance. It added that the State's arguments did not seek to contest the Court's competence owing to time, matter, or place, and were not of a preliminary nature; to the contrary, they referred to facts alleged by the representatives that supposedly were not part of the factual framework defined in its Merits Report.

92. Based on the above, the Commission recalled that the factual framework of the proceedings before the Court was constituted by the facts contained in the Merits Report submitted by the Commission. Nevertheless, the representatives were able to submit autonomous legal arguments and describe those facts that explained, clarified or rejected facts that had been submitted to the consideration of the Court. Meanwhile, the Court was called on to assess whether the elements introduced explained or clarified the facts described by the Commission in its Merits Report and whether they were related to the factual framework of the case.

93. Lastly, the Commission considered that the elements introduced by the representatives constituted an explanation of the context of institutional cover-up established in the Merits Report. In addition, it could be understood that they were related to the attempts by various domestic instances to obtain information from public entities, including the military, and, thus, they were reasonably related to the factual framework and the analysis made in the Merits Report.

94. The **representatives** underscored that the contents of the factual framework did not constitute a preliminary objection, but rather related to an analysis that the Court must make to determine the merits of the case, as revealed by the Court's case law.

95. Nevertheless, regarding the inclusion of facts that were not developed in the Merits Report, they argued that this was possible when they were facts that explained, clarified or

rejected the facts submitted to the Court's consideration. They also indicated that facts classified as supervening can also be admitted. In this regard, it was the role of the Inter-American Court to decide, in each specific case, on the admissibility of arguments concerning the factual framework, safeguarding the procedural balance between the parties and the adversarial principle.

96. In addition, the representatives indicated that their allegation of the presumed violation of the right to the truth was based on three facts that were included in the Inter-American Commission's Merits Report: (i) the official version of Vladimir Herzog's suicide by hanging; (ii) the absence of official documents regarding the circumstances of his arbitrary detention, torture and murder, and (iii) the absence of an adequate investigation.

G.2. Considerations of the Court

97. The Court recalls that preliminary objections are allegations of a preliminary nature intended to prevent the examination of the merits of a matter in dispute by contesting the admissibility of a case, or the Court's competence to examine a specific case or any of its aspects, due either to the person, matter, time or place, provided that such allegations are of a preliminary nature.⁴¹ If the allegations cannot be considered without first making a preliminary examination of the merits of the case, they cannot be analyzed by means of a preliminary objection.⁴² Therefore, the Court does not consider that these allegations made by the State are a preliminary objection, without prejudice to examining the allegation in this section.

98. In this regard, the Court recalls that, according to its consistent case law, the factual framework of the proceedings before the Court consists of the facts contained in the Merits Report, with the exception of facts classified as supervening, provided that the latter relate to the facts of the proceedings. This is without prejudice to the representatives being able to introduce facts that explain, clarify or reject those that have been mentioned in the Merits Report and have been submitted to the consideration of the Court.⁴³ In this case, the Court notes that the information forwarded by the representatives is related to the alleged institutional cover-up that the Commission refers to in its Merits Report. The Court also considers that, even though the Commission has not established a violation of the right to the truth, the public civil action is included in the factual framework of the Merits Report, so that the facts presented by the representatives in relation to that judicial initiative are admissible and will be considered in the chapter on the merits.

V EVIDENCE

A. Documentary, testimonial and expert evidence

99. The Court received diverse documents presented as evidence by the State, the representatives, and the Commission, attached to their principal briefs (*supra* paras. 2, 7 and 8). The Court also received the affidavits of expert witnesses John Dinges and Naomi Roht-

⁴¹ Cf. *Case of Las Palmeras v. Colombia. Preliminary objections*, para. 34, and *Case of García Ibarra et al. v. Ecuador, Preliminary objections, merits, reparations and costs*. Judgment of November 17, 2017. Series C No. 306, para. 18.

⁴² Cf. *Case of Castañeda Gutman v. Mexico*, para. 39, and *Case of Chinchilla Sandoval v. Guatemala. Preliminary objections. Merits. Reparations and costs*. Judgment of November 30, 2016. Series C No. 328, para. 39.

⁴³ Cf. *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Acosta et al. v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of March 25, 2017. Series C No. 334, para. 30.

Arriaza proposed by the Commission; expert witnesses Dimitrios Dimoulis and María Auxiliadora Minahum proposed by the State, and presumed victims André Herzog and Ivo Herzog and expert witnesses Juan Méndez, Fabio Simas, Renado Sérgio de Lima and Ana C. Deutsh, proposed by the representatives. Regarding the evidence provided during the public hearing, the Court received the statements of presumed victim Clarice Herzog, witness Marlon Weichert and expert witness Sergio Gardenghi Suiama, proposed by the representatives, and of expert witness Alberto Zacharias Toron, proposed by the State.

B. Admission of the evidence

B.1. Admission of the documentary evidence

100. In this case, as in others, the Court admits those documents presented by the parties and the Commission at the proper procedural moment (Article 57 of the Rules of Procedure), that were not contested or challenged, and the authenticity of which was not questioned.⁴⁴ In addition, the Court will now decide various disputes concerning the admissibility of certain documents.

101. After the time limit for presenting annexes to the brief answering the submission of the case and with preliminary objections had expired, the State made a late submission of a document⁴⁵ previously identified in the list of annexes. The document was considered time-barred and was not admitted to the case file.

102. With regard to the documents on costs and expenses forwarded by the representatives with their final written arguments, the Court will only consider those that refer to new costs and expenses incurred during the proceedings before this Court; in other words, those made following presentation of the motions and pleadings brief. Consequently, it will not consider invoices dated prior to the presentation of the motions and pleadings brief, because they should have been presented at the proper procedural moment.

103. In addition, the Court points out that the State submitted various observations on the annexes provided by the representatives with their final written arguments.⁴⁶ These observations refer to the content and probative value of the documents and do not constitute an objection to their admission.

B.2. Admission of the statements and expert opinions

104. The Court deems it pertinent to admit the statements made during the public hearing and the affidavits, insofar as they are in keeping with the purpose defined in the order requiring them and the purpose of this case.

C. Assessment of the evidence

105. As established in Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, and also in its consistent case law concerning evidence and its assessment, the Court will examine

⁴⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 140, and *Case of Acosta et al. v. Nicaragua*, para. 20.

⁴⁵ The document consists of the pages dedicated to Vladimir Herzog in the publication: "*Direito à Memória e à Verdade*" [*The Right to memory and truth*].

⁴⁶ The State presented various observations on the annexes and argued that it was not sufficient that probative documents were merely submitted; rather, the parties were required to include arguments relating the evidence to the facts that it was supposed to represent and, in the case of alleged financial disbursements, the items and their justification had to be clearly established.

and assess the documentary probative elements forwarded by the parties and the Commission, the statements and the expert opinions, when establishing the facts of the case and ruling on the merits. To this end, it will abide by the principles of sound judicial discretion within the corresponding legal framework, taking into account the whole body of evidence and the arguments that have been presented during the case.⁴⁷

VI PROVEN FACTS

106. Following an analysis of the probative elements, the statements of witnesses and expert witnesses, as well as the arguments of the Inter-American Commission, the representatives and the State, the Court considers proved the facts described below that were not contested by the State at any time during the proceedings. In addition, the facts described below that occurred prior to the date on which Brazil accepted the Court's jurisdiction (December 10, 1998) serve as background information to contextualize what happened after that date.

A. *Historical context*

107. As the Court indicated in its judgment in the case of *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*:⁴⁸

85. In April 1964, a military coup overthrew the government of President João Goulart. The military regime was established on the basis of the national security doctrine and the issue of successive "national security laws" and regulations during a state of emergency, such as the institutional acts, "that served as the supposed legal framework to provide juridical support to the increasing repression." This period was characterized by "the installation of a repressive apparatus that took on characteristics of a truly powerful nature parallel to that of the State," reaching its "peak" with the issue of Institutional Act No. 5, in December 1968. Among other acts of repression during that period, the National Congress was closed, there was complete press censorship, and individual and political rights, freedom of expression, freedom of association, and the guarantee of *habeus corpus* were suspended. Also, the scope of the military justice system was extended and a National Security Law introduced life imprisonment and the death penalty, among other measures.

86. Between 1969 and 1974, a "devastating attack was mounted on the armed opposition groups." The mandate of President Médici (1969-1974) represented "the most extreme phase of the repression during the 21 years of the military regime" in Brazil. Subsequently, "during the first three years of the [Government of President] Geisel [1974-1979], the disappearance of political prisoners, which initially represented only a fraction of the deaths that occurred, became the predominant pattern so as not to reveal the contradiction between the discourse on an opening-up and the systematic repetition of the regular fake official reports of assaults, escape attempts, and false suicides." Thus, as of 1974 "there were no more deaths in the prisons, all of the political detainees who died had 'disappeared,' [and] thereafter the regime did not admit to the murder of its opponents."

87. According to the Special Commission, almost 50,000 people were detained just in the first few months of the dictatorship; around 20,000 prisoners were subjected to torture; there were 354 politically-motivated deaths and disappearances; 130 people were expelled from the country; the mandates and political rights of 4,862 people were suspended, and hundreds of rural workers were murdered. The Special Commission noted

⁴⁷ Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*, para. 76, and *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs*. Judgment of December 1, 2015, Series C No 330, para. 22.

⁴⁸ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2010. Series C No. 219, paras. 85 and ff.

that “Brazil is the only country [in the region] that did not use [criminal] proceedings to examine the human rights violations that took place during the dictatorship [despite having] formalized, by Law No. 9,140/95, the State’s acknowledgement of responsibility for the deaths and disappearances that had been denounced.” This is because, in 1979, the State enacted an Amnesty Law.

108. The most violent repression of those opposed to the military regime took place in 1964 and from 1968 to 1975. It was during these periods that most politically-motivated disappearances and deaths officially acknowledged by the State occurred. Moreover, these periods also coincided with the centralization of investigations and repression operations in the information centers of the Navy (CENIMAR), the Army (CIE) and the Air Force (CISA), and the establishment of the Centers for Internal Defense Operations (CODI) and the respective Internal Operations Department (DOI).⁴⁹

109. Faced with the apparent growth of the Brazilian Communist Party (PCB) and the realization that it would represent a threat to the Government of President Geisel, the security forces decided to “neutralize” the PCB. In this regard, between 1974 and 1976, journalists of “Voz Operária” and members of the PCB began to be abducted or detained, tortured and even killed by State agents.⁵⁰

110. Between the end of September and the beginning of October, 1975, the São Paulo DOI/CODI intensified actions of repression against journalists.⁵¹

111. On October 24, 1975, the day before Vladimir Herzog was deprived of his liberty, 11 journalists were detained: Sergio Gomes da Silva, Marinilda Marchi, Frederico Pessoa da Silva, Ricardo de Moraes Monteiro, José Pola Galé, Luiz Paulo da Costa, Anthony de Christo, Paulo Sérgio Markun, Diléa Frate, George Duque Estrada and Rodolfo Konder.⁵²

112. Dozens of leaders and members of the PCB Central were detained and tortured, although not all of them were murdered.⁵³ It is estimated that between 1974 and 1976, at least 19 people were murdered, including 11 PCB leaders.⁵⁴ In total, between March 1974 and January 1976, 679 members of the PCB, including Vladimir Herzog, were detained under Operation Radar.⁵⁵

B. Vladimir Herzog

113. Vladimir Herzog was born on May 27, 1937, in the former Yugoslavia (now Croatia) and arrived in Brazil in 1946, at the age of 9, with his parents, Zigmund and Zora Herzog. He

⁴⁹ Federal Public Prosecution Service, *Crimes da Ditadura Militar: Relatório sobre as atividades de persecução penal desenvolvidas pelo MPF em matéria de graves violações a DH cometidas por agentes do Estado durante o regime de exceção*, Brasília, 2017, p. 86 (evidence file, folio 14283).

⁵⁰ Dantas, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editorial Civilização Brasileira, 2014 (evidence file, folio 3691); Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração*. Rio de Janeiro: Objetiva, 2005, pp. 11-12 (evidence file, folios 8759 to 8769); and Brazil. Office of the President of the Republic. Special Secretariat for Human Rights. *Direito à Memória e à Verdade*, Special Commission on Political Deaths and Disappearances. Brasília, Special Secretariat for Human Rights, 2007, p. 374 (evidence file, folio 372). Brazil. Report of the National Truth Commission. December 10, 2014 (evidence file, folio 3273).

⁵¹ Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração*, pp. 112 and 113 (evidence file, folios 8782 and 8783).

⁵² Dantas, Audálio. *As duas guerras de Vlado Herzog* (evidence file, folio 3691).

⁵³ Report of the National Truth Commission (evidence file, folio 3273).

⁵⁴ Report of the National Truth Commission (evidence file, folios 3249 and 3250).

⁵⁵ Report of the National Truth Commission (evidence file, folio 3281).

took Brazilian citizenship and studied philosophy. He began his career as a journalist in 1959 with the newspaper "*Estado de São Paulo*." He married Clarice Ribeiro Chaves shortly before the coup d'état, on February 15, 1964.⁵⁶

114. Following the coup d'état, in 1965, the couple went to live in London for a little more than two years during which Vladimir worked as a BBC producer and broadcaster and they had their two children: André and Ivo. In 1968, he returned to Brazil and worked as cultural editor of the weekly publication "*Visão*." In 1972, he moved to TV Cultura to work as editor of a news program, and then became Director of the channel's journalism department.⁵⁷

115. In addition to being a journalist and playwright, Herzog was also a member of the Brazilian Communist Party (PCB).⁵⁸

C. Operation Radar

116. Operation Radar was created as an offensive of the security forces to combat and dismantle the PCB and its members. However, the Operation was not limited to detentions, it was also aimed at killing the PCB leaders.⁵⁹ The Operation began in 1973, headed by the Army Information Center (CIE) together with the Second Army's DOI-CODI.⁶⁰ The offensive operated between March 1974 and January 1976.

117. The Second Army's DOI was notorious for being one of the worst and most violent centers of political repression during the dictatorship and, in particular, during the time that Carlos Alberto Brilhante Ustra was in command. It was during this time that the greatest number of acknowledged cases of torture, summary executions and disappearances of political opponents was recorded. The Second Army's DOI detained 2,541 people and received 914 prisoners sent by other agencies. It has been acknowledged that the DOI executed 54 victims and 1,348 prisoners were transferred to the State Department of Political and Social Order (DEOPS).⁶¹

118. It is believed that the "final attack" on the PCB in São Paulo began on September 29, 1975, when José Montenegro de Lima was detained, tortured and killed. Dozens of people were detained in the following days.⁶²

⁵⁶ Statement by Clarice Herzog during the public hearing; *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folios 405 and 406). Report of the National Truth Commission (evidence file, folio 3299); Committee of Families of the Political Disappeared. "1975: Vladimir Herzog." in: Dossier of the Dictatorship: Political Deaths and Disappearances in Brazil, 1964-1985. 2nd edition, 2007 (evidence file, folios 3976 and 3977).

⁵⁷ Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração* (evidence file, folios 8748 to 8751); Committee of Families of the Political Disappeared. "1975: Vladimir Herzog" (evidence file, folio 3977).

⁵⁸ *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folios 405 and 407); Report of the National Truth Commission (evidence file, folios 1004 and 3299); Committee of Families of the Political Disappeared. "1975: Vladimir Herzog" (evidence file, folio 3977); Pages devoted to Vladimir Herzog in the publication "*Direito à memória e à verdade*" (evidence file, folio 10337.3); Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração* (evidence file, folios 8759 to 8767).

⁵⁹ Report of the National Truth Commission (evidence file, folio 3317).

⁶⁰ Report of the National Truth Commission (evidence file, folio 3273).

⁶¹ Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 228 (evidence file, folio 14425).

⁶² Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração*, pp. 111 to 137 (evidence file, folios 8782 a 8795).

119. Many victims were executed in clandestine centers used by DOI-CODI/SP agents to torture and murder people and to hide the corpses.⁶³ The Itapevi house, located in the metropolitan area of São Paulo, has been named as a clandestine center used by the Second Army's DOI-CODI and by the CIE to carry out acts of torture and to execute those imprisoned under Operation Radar (especially members of the PCB).⁶⁴

120. In this way, members of the PCB were gradually detained, tortured and executed by Operation Radar between 1974 and 1976.⁶⁵ According to the Brazilian Federal Public Prosecution Service, evidence obtained from 1970 to 1975 reveals the systematic practice of executions and disappearances of the opposition, with a list of 281 deaths or disappearances of opponents, which represents 75% of all the deaths and disappearances throughout the time of the dictatorship in Brazil.⁶⁶

D. The events of October 25, 1975

121. On the evening of October 24, 1975, two DOI/CODI agents arrived at the offices of TV Cultura where Vladimir Herzog was working. Mr. Herzog was asked to accompany them to the DOI/CODI in order to give a statement. After the director of the television channel intervened, the security forces agreed to summon Mr. Herzog so that he could make a "voluntary" statement the following morning.⁶⁷

122. Vladimir Herzog went to the offices of the DOI/CODI, voluntarily, on the morning of Saturday, October 25.⁶⁸ On arriving, he was deprived of his liberty, interrogated and tortured. The journalist, Rodolfo Osvaldo Konder, who was detained in the DOI/CODI at the time, has indicated that:

On Saturday morning, I saw that Vladimir Herzog had arrived [...]. George Duque Estrada, from the "*Estado de São Paulo*" was next to me and I commented to him that Vladimir Herzog was there. [...] Some time later, Vladimir was taken from the room. We continued to be seated on a bench until one of the interrogators came and took me and [...] Duque Estrada to an interrogation room [...]. Vladimir was sitting on a chair with a hood over his head. When we entered the room, the interrogator ordered us to take off our hoods, and that's why we saw that it was Vladimir and we also saw the interrogator. [...] Both Duque Estrada and I advised Vladimir to say what he knew. [...] Vladimir said that he knew nothing and the two of us were taken from the room back to the wooden bench where we were seated previously, in the next room. From there we could hear clearly the shouts, first of the interrogator and then of Vladimir, and we also heard when the interrogator asked that someone pass him the "*pimentinha*"⁶⁹ and requested the help of a team of torturers. Someone turned the radio on and Vladimir's cries were nearly drowned out by the sound of the radio [...]. At that moment, Vladimir was being tortured and cried out. After a certain time, the sound of Vladimir's voice changed as if they were putting something in his mouth [...], as if they had put a gag

⁶³ Report of the National Truth Commission (evidence file, folio 3251).

⁶⁴ Report of the National Truth Commission (evidence file, folios 3141 and 3250).

⁶⁵ Report of the National Truth Commission (evidence file, folio 3123).

⁶⁶ Federal Public Prosecution Service, *Crimes da Ditadura Militar*, pp. 76 and 77 (evidence file, folios 14273 and 14274).

⁶⁷ *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folio 406); Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração*, pp. 132 and 133 (evidence file, folio 8793).

⁶⁸ *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folio 406); Report of the National Truth Commission (evidence file, folio 3299); Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração*, p. 133 (evidence file, folio 8793).

⁶⁹ The "*pimentinha*" was an electric shock device, commonly known as an "electric prod" in Latin America.

in this mouth. Later the sounds ceased. After lunch [...] the same interrogator came [...] he took me by the arm and led me to the room where Vladimir was being held, allowing me to take my hood off, but now he seemed particularly nervous.⁷⁰

123. On the afternoon of that day, Vladimir Herzog was murdered by the members of the DOI/CODI who were holding him prisoner. According to the expert opinion provided to the National Truth Commission, it was determined that he had been strangled.⁷¹ Vladimir Herzog was 38 years of age.

124. That same day, the Second Army Command, in a press release, published the official version of the events. It affirmed that Vladimir Herzog had committed suicide by hanging himself with a strip of cloth. The press release stated that Mr. Herzog had been invited to appear, because Konder and Duque Estrada had named him as a member of the PCB. According to this version, during a face-to-face with these journalists, Vladimir Herzog had allegedly confessed that he was a member of the party and had even made a written statement.⁷² Lastly, it was asserted that a forensic report had confirmed death by suicide.⁷³

125. The murder of Vladimir Herzog caused deep shock in Brazilian society. Strikes were held for several days promoted by both the journalists association and by university students and professors.⁷⁴ Thousands of people attended Vladimir Herzog's funeral.⁷⁵ Also, a few days after his death, a high mass was held in his honor in São Paulo Cathedral attended by thousands of people.⁷⁶

E. Military police investigation (IPM No. 1173-75)

126. The major social reaction to Vladimir Herzog's death resulted in the decision of the Commander General of the Second Army that a military police investigation should be opened to discover "the circumstances of the suicide of the journalist Vladimir Herzog." Military Criminal Investigation No. 1173-75 was headed by Brigade General Fernando Guimarães Cerqueira Lima.⁷⁷

127. Mr. Motoho Chiota, the official who wrote the forensic report concluded that the position of the corpse corresponded to a "typical position of suicide by hanging." Also, Arildo Viana and Harry Shibata, forensic experts, provided an autopsy report.⁷⁸ The fallacious nature of the

⁷⁰ Proceeding No. 2008.61.81.013434-2, São Paulo Federal Justice System, Volume 2, folio 280, statements of Rodolfo Osvaldo Konder, of November 7, 1975 (evidence file, folios 3965 to 3967); Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração*, pp. 134 and 135 (evidence file, folio 8794); Report of the National Truth Commission (evidence file, folios 3300, 3301 and 11097).

⁷¹ Report of the National Truth Commission (evidence file, folio 3300).

⁷² Report of the National Truth Commission (evidence file, folios 1003 and 3300).

⁷³ Report of the National Truth Commission (evidence file, folio 1004); Proceeding No. 2008.61.81.013434-2, São Paulo Federal Justice System, Volumen 3, folios 492 and 493, Official Note of the Second Army Command.

⁷⁴ Brazil. *Desaparecidos políticos, um capítulo não encerrado da história Brasileira*. Editorial Instituto Macuco. São Paulo: 2012 (evidence file, folio 7245); Expert opinion of John Dinges (evidence file, folio 14565). Report of the National Truth Commission (evidence file, folio 635)

⁷⁵ Dantas, Audálio. *As duas guerras de Vlado Herzog* (evidence file, folios 3825 and 3883); Figueiredo, Lucas. *Lugar nenhum: militares e civis na ocultação dos documentos da ditadura*. 1st ed. São Paulo: Companhia das Letras, 2015, p. 94 (evidence file, folio 8678); Report of the National Truth Commission (evidence file, folio 635)

⁷⁶ *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folio 406); Report of the National Truth Commission (evidence file, folio 635 and 3300).

⁷⁷ Report of the National Truth Commission (evidence file, folio 3300); Dantas, Audálio. *As duas guerras de Vlado Herzog* (evidence file, folios 3897 and 3898).

⁷⁸ Report of the National Truth Commission (evidence file, folio 3300).

autopsies provided by the security forces' own physicians has been reported as a constant during the Brazilian military dictatorship.⁷⁹

128. The investigation reached the conclusion that Vladimir Herzog died from suicide by hanging. In this way, the official version at the time of the event was legitimated.⁸⁰ That being the case, and considering that neither the military criminal code nor military regulations had been violated, the investigations were closed. This decision was confirmed on February 12, 1976, by the Military Jurisdiction.⁸¹

129. On December 9, 1975, Vladimir Herzog's death certificate was issued, identifying the cause of death as "mechanical asphyxiation by hanging."⁸²

F. Declaratory action No. 136-76

130. On April 19, 1976, Clarice, Ivo and André Herzog filed a declaratory action before the São Paulo Federal Justice System⁸³ to obtain a declaration of the responsibility of the Federal Union⁸⁴ for the arbitrary detention, torture and death of Vladimir Herzog.⁸⁵

131. On June 2, 1976, the Union presented its defense,⁸⁶ and on March 16, 1978, the federal judge rejected its preliminary arguments.⁸⁷ On May 16, 1978, the preliminary hearing was held.⁸⁸ During this hearing, Harry Shibata testified that although he had signed Herzog's autopsy report, he had never seen his corpse.⁸⁹ Also, the journalist, Paulo Sérgio Markun stated that the testimony he had given in the context of the military police investigation had

⁷⁹ São Paulo Municipal Chamber. CPI – Perus/Desaparecidos. In: *Vala clandestina de Perus: desaparecidos políticos, um capítulo não encerrado da história Brasileira*. São Paulo: Instituto Macuco, 2012, folio 172 (evidence file, folio 3535); Expert opinion of Sergio Suiama provided during the hearing; Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 116 (evidence file, folio 14313).

⁸⁰ Dantas, Audálio. *As duas guerras de Vlado Herzog* (evidence file, folio 3897); Proceeding No. 2008.61.81.013434-2, São Paulo Federal Justice System, Volumen 1, folio 129, Opinion of the Military Public Prosecutor requesting closure, of February 12, 1976 (evidence file, folio 4249); Proceeding No. 2008.61.81.013434-2, São Paulo Federal Justice System, Volumen 1, folio 130/132, Decision to close the Military Police Investigation of March 8, 1976 (evidence file, folios 4252 to 4255); Report of the National Truth Commission (evidence file, folio 3300); Markun, Paulo. *Meu querido Vlado. A história de Vladimir Herzog e do sonho de uma geração*, p. 112 (evidence file, folio 8783); *Direito à Memória e à Verdade: Special Commission on Political Deaths and Disappearances*, p. 408 (evidence file, folio 406).

⁸¹ Proceeding No. 2008.61.81.013434-2, São Paulo Federal Justice System, Volumen 1, folio 129, Opinion of the Military Public Prosecutor requesting closure of February 12, 1976 (evidence file, folio 4249).

⁸² Proceeding No. 2008.61.81.013434-2, folio 629, Death certificate of Vladimir Herzog, dated December 9, 1975 (evidence file, folio 4210).

⁸³ Statement by Clarice Herzog during the public hearing.

⁸⁴ The term "Union" or "Federal Union" is synonymous with the Federal Government in Brazil.

⁸⁵ Proceeding No. 2008.61.81.013434-2, folios 326, 328 and 333 (evidence file, folios 4256 to 4272); Initial request of Declaratory action No. 136/76, of April 19, 1976 (evidence file, folio 4272).

⁸⁶ Proceeding No. 2008.61.81.013434-2, folios 88-123 (evidence file, folios 4274 to 4309).

⁸⁷ Proceeding No. 2008.61.81.013434-2, folios 268-270 (evidence file, folios 4311 to 4313).

⁸⁸ Proceeding No. 2008.61.81.013434-2, folios 431/452, Preliminary and sentencing hearing in Declaratory action No. 136/76, of May 16, 1978 (evidence file, folio 4333).

⁸⁹ Proceeding No. 2008.61.81.013434-2, folio 441, Statement by Harry Shibata in Declaratory action No. 136/76, of May 16, 1978 (evidence file, folio 4158); Proceeding No. 2008.61.81.013434-2, folio 431/452, Preliminary and sentencing hearing in Declaratory action No. 136/76, of May 16, 1978 (evidence file, folio 4342).

been manipulated.⁹⁰ Lastly, Rodolfo Konder stated that he could clearly hear Mr. Herzog's cries while he was tortured by members of the DOI/CODI.⁹¹

132. On October 27, 1978, the federal judge, Marció José de Moraes, delivered judgment declaring that Vladimir Herzog had died from unnatural causes when he was in the DOI/CODI/SP. The judge indicated that there had been no reason for Mr. Herzog to wear a belt because he was wearing a one-piece suit; he also referred to the illegality of Vladimir Herzog's detention, as well as the evidence of the torture to which he had been subjected.⁹²

133. The judge asserted that the supplementary report (whose main conclusion was the 'occurrence of suicide by hanging') was worthless because this document had been drawn up based on the autopsy report, which had been proved to have been fabricated. He also noted that the statements taken during the Army's investigation in favor of the Federal Union's version had not been repeated during the proceeding and had no probative value because they were completely contrary to the testimonies taken judicially in keeping with the adversarial principle.⁹³ Thus, the Federal Union was unable to prove its version of Vladimir Herzog's suicide.

134. In addition, the judge concluded that the crimes of abuse of power and torture had been perpetrated against Vladimir Herzog and the other political prisoners detained in the DOI/CODI, and therefore required that the case file be forwarded to the prosecutor of the Military Jurisdiction.⁹⁴

135. The Union filed an appeal against this judgment on November 17, 1978.⁹⁵ In 1983, the Federal Appeals Court declared that a legal relationship existed between the parties of the Declaratory Action and the Union, which consisted in the obligation of the latter to compensate the damage arising from Mr. Herzog's death, and indicated that damages should be claimed by an action for compensation. The Union filed a request for reconsideration of this decision ("*embargos infringentes*").⁹⁶ On May 18, 1994, the Federal Regional Court of the third region rejected the appeal,⁹⁷ and the decision became final on September 27, 1995.

G. The Amnesty Law

⁹⁰ Proceeding No. 2008.61.81.013434-2, folio 431/452, Preliminary and sentencing hearing in Declaratory action No. 136/76, of May 16, 1978 (evidence file, folio 4349 to 4351); Proceeding No. 2008.61.81.013434-2, folio 448, Statement by Paulo Sérgio Markun in Declaratory action No. 136/76, of May 16, 1978 (evidence file, folios 4362 to 4366).

⁹¹ Report of the National Truth Commission (evidence file, folio 3300 and 3301).

⁹² Proceeding No. 2008.61.81.013434-2, Judgment in Declaratory action No. 136/76, October 27, 1978 (evidence file, folios 4074 to 4090).

⁹³ Proceeding No. 2008.61.81.013434-2, Judgment in Declaratory action No. 136/76, October 27, 1978 (evidence file, folios 4083 to 4091).

⁹⁴ Proceeding No. 2008.61.81.013434-2, Judgment in Declaratory action No. 136/76, October 27, 1978 (evidence file, folios 4028 to 4094).

⁹⁵ Proceeding No. 2008.61.81.013434-2, folios 725-743, Appeal by the Federal Union, November 17, 1978 (evidence file, folio 4377 to 4396).

⁹⁶ The "*embargos infringentes*" were an exclusive defense remedy based on the absence of unanimity in a collegiate decision. They also contested specific points on which there was disagreement. It should be pointed out that only the contested points could have suspensive effects or be reconsidered; the rest of the ruling remained unaltered.

⁹⁷ Federal Regional Court of the Third Region, Judgment on the request for reconsideration. No. 89.03.7264-2, of May 18, 1994 (evidence file, folio 4315 to 4328).

136. On August 28, 1979, General João Baptista Figueiredo validated Amnesty Law No. 6683/79 which granted an amnesty as follows:⁹⁸

Article 1. Amnesty is granted to anyone who, during the period from September 2, 1961, to August 15, 1979, committed political or related crimes; electoral crimes; to anyone whose political rights were suspended, and to officials of the direct and indirect administration, of institutions linked to the public powers, to officials of the legislature and the judiciary, to military personnel and to trade union leaders and representatives, who have been sanctioned on the basis of institutional and complementary acts.

§ 1º For the effects of this article, crimes of any nature related to political crimes or carried out with a political motivation shall be considered related.

§ 2º Anyone convicted of the crimes of terrorism, assault, abduction and personal attacks is excluded from the benefits of the amnesty.

137. On April 29, 2010, the Federal Supreme Court decided, by seven votes to two, that the Amnesty Law was compatible with the 1988 Brazilian Constitution, reaffirming its effects. This decision was of an *erga omnes* nature, with binding effects for all the organs of the State.⁹⁹

138. This Court has already ruled on the said law in the judgment handed down in the case of Gomes Lund *et al.* (*Guerrilha do Araguaia*) v. Brazil:

Under this law, to date, the State has not criminally investigated, prosecuted or punished those responsible for the human rights violations committed during the military regime [...]. This is because "the interpretation [of the Amnesty Law] automatically absolves all the human rights violations that may have been perpetrated by agents of the political repression."¹⁰⁰

[...]

Given its manifest incompatibility with the American Convention, the provisions of the Brazilian Amnesty Law that impede the investigation and punishment of gross human rights violations lack legal force. Consequently, they cannot continue to represent an obstacle to the investigation of the facts in this case, or to the identification and punishment of those responsible, and they cannot have an equal or similar impact on other cases of gross violations of human rights recognized in the American Convention that occurred in Brazil.¹⁰¹

139. With regard to the ADPF [Action claiming non-compliance with a fundamental precept] decision No. 153, the Brazilian Bar Association, the petitioner in that action, filed a motion for clarification ("*embargos de declaração*") on March 16, 2011, that had not been decided at the time of this judgment. Also, the judiciary continue to apply Law No. 6683/79.

H. Police investigation No. 487/92 (São Paulo state jurisdiction)

⁹⁸ Law No. 6,683, of August 28, 1979 (evidence file, folio 6825); *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folio 26).

⁹⁹ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, paras. 135 and 136.

¹⁰⁰ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 135.

¹⁰¹ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 174.

140. At the beginning of 1992, an interview was published in the weekly magazine “*Isto é, senhor,*” in which Pedro Antonio Mira Grancieri, known as “*Captain Ramiro,*” stated that he had been the only person responsible for the Vladimir Herzog’s interrogation.¹⁰²

141. As a result of this, on April 27, 1992, Hélio Bicudo, a federal member of Congress at the time, asked the Public Prosecution Service to investigate the participation of Mira Grancieri in Vladimir Herzog’s death.¹⁰³ On May 4, 1992, the Public Prosecution Service requested the police to open a police investigation, and required that Mira Grancieri be formally identified by witnesses.¹⁰⁴

142. Despite the progress made in the investigation, on July 21, 1992, Mira Grancieri filed an application for *habeas corpus*, arguing that the facts had already been examined by the military investigation which had been closed, that the ordinary jurisdiction did not have competence to examine the facts, and that the Amnesty Law prevented an investigation of the facts.¹⁰⁵

143. On October 13, 1992, the Fourth Chamber of the São Paulo State Court unanimously agreed to grant a writ of *habeas corpus* and closed the investigation in application of the Amnesty Law.¹⁰⁶

144. On January 28, 1993, the São Paulo Prosecutor General appealed the decision on the basis that police investigations could not be paralyzed by an application for *habeas corpus*.¹⁰⁷

145. Nevertheless, on August 18, 1993, the Superior Court of Justice confirmed the trial judge’s decision. The justices ruled that formal procedural requirements had not been met and rejected the appeal.¹⁰⁸

I. Acknowledgement of responsibility under Law No. 9,140/1995

146. On December 4, 1995, Law No. 9,140/1995 was promulgated in which the State acknowledged its responsibility, *inter alia*, for the “murder of political opponents” over the period September 2, 1961 to August 15, 1979.

147. The Law also created the Special Commission on Political Deaths and Disappearances (CEMDP). Among other matters, the Commission was mandated with identifying individuals: (a) who, because they had participated, or had been accused of participating, in political activities had died from unnatural causes in police establishments or similar places; (b) who had died due to police repression during public demonstrations or armed conflicts with the

¹⁰² Weekly magazine “*Isto é Senhor*” of March 25, 1992, article “*Eu, Capitão Ramiro, interroguei Herzog*” (evidence file, folio 4127 to 4131); Proceeding No. 2008.61.81.013434-2, folios 974/982, Hélio Bicudo’s representative, April 27, 1992 (evidence file, folio 4439).

¹⁰³ Proceeding No. 2008.61.81.013434-2, folios 974/982, Hélio Bicudo’s representative, April 27, 1992 (evidence file, folio 4439/4447).

¹⁰⁴ Proceeding No. 2008.61.81.013434-2, folios 1151, Public Prosecution Service request to open a police investigation dated May 4, 1992 (evidence file, folios 4448 to 4450).

¹⁰⁵ *Habeas corpus* in favor of Pedro Antônio Mira Grancieri, No. 131.798/3-4-SP, of July 21, 1992, j. 13/10/92, Fourth Criminal Chamber, Proceeding No. 2008.61.81.013434-2, folios 1191-1198 (evidence file, folios 4478 to 4485).

¹⁰⁶ Decision of October 13, 1992, in the *habeas corpus* proceeding (evidence file, folios 4478 to 4485 and 13742 to 13749); Statement made during the hearing by Marlon Weichert.

¹⁰⁷ Proceeding No. 2008.61.81.013434-2, folio 1208, Special appeal of January 28, 1993, against the *habeas corpus* decision (evidence file, folio 4487 to 4497).

¹⁰⁸ Proceeding No. 2008.61.81.013434-2, folio 1232/1242, Judgment of the Superior Court of Justice in Special Appeal No. 33.782-7-SP, of August 18, 1993 (evidence file, folios 4499 to 4509).

security forces, and (c) who had died as a result of suicide committed due to fear of imminent arrest or as a result of the psychological consequences of acts of torture perpetrated by agents of the security forces.

148. Law No. 9,140/95 also determined that the Special Commission could award pecuniary compensation to the next of kin of those who died or were disappeared for political reasons. In this regard, it established a mathematical formula and a minimum sum of R\$100.000.¹⁰⁹

149. Based on that law, Clarice Herzog requested acknowledgement that Vladimir Herzog had been tortured and murdered in the São Paulo DOI/CODI. Her request was approved in April 1996¹¹⁰ and, in 1997, she received R\$100,000.00 (equivalent to approximately US\$100,000.00 at the time) as compensation.¹¹¹

150. Subsequently, in 2007, the Special Commission published a report entitled "*Direito à Memória e à Verdade*" (The Right to Memory and to Truth) in which it analyzed the general context in which the last Brazilian dictatorship occurred and also cases of specific victims of State terrorism, including Vladimir Herzog.¹¹²

151. Regarding Vladimir Herzog, the Special Commission concluded that:

The case of Vladimir Herzog caused nation-wide commotion that changed the attitude of civil society owing to the acts of torture perpetrated against political prisoners.

[...] The death of Vladimir Herzog occurred when press censure was beginning to ease up and the general public began to lose its fear of dissent and protest. The repercussion of the accusations significantly damaged the credibility of the military regime and resulted in the rise of a strong feeling of indignation in all the opinion-forming media. The falsity of the alleged suicide became even clearer from the photographs that showed the journalist hanged in the São Paulo DOI-CODI offices, where he had gone to make a statement in response to a summons received the previous evening.

[...] Vladimir Herzog was placed on the list of individuals being monitored by the law enforcement agencies because they were suspected of belonging to the PCB. He was summoned to appear voluntarily before the DOI-CODI in Tutoia Street, Paraíso district, at 8 a.m. on October 25, 1975. The same day, about 15 hours later, his jailers allegedly found him dead, hanged with the belt of the prison one-piece suit, with his feet on the ground, partially suspended. Those detained with him were unanimous in declaring that the obligatory one-piece suit they all wore did not include a belt.

That farce was finally exposed when the statements of George Duque Estrada and Leandro Konder, journalists detained in the same place, were published. They testified that they had heard Vladimir Herzog's cries when he was being tortured. Clear evidence of torture was identified by the Jewish funeral committee in charge of preparing the body for burial. This was the reason Vladimir Herzog was not buried in the area of the cemetery kept for those who had committed suicide, according to the religious precepts of Judaism. Lastly, the contradictory statements of the forensic physicians, Harry Shibata, Arildo de Toledo Viana and Armando Canger Rodrigues, during the court action filed by the family, also contributed to demolish the false version of suicide. When the

¹⁰⁹ Law No. 9,140 of December 4, 1995 (evidence file, folios 13724 to 13727).

¹¹⁰ Copy of extract from the sixth regular meeting of the Commission on Political Deaths and Disappearances, published in the Official Gazette of April 11, 1996 (evidence file, folio 13729); Statement by Clarice Herzog during the public hearing.

¹¹¹ Decree No. 2,255 of June 16, 1997 (evidence file, folio 13732).

¹¹² *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folios 1 to 499); Statement by Clarice Herzog during the public hearing.

media were notified of his death, the journalists brought many newsrooms in São Paulo to a halt, and the company owners had to negotiate with them so that they would ensure that the following day's edition could go out. The journalists' association declared a permanent vigil and a religious ceremony was organized in the Cathedral, which the Commander of the Second Army, General Ednardo D'Ávila Melo tried to prevent by closing the avenues that led to the center of São Paulo. Nevertheless, thousands of people crammed into the overcrowded Cathedral and part of the square outside during the ecumenical service held by Cardinal Don Paulo Evaristo, Rabbi Henry Sobel and the Reverend Jaime Wright, brother of the disappeared politician, Paulo Stuart Wright.

In 1978, the courts ruled that the Union was responsible for his death. Accordingly, the processing of Vladimir Herzog's case by the CEMDP was undisputed, and was approved unanimously in the initial months of the Special Commission's existence. Unfortunately, the report presented by the Ministry of the Marine to the Minister of Justice Mauricio Correa in 1993 when the democratic rule of law had been in force in our country for five years preferred to adhere to the version of the dictatorship: "he committed suicide on October 25, 1975, by hanging himself in his cell in the Second Army's DOI-CODI, as described in the IPM and rulings issued by competent organs of the São Paulo Public Security Secretariat."

In 1979, in honor of Vlado – as he was known to his colleagues – the Professional Journalists' Association of the state of São Paulo created the Vladimir Herzog Amnesty and Human Rights journalistic prize."¹¹³

J. Actions of the Federal Public Prosecution Service (Proceeding No. 2008.61.81.013434-2)

152. Based on the facts described in the CEMDP report, on November 21, 2007, the lawyer, Fábio Konder Comparato, requested the Federal Public Prosecution Service to investigate the criminal acts and abuse perpetrated against political opponents of the military regime, understanding that the legal framework then in force obliged the State to investigate and punish any crimes against humanity that had been committed.¹¹⁴

153. Initially, the request was examined by members of the Federal Public Prosecution Service who did not have jurisdiction for criminal matters. Consequently, on March 5, 2008, the Prosecutor of the Republic, Eugenia Augusta Gonzaga Favero, and the Regional Prosecutor of the Republic, Marlon Alberto Weichert, requested that the proceedings be forwarded to one of the members of the Public Prosecution Service with jurisdiction for criminal matters. At that time, they expressly asked for an investigation into the crimes committed against Vladimir Herzog, affirming that the state jurisdiction's ruling was null and void.¹¹⁵

154. As a result of this request, on September 12, 2008, Prosecutor Fábio Elizeu Gaspar filed a motion requesting the Federal Court to close the investigation.¹¹⁶

155. In this motion, he acknowledged that the murder of Vladimir Herzog had the characteristics of a crime against humanity, and stated that he had "no difficulty in concluding

¹¹³ *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folios 405 to 407).

¹¹⁴ Brief of Fabio Konder Comparato submitted to the Prosecutor of the Republic, São Paulo, November 19, 2007). (evidence file, folios 3521 to 3527).

¹¹⁵ Proceeding No. 2008.61.81.013434-2, folio 1279, Ofício No. GABPR12-EAGF/SP-000109/2008, of March 5, 2008 (evidence file, folios 4511 to 4513).

¹¹⁶ Proceeding No. 2008.61.81.013434-2, folios 2-50, Regional Prosecutor of the Republic's request to close the case (evidence file, folios 4515 to 4563).

that the murder of Vladimir Herzog has all the characteristics of the so-called crimes against humanity, and can be fully characterized as such.” Nevertheless, he understood that the law did not include a definition that characterized it in this way.¹¹⁷

156. The prosecutor also considered that the Amnesty Law was not applicable to the case. In his words: “The law is quite clear. Amnesty is granted for political crimes, and crimes related to political crimes and electoral crimes. The murder of Vladimir Herzog may be considered an inadmissible political crime, never an admissible one.” He also indicated that the amnesty did not extinguish the possibility of punishing the crime committed.¹¹⁸ However, he concluded that it was not possible to conduct the criminal investigation, because substantial *res judicata* existed.¹¹⁹ Moreover, a statute of limitations was applicable as regards the possible punishment¹²⁰ whether or not the judge had jurisdiction.¹²¹

157. Regarding the application of statutory limitations to the criminal action, he considered that the fact that Brazil was a party to the Pact of San José did not necessarily mean that the crime was not subject to the statute of limitations in this specific case, because the treaty “does not establish clearly any hypothesis of imprescriptibility for the past.” In addition, it was his opinion that international custom “cannot overrule domestic proceedings” and that imprescriptibility could not be established based on international custom, because that would lead to lack of legal certainty.¹²²

158. Lastly, he understood that there was no incompatibility between the domestic organ’s decision and the international obligations of the State, because they were two different systems.¹²³

159. In response to his request, the federal judge, Paula Mantovani Avelino, accepted the arguments of the Public Prosecution Service, understanding that *res judicata* existed in the case and this made it impossible to continue to the investigation since the criminal action had extinguished: “Since substantial *res judicata* exists, the possibility of punishing the crime has terminated irremediably and this, in itself, would prevent opening a new proceeding to investigate the same facts.”¹²⁴ She also affirmed that the acts perpetrated against Vladimir Herzog should not be considered crimes against humanity because such crimes had not been defined by law at the time of the events. Her ruling also indicated that “the domestic legal order in force does not admit the creation of crimes by subordinate legislation, provisional measure, or legislative decree or decision; thus, *a fortiori* it is not possible to conclude that a custom may be used to this end, however entrenched this is.”¹²⁵

¹¹⁷ Proceeding No. 2008.61.81.013434-2, Regional Prosecutor of the Republic’s request to file the case (evidence file, folio 4541).

¹¹⁸ Proceeding No. 2008.61.81.013434-2, Regional Prosecutor of the Republic’s request to file the case (evidence file, folios 4536 to 4539).

¹¹⁹ Proceeding No. 2008.61.81.013434-2, Regional Prosecutor of the Republic’s request to file the case (evidence file, folio 4525).

¹²⁰ Proceeding No. 2008.61.81.013434-2, Regional Prosecutor of the Republic’s request to file the case (evidence file, folios 4514 to 4563); Statement made during the hearing by Marlon Weichert.

¹²¹ Proceeding No. 2008.61.81.013434-2, Regional Prosecutor of the Republic’s request to file the case (evidence file, folios 4527 and 4528).

¹²² Proceeding No. 2008.61.81.013434-2, Regional Prosecutor of the Republic’s request to file the case (evidence file, folios 4539 a 4561).

¹²³ Proceeding No. 2008.61.81.013434-2, Regional Prosecutor of the Republic’s request to file the case (evidence file, folio 4552).

¹²⁴ Proceeding No. 2008.61.81.013434-2, Decision of the Federal Judge of January 9, 2009 (evidence file, folio 4574).

¹²⁵ Proceeding No. 2008.61.81.013434-2, Decision of the Federal Judge of January 9, 2009 (evidence file, folio 4577).

160. Lastly, according to this judge, the action had been extinguished because, in her opinion: "homicide and genocide, and also torture [...] are not imprescriptible crimes in the Constitution and other provisions of the laws in force."¹²⁶ Thus, she decided to close the proceeding on January 9, 2009.¹²⁷

K. Civil action filed by the Federal Public Prosecution Service in 2008

161. On May 14, 2008, the Federal Public Prosecution Service filed a public civil action against the Union and against the former commanders of the DOI/CODI/SP, Audir Santos Maciel and Carlos Alberto Brilhante Ustra. The purpose of the action was for the court: (1) to declare that the Brazilian Army was obliged to release all the information it held concerning the activities that took place in the Second Army's DOI/CODI between 1970 and 1985; (2) to declare that the Union had failed to take the necessary measures to make reparation for damages in relation to payment of the compensation established in Law No. 9,140/95; (3) to declare the responsibility of the former commanders, and (4) to sentence the commanders to make various reparations and be removed from public functions.¹²⁸

162. On May 5, 2010, the Eighth Federal Court of São Paulo declared the public civil action inadmissible arguing that the action was inappropriate, and also based on the Amnesty Law.¹²⁹ The court considered that the action filed by the Federal Public Prosecution Service could not impose an obligation "to act," and could not produce effects that were typical of, and inherent in, an application for *habeas data*.¹³⁰

163. Regarding the application of the Amnesty Law, the court founded its ruling on the decision of the Federal Supreme Court in ADPF No. 153, arguing that the said decision was binding "for everyone." It added that the amnesty was "broad, general and unlimited" and therefore ended all civil and criminal consequences of the facts amnestied.¹³¹ The Public Prosecution Service filed an appeal against this ruling on June 25, 2010.¹³² No final decision had been taken on the appeal at the date of this judgment.¹³³

L. Actions of the National Truth Commission (CNV)

164. On November 18, 2011, Law No. 12,528/2011 was promulgated creating the National Truth Commission (CNV). The purpose of the Commission was "to examine and to shed light

¹²⁶ Proceeding No. 2008.61.81.013434-2, Decision of the Federal Judge of January 9, 2009 (evidence file, folio 4581).

¹²⁷ Proceeding No. 2008.61.81.013434-2, Decision of the Federal Judge of January 9, 2009.(4565 a 4581); Proceeding No. 2008.61.81.013434-2, Federal Public Prosecution Service investigation proceeding (evidence file, folio 6641 to 6657).

¹²⁸ Initial petition of Public civil action No. 2008.61.00.011414-5, of May 14, 2008 (evidence file, folio 4583 to 4656); Copy of the record of Public civil action No. 2008.61.00.011414-5 (evidence file, folio 8930/10336); Statement made during the hearing by Marlon Weichert.

¹²⁹ Proceeding No. 2008.61.00.011414-5. Eighth Federal Court of São Paulo. Judgment of May 5, 2010, folios 18 and 20 (evidence file, folios 4658 to 4677); Copy of the record of Public civil action No. 2008.61.00.011414-5 (evidence file, folios 8930 to 10336).

¹³⁰ Proceeding No. 2008.61.00.011414-5, Judgment of May 5, 2010, folios 18 and 20 (evidence file, folio 4664).

¹³¹ Proceeding No. 2008.61.00.011414-5, Judgment of May 5, 2010, folios 18 and 20 (evidence file, folio 4676).

¹³² Copy of the record of Public civil action No. 2008.61.00.011414-5 (evidence file, folios 8930 to 10336); Appeal No. 0011414-28.2008.4.03.6100 of January 17, 2011 (evidence file, folios 4679 to 4680); Proceeding No. 2008.61.01.00.011414-5 (evidence file, folio 6708); Proceeding No. 2008.61.00.011414-5 Public civil action, Appeal (evidence file, folios 6664 to 6705).

¹³³ Consulted at: <http://www.jfsp.jus.br/foruns-federais/> on March 1, 2018.

on the gross human rights violations” committed between September 18, 1946, and October 6, 1988. It functioned from May 2012 to December 2014.¹³⁴

165. This Commission ordered another expert appraisal of the photographs of Vladimir Herzog’s body. The appraisal concluded that the marks on his throat and chest were typical of death by mechanical asphyxiation and not by self-inflicted hanging. In this regard, it indicated: “In September 2014, the Commission’s team of experts concluded its indirect expert report on the death of Vladimir Herzog. The experts indicated the existence of two grooves in the journalist’s neck, both made while he was still alive. One of them was typical of strangling, while the other was characteristic of hanging sites (sites prepared to simulate hangings). The evidence of two different marks in the cervical region was decisive for the experts to determine that: first, Vladimir Herzog was strangled, probably with the belt cited by the forensic expert and, then, a gallows system was devised, one end of the belt was tied to the protective grillwork of the window, and the other to Vladimir Herzog’s neck by a slip knot. The body was then placed in partial suspension to simulate an actual hanging.”¹³⁵

166. Consequently, it was determined that the cause of death was homicide by strangling. The team also examined the letter that the journalist had supposedly written just before he died and concluded that the wording was not spontaneous, but had been copied from a model.¹³⁶

167. In keeping with its powers, the National Truth Commission requested rectification of the cause of death recorded on Vladimir Herzog’s death certificate. On September 24, 2013, the judge ordered that the Civil Registry record that the death of Vladimir Herzog occurred as a result of injuries and ill-treatment suffered in the DOI/CODI/SP.¹³⁷ The Truth Commission’s final report stated that there could be no doubt that Vladimir Herzog had been unlawfully detained, tortured and murdered by agents of the State in the DOI/CODI/SP on October 25, 1975.¹³⁸

VII MERITS

168. The Court will now proceed to examine the international responsibility of the State based on its international obligations under the American Convention and the Inter-American Convention to Prevent and Punish Torture in relation to the alleged failure to investigate, prosecute and eventually punish those responsible for the torture and murder of Vladimir Herzog. In addition, the Court will examine the alleged failure to comply with the right to know the truth owing to the dissemination of the false version of Vladimir Herzog’s death, and the State’s refusal to hand over military documents and the consequent failure to identify the perpetrators of Mr. Herzog’s death. Lastly, the Court will determine whether the right to personal integrity of the members of Vladimir Herzog’s family has been violated owing to the failure to investigate and punish those responsible.

¹³⁴ Brazil, Presidency of the Republic, Law No. 12.528, of November 18, 2011; Statement made during the hearing by Marlon Weichert.

¹³⁵ Report of the National Truth Commission (evidence file, folio 3301).

¹³⁶ National Truth Commission, *Laudo Pericial Indireto produzido em decorrência da morte de Vladimir Herzog*, September 29, 2014 (evidence file, folios 6745 and 6746).

¹³⁷ Copy of the amended death certificate of Vladimir Herzog (evidence file, folios 13734 and 13735); Copy of the judgment in case No. 0046690- 64.2012.8.26.0100 (evidence file, folios 13737 to 13740); Statement by Clarice Herzog during the public hearing.

¹³⁸ Report of the National Truth Commission (evidence file, folio 3301).

VII-1
RIGHTS TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION
(Articles 8¹³⁹ and 25,¹⁴⁰ in relation to Articles 1(1)¹⁴¹ and 2¹⁴² of the American
Convention, and Articles 1,¹⁴³ 6¹⁴⁴ and 8¹⁴⁵ of the Inter-American Convention to
Prevent and Punish Torture)

A. Arguments of the parties and of the Commission

169. The **Commission** argued that the detention, torture and murder of Vladimir Herzog took place in the context of gross human rights violations during the Brazilian military

¹³⁹ Article 8. Right to a Fair Trial. "1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the Proceeding, every person is entitled, with full equality, to the following minimum guarantees: a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense; d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g. the right not to be compelled to be a witness against himself or to plead guilty; and h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind..

4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal Proceeding shall be public, except insofar as may be necessary to protect the interests of justice."

¹⁴⁰ Article 25. Judicial Protection. "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted."

¹⁴¹ Article 1. Obligation to Respect Rights. "1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

¹⁴² Article 2. Domestic Legal Effects. "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

¹⁴³ Article 1. "The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention."

¹⁴⁴ Article 6. "In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction."

¹⁴⁵ Article 8. "The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State."

dictatorship and, particularly, within an acknowledged systematic pattern of repressive actions against the Brazilian Communist Party (PCB). It also indicated that the actions were aimed at punishing the supposed political opinions and activism of the journalist and had the effect of threatening and intimidating other journalists who were critical of the military regime.

170. It considered that the impunity and concealment of the truth in this case had had prejudicial effects on the exercise of the right to freedom of expression, in general, and on the right to information in the country. In the Commission's opinion, freedom of expression had been a specific objective of the military repression in all the countries of the Southern Cone, by co-option and by direct control of the media, and also by violently attacking independent journalists and critics of the regime, resulting in detention, torture and murder in many cases.

171. The Commission recalled that, in cases of torture, the State must open an investigation, *ex officio*, and with due diligence, conducted by independent authorities who should not have any hierarchical or institutional connection to the accused.

172. In this regard, the Commission asserted that the State had failed to comply with its obligation to investigate, with due diligence, the facts that violated the human rights of Vladimir Herzog. In its opinion, the investigation into his death conducted in the military jurisdiction in 1975 prevented the clarification of the facts and violated the right of the victim's family to know the truth of what happened.

173. The Inter-American Commission recognized that, following the transition to democracy, the Brazilian State had taken measures that had contributed to clarifying the historical truth of the unlawful detention, torture and death of the journalist, Vladimir Herzog. Nevertheless, the "historical truth" contained in the reports produced by the Truth Commission did not complete or substitute for the State's obligation to ensure that individual or State responsibilities were determined by the courts in appropriate proceedings, and it was therefore the State's duty to open and expedite criminal investigations to determine the corresponding responsibilities pursuant to Articles 1(1), 8 and 25 of the Convention.

174. The Commission indicated that, in this case, the Brazilian Judiciary had validated the interpretation of Law No. 6,683/79 (Amnesty Law). Consequently, the Commission considered that the judicial authorities that took part in the investigation into the arbitrary detention, torture and murder of Vladimir Herzog had prevented the identification, prosecution and eventual punishment of those responsible, and had failed to exercise the proper control of conventionality to which they were obliged following ratification of the American Convention, in accordance with the international obligations of Brazil under international law.

175. In addition, the Commission recalled that the application of amnesty laws or other measures to exclude liability that prevented access to justice in cases of gross human rights violations had two effects. On the one hand, they rendered ineffective the obligation of States to respect the rights and freedoms recognized in the American Convention and to ensure their free and full exercise to all persons subject to their jurisdiction without any discrimination. On the other hand, they prevented access to information about the facts and circumstances that surrounded the violation of a fundamental right and eliminated the most effective measure to ensure the exercise of human rights – that is, the prosecution and punishment of those responsible – because they prevented implementation of the judicial remedies of the domestic jurisdiction.

176. It indicated that, in 2009, a federal criminal court had ruled to close the investigation into the facts of this case, considering that the closure ordered by the state courts in 1993, in application of the Amnesty Law, had acquired the status of *res judicata*. Thus, the Commission

understood that, in view of its evident incompatibility with the American Convention, the interpretation and application of the Amnesty Law in this case was aimed at shielding those presumably responsible from the action of justice and leaving the crime committed against the journalist Vladimir Herzog in impunity. It indicated that, in this case, the State could not resort to the principle of *ne bis in idem* in order not to comply with its international obligations.

177. Regarding the presumed violation of the principle of legality, the Commission argued that the opening of an investigation in this case did not violate the rule of law because, at the time the facts occurred, international law recognized as a general principle the imprescriptibility of war crimes and crimes against humanity.

178. Based on the above, the Commission concluded that the failure to investigate the facts, and to prosecute and punish those responsible violated the rights to judicial guarantees and judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Clarice (wife), André and Ivo (sons) and Zora (mother, deceased in 2006), all Herzog.

179. First, the **representatives** considered that Brazil's responsibility in this case was aggravated because it involved a crime against humanity, since the arbitrary detention, torture and death of Vladimir Herzog was not an isolated act, but occurred in a context of massive and systematic violence against those who were considered political opponents of the military regime.

180. The representatives indicated that the State had the obligation to investigate possible acts of torture or other cruel, inhuman or degrading treatment, an obligation that persisted even in those cases in which the facts occurred before the State had accepted the jurisdiction of the Court.

181. They argued that, although various proceedings had been conducted in the domestic sphere, to date the State had not guaranteed effective judicial protection to investigate and establish the whole truth of the circumstances of the arbitrary detention, torture and death of Vladimir Herzog, and to identify and punish those responsible.

182. They indicated that an effective investigation had not been conducted in the criminal jurisdiction because the only appropriate means for this, the criminal judicial proceeding before the competent authority of the ordinary federal jurisdiction, had been obstructed by *res judicata* and the statute of limitations, even before the effective initiation of the investigations. The previous attempt to obtain an investigation before the organs that did not have competence to act in the case was closed prematurely.

183. Regarding the Amnesty Law, they indicated that its interpretation had continued for decades allowing the authorities to evade the obligation to investigate, *ex officio*, facts that constituted gross human rights violations, such as torture. In the case of Vladimir Herzog, the Amnesty Law was applied specifically in 1992 and this, subsequently, led to the appeal filed by the Federal Public Prosecution Service being closed in 2008. The amnesty had also had effects on the public civil action filed by the Federal Public Prosecution Service. They indicated that those facts fell within the Court's temporal competence.

184. The representatives argued that the State had used the device of substantial *res judicata*, supposedly produced by the 1993 decision, to avoid investigating and punishing those responsible. That had been the main argument to close the investigations opened before the federal system of justice in 2008. In this regard, they indicated that the principle of *ne bis*

in idem was not an absolute right and was inapplicable when its purpose was to shield the accused from their criminal responsibility, or if it was not declared by an independent and impartial judge, or if it was not declared with the true intention of submitting the person responsible to the action of justice.

185. Regarding the statute of limitations and the principle of strict legality, the representatives argued that the prohibition and imprescriptibility of crimes against humanity has achieved the status of a peremptory norm of *jus cogens* that must be respected and complied with by the international community of States, regardless of whether or not they had ratified instruments that included such crimes. According to the representatives, at the time of the facts of this case, in 1975, torture and crimes against humanity had already been recognized as violations of international law.

186. Regarding the unjustified delay and the obstacles to the public civil action, the representatives of the presumed victims emphasized that, more than eight years after it had been filed, there was still no decision on the appeal in the public civil action filed by the Federal Public Prosecution Service in 2008. They stressed that the public civil action was of a declaratory nature, with specific requests based on documentary evidence provided to the case file, and that the accused had been identified and located, which eliminated the possibility of citing the criterion of the complexity of the action. The unjustified delay was based exclusively on the conduct of the judicial authorities who had acted with negligence and omission. This delay was particularly serious because the purpose of the public civil action was to obtain a declaration of the existence of the State obligation to release all the information relating to the activities conducted in the Army's DOI/CODI over the period 1970 to 1985.

187. Regarding the State's omission in relation to the effects of the Court's judgment in the case of *Gomes Lund et al.*, the representatives alleged that when the Court established that the Amnesty Law could not represent an obstacle for the investigation and punishment of those responsible for gross human rights violations, it also determined that the judgment would have effects for other cases of serious violations that had occurred in Brazil. Despite this, the State had failed to take the necessary steps to re-open the criminal investigations into serious human rights violations, the result being, in their opinion, that the State had incurred international responsibility for omission in the instant case.

188. Consequently, the representatives argued that Brazil was responsible for violating the obligation to ensure the right to freedom of expression owing to the failure to investigate, prosecute and punish those responsible for the gross human rights violations committed against the journalist Vladimir Herzog. They also concluded that the impunity of the facts to date constituted a situation of permanent violation of the obligation to investigate and punish torture, which resulted in the violation of the State's obligation to guarantee Articles 5 and 13 of the American Convention on Human Rights, in relation to Articles 1(1), 8 and 25 of this instrument, as well as Articles 1, 6 and 8 of the ICPPT, "to the detriment of Vladimir Herzog."

189. They also concluded that the State was responsible for violating the rights established in Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2 of this instrument, owing to the application of the Amnesty Law, the statute of limitations and other provisions of domestic law that prevented the investigation and punishment of the facts denounced. They considered, therefore, that, by applying such provisions, the State organs deprived Vladimir Herzog of due judicial protection, denying the right of his family to be heard by a competent authority and preventing them from obtaining a diligent, impartial and effective investigation.

190. Lastly, they considered that the State had violated the obligation to investigate, pursuant to the provisions of Articles 5 of the Convention and 1, 6 and 8 of the ICPPT.

191. The **State** considered that Articles 8 and 25 of the Convention should be differentiated, because each article protected different rights. It understood that Article 25 referred to access to the State jurisdiction following the violation of a victim's right; in other words, the obligation of the State to grant the victim the possibility of judicial protection to obtain recognition of a human rights violation and the consequent reparation.

192. Meanwhile, Article 8 of the Convention referred to the situation in which a person was a passive subject of a judicial proceeding; in other words, he was accused of having committed a wrongful act, which could be either criminal or civil in nature.

193. The State argued that the presumed victims had never been party to a judicial proceeding relating to the case in question, so that it was impossible that Article 8(1) of the American Convention and Article 8 of the ICPPT had been violated. That situation was a necessary condition in order to have those rights, and the State could not be sanctioned for the violation of those provisions. It also indicated that even if it was considered that the right to judicial guarantees covered the guarantee of due process of law, regardless of the capacity of the party (author or accused), violation of due process of law could not be verified in the instant case.

194. In the State's opinion there could be no doubt about the competence, independence and impartiality of the federal judge who admitted the request to close the case made by the Prosecutor of the Republic in 2008, so that it could not be alleged that due process of law had been violated. The Inter-American Commission's report did not indicate that there had been any violation of due process of law in the civil jurisdiction.

195. In this regard, it argued that, even after all the evidence in the case had been provided to the Court, no violation of the victims' right of defense in the domestic proceedings in which they were parties had been proved.

196. According to the State, the facts described in the submission to the Court revealed that the presumed violation of Article 25(1) of the Convention allegedly occurred only in the processing and conclusion of the requests for information by the Federal Public Prosecution Service in 2008. It argued that, contrary to what the Commission had indicated, the closure of the proceeding in 2008 was not due to the application of the Amnesty Law, but rather to the application of *res judicata* and the statute of limitations.

197. With regard to the temporal limits, it indicated that although States must conduct control of conventionality *ex officio*, taking into account the interpretation that the Court had made of the Convention, "the court's 1993 decision was taken before the judgment in the case of *Barrios Altos v. Peru* (2001), when the Court decided, for the first time, that it was empowered to rule on the validity of domestic laws, especially in the case of amnesty laws." In the State's understanding, up until then, the Judiciary had the obligation to respect the legal parameters previously established for the specific case in the domestic sphere and did not have the legal obligation to abide by the decisions of the Inter-American Court in cases relating to amnesty, the statute of limitations and *res judicata*; judges had to respect the principle of the rule of law and the procedural guarantees of the accused.

198. The State also indicated that the Court's judgments were binding for the specific case and for the parties thereto, and that it would not be reasonable to sanction the State when, at the time of the domestic decision, that legal obligation did not exist.

199. The State also noted that *jus cogens* norms did not have absolute hierarchy over procedural matters.

200. Consequently the State affirmed that: (a) legally, it was not possible to require the domestic authorities to adopt a decision other than the one adopted in 1993 with regard to the investigations; (b) disputing the domestic decision based on subsequent international jurisprudence did not take into consideration the formal limits applicable to due process of law (such as substantive *res judicata*); (c) abiding by procedural norms of a lower rank in cases of what could be considered *jus cogens* norms or serious human rights violations was not substantially different from the observance, at the domestic level, of the formal limits to a judge's actions (statute of limitations, *res judicata*, non-retroactivity of the more severe criminal law), and (d) the normative content of what could be considered a *jus cogens* norm or serious human rights violations should not be confused with an absence of limits to the State's international responsibility. Based on the above, the Brazilian State understood that it could not be held responsible for the supposed denial of justice in this case.

201. The guarantee of the statute of limitations was a mainstay of the democratic rule of law and could only be excluded, exceptionally: (a) for the criminal prosecution of certain crimes, where applying a statute of limitations would infringe upon their gravity or complexity; (b) by a legal provision, owing to adherence to the rule of law in criminal matters, and (c) for facts subsequent to the law that determined their imprescriptibility, owing to the principle of the priority of the criminal law, something which, in the State's opinion, had not occurred in this case.

202. The State acknowledged the Court's case law which considered that crimes were imprescriptible when they constituted "gross violations of human rights." However, the State dissented from that opinion because it made sense in the international criminal jurisdiction, which functioned in an ancillary way - especially when the State that bore the main responsibility did not exercise its jurisdiction effectively - and therefore exercised its jurisdiction at a much later date than when the facts occurred. It emphasized that none of the treaties signed by Brazil imposed on domestic criminal proceedings the obligation to prolong the statutory limitations.

203. According to the State, the imprescriptibility of a crime could not be based on international custom as that would be contrary to the principle of legality established in Article 9 of the American Convention.

204. Regarding the crime of torture, the State indicated that this crime had been defined in domestic law in 1997, by Law No. 9455/97. Accordingly, the criminal prosecution of this crime could only be initiated after that law's entry into force. The State argued that any other understanding would violate the principles of legality and non-retroactivity.

205. In relation to the alleged violation of the American Convention owing to an unjustified delay and obstacles that occurred in the context of the civil action, the State considered that the requests should be divided into two groups: those that involved rights guaranteed in the American Convention, and those that involved rights that were not included. Regarding the first group, the State considered that the context in which Carlos Alberto Brilhante Ustra and Audir Santos Maciel, responsible for the crimes of torture, were summoned to testify did not correspond to the civil jurisdiction, because the summons should have been issued in the criminal jurisdiction following a criminal investigation. In the case of the second group of requests, it indicated that the Convention recognized civil and political rights exclusively for individuals who had been or could be identified, and not for corporations, public entities, groups of people, etc. In this regard, the subject of both the supposed collective non-pecuniary

damage, and the request that the State release all the information on the activities carried out by the Second Army's DOI/CODI was the collectivity and not an individual; thus, those claims had no basis in the Convention. The State reached the same conclusion with regard to the request that the accused be relieved of their status as public officials. According to the State, the public civil action was inappropriate for its intended purpose. Consequently, it considered that the said proceeding should not be deemed an act that potentially violated Article 25 of the Convention. Subsidiarily, the State argued that there had been no irregularities in the processing of the public civil action.

206. In this regard, it asked the Court to exclude the said action from the case, either because it had not been mentioned in the Commission's Admissibility Report or because it did not refer specifically to the case of Vladimir Herzog.

207. With regard to the alleged violation of the obligation to investigate and punish torture that affected the right to freedom of expression, the State argued that the supposed violation of the obligation of guarantee of Articles 5 and 13 was not possible, because at the time of the facts, torture had not yet been defined as a crime in the laws of Brazil.

B. Considerations of the Court

208. In this section, the Court will develop the pertinent legal considerations on the alleged violations of the rights to judicial guarantees and judicial protection, in relation to the alleged impunity for the arbitrary detention, torture and death of the journalist Vladimir Herzog. To determine whether the State obligation to investigate, prosecute and punish those responsible for the torture and murder of Vladimir Herzog persisted at the time Brazil accepted the jurisdiction of the Court, the Court must first examine the facts that occurred in order to decide whether the death of Mr. Herzog was, indeed, the result of a crime against humanity as the representatives allege.

209. Also, before determining substantial aspects relating to the legal arguments presented by the parties, it should be pointed out that the amnesties adopted in the closing days of some of the South American dictatorships at that time – as in the case of Brazil where the Amnesty Law was enacted before the return to democracy – were intended to legitimate them; positing the illusory existence of an armed conflict, whose supposed victors, magnanimously, closed the alleged conflict declaring that the crimes committed by all those who intervened were covered by that law. However, the context of this case reveals the total absence of warlike acts, demonstrating that, at most, political crimes were committed that should have been prosecuted and punished by law, but that were repressed using criminal methods, and served as a pretext for the persecution of politicians, activists, members of trade unions, journalists, artists and any person who the dictatorship considered dissident or a danger to its power.

210. Thus, bearing in mind its temporal competence and the different law suits and actions of the Public Prosecution Service filed in this case, the Court will make its analysis in the following order: (1) crimes against humanity and the relevant international jurisprudence; (2) the legal consequences of the perpetration of a crime against humanity; (3) the torture and death of Vladimir Herzog and its consequences for this case, and (4) the State's actions before and after Brazil's acceptance of the jurisdiction of the Inter-American Court. Lastly, the Court will present the five conclusions it has drawn in this specific case.

B.1. Crimes against humanity

211. The Inter-American Commission considered that the torture and death of Mr. Herzog constituted a gross violation of human rights. The representatives of the presumed victims

considered that they constituted a crime against humanity. For both the Commission and the representatives, the consequences of either of these offenses would be the same: the obligation of the State to investigate, prosecute and punish those responsible for the facts, without using procedural obstacles that could protect them from legal action. Meanwhile, the State did not refer to either of these classifications, but contested the legal effects alleged by the Commission and the representatives in this specific case.

212. In the judgment in the *case of Almonacid Arellano v. Chile*,¹⁴⁶ relating to the murder of Luis Alfredo Almonacid Arellano on September 16, 1973, the Inter-American Court indicated that “there is sufficient evidence to conclude that in 1973, the year in which Mr. Almonacid Arellano died, the perpetration of crimes against humanity, including murder committed in the course of a widespread or systematic attack against certain sectors of the civilian population, was in violation of a binding rule of international law. The said prohibition to commit crimes

¹⁴⁶ Cf. *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, paras. 94 and ff:

94. The development of the concept of a “crime against humanity” started at the beginning of the last century. In the preamble to The Hague Convention on Laws and Customs of War on Land (1907) (Convention IV), the High Contracting Parties established that “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of Nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” Likewise, the term “crimes against humanity and civilization” was used by the Governments of France, the United Kingdom and Russia on May 28, 1915, to denounce the massacre of Armenians in Turkey.

95. Murder as a crime against humanity was included for the first time in Article 6(c) of the Charter of the International Military Tribunal of Nuremberg which was annexed to the Agreement to establish an International Military Tribunal for the trial and punishment of the main war criminals of the European Axis countries, signed in London on August 8, 1945 (the “London Charter”). Shortly afterwards, on December 20, 1945, the Control Council Law No. 10 also considered murder as a crime against humanity in its Article II(c). Similarly, the crime of murder was included in Article 5(c) of the Charter of the International Military Tribunal for the trial of the main war criminals of the Far East (Tokyo Charter), adopted on January 19, 1946.

96. Furthermore, the Court acknowledges that the Nuremberg Charter played an important role in establishing the elements that characterize a crime as a “crime against humanity.” This Charter provided the first articulation of the elements for such a crime. The original conception of such elements remained basically unaltered as of the date of the death of Mr. Almonacid Arellano, with the exception that crimes against humanity may be committed during both times of peaceful and times of war. On that basis, the Court acknowledges that crimes against humanity include the perpetration of inhuman acts, such as murder, committed in a context of widespread or systematic attacks against civilians. A single illegal act such as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise. In the same sense, the International Tribunal for the Former Yugoslavia rendered judgment in the *Case of Prosecutor v. Dusko Tadic*, when considering that “a single act committed by a perpetrator within a context of a widespread or systematic attack against the civil population brings about individual criminal liability, and it is not necessary for the perpetrator to commit numerous offenses in order to be considered responsible.” [...].

97. On the other hand, the International Military Tribunal for the trial of the Major War Criminals (hereinafter the “Nuremberg Tribunal”), which had jurisdiction to hear the cases of crimes included in the London Charter, stated that the Nuremberg Charter “is the expression of international law existing at the moment of its creation, and to such extent, is in itself a contribution to international law.” In this way, it provided recognition of the existence of an international custom, as an expression of international law, which prohibited such crimes.

98. The prohibition of crimes against humanity, including murder, was further corroborated by the United Nations. On December 11, 1946, the General Assembly confirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgments of said Tribunal.” Furthermore, in 1947, the General Assembly entrusted the International Law Commission with “formulating the international law principles recognized by the Charter and by the judgments of the Nuremberg Tribunal.” These principles were adopted in 1950. Among them, Principle VI(c) classifies murder as a crime against humanity. Likewise, the Court points out that Article 3 common to the Geneva Conventions of 1949, to which Chile has been a party since 1950, also prohibits “homicide in all its forms” of persons that do not directly take part in the hostilities.

against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.”¹⁴⁷

213. In this regard, the Court notes that, over its 40 years of existence, it has referred to crimes against humanity, war crimes or crimes under international law on very few occasions, given the exceptional nature and seriousness of these categories. It has only been in the *Cases of Goiburú v. Paraguay*,¹⁴⁸ *Gelman v. Uruguay*,¹⁴⁹ *La Cantuta v. Peru*,¹⁵⁰ *the Miguel Castro Prison v. Peru*¹⁵¹ (crimes against humanity), *the Massacres of El Mozote and neighboring places v. El Salvador*¹⁵² (war crimes) and *the Hacienda Brasil Verde Workers v. Brazil*¹⁵³ (crimes under international law), that it has used these categories for violations in the sense indicated in the judgment in the case of *Almonacid Arellano*, in order to explain clearly the scope of State responsibility under the Convention in the specific case, together with the legal consequences for the State.¹⁵⁴

214. To complement the foregoing, the Court notes that the prohibition of crimes under international law and crimes against humanity was already considered part of general international law by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity adopted by the United Nations General Assembly on November 26, 1968¹⁵⁵ (hereinafter “the 1968 Convention” or “the Convention on Non-Applicability of Statutory Limitations”). Bearing in mind Resolution 2338 (XXII) of the United Nations General Assembly,¹⁵⁶ the interpretation derived from the Preamble of the 1968 Convention is that the imprescriptibility of crimes against humanity arises from the fact that none of the instruments relating to their prosecution and punishment made provision for a limitation period, so that this Convention only reaffirmed pre-existing principles of international law. Thus, the Convention on Non-Applicability of Statutory Limitations is declarative in nature; that is, it reflects a principle of international law in force prior to its adoption.¹⁵⁷

¹⁴⁷ *Case of Almonacid Arellano et al. v. Chile*, para. 99.

¹⁴⁸ *Cf. Case of Goiburú et al. v. Paraguay. Merits, reparations and costs.* Judgment of September 22, 2006. Series C No. 153, para. 82 and 128.

¹⁴⁹ *Cf. Case of Gelman v. Uruguay. Merits and Reparaciones.* Judgment of February 24, 2011. Series C No. 221, para. 99.

¹⁵⁰ *Cf. Case of La Cantuta v. Peru. Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 225.

¹⁵¹ *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, para. 404.

¹⁵² *Cf. Case of the Massacres of El Mozote and neighboring places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012. Series C No. 252, para. 286.

¹⁵³ *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil*, paras. 248 to 306.

¹⁵⁴ *Cf. Case of Manuel Cepeda Vargas v. Colombia.* Preliminary objections, merits, reparations and costs. Judgment of May 26, 2010. Series C No. 213, para. 42; *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala.* Merits. Reparations and costs. Judgment of November 20, 2012. Series C No. 253, para. 215.

¹⁵⁵ *Cf. UN. General Assembly. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.* Resolution 2391 (XXIII), November 26, 1968. Disponible [https://undocs.org/A/RES/2391\(XXIII\)](https://undocs.org/A/RES/2391(XXIII)).

¹⁵⁶ *Cf. UN. General Assembly. Question of the punishment of war criminals and of persons who have committed crimes against humanity*, Resolution 2338 (XXII), December 18 1967. Available at [https://undocs.org/en/A/RES/2338\(XXII\)](https://undocs.org/en/A/RES/2338(XXII)).

¹⁵⁷ See, in this regard, for example: Supreme Court of Justice of the Nation, Argentina: Appeal. Judgment of June 14, 2005, *Case of Julio Héctor Simón et al.*, case No. 17,768, *considerandum* 42; Appeal. Judgment of August 24, 2004, *Case of Arancibia Clavel, Enrique Lautaro*, case No. 259, *consideranda* 29, 38 and 39; Ordinary appeal. Judgment of November 2, 1995, *Case of Erich Priebke* No. 16,063/94, *consideranda* 4 and 5; *considerada* 89 and 90 of the Concurring opinion of Judge Gustavo A. Bossert. See also: Federal Criminal and Correctional Appeals Chamber, Argentina, Appeal for annulment. September 9, 1999, *Case of Videla et al.*, *considerandum* III; Federal Oral Criminal Court of La Plata. Judgment of September 19, 2006, *Case of "Circuito Camps" et al.* (Miguel Osvaldo Etchecolatz), Case No. 2251/06, *considerandum* IV.a; Federal Oral Criminal Court No. 1 of San Martín. Judgment for crimes against

215. This circumstance has two main consequences: (a) States must apply the content of this Convention even though they have not ratified it, and (b) regarding its temporal sphere, it should be applied even to crimes committed before its entry into force, because what would be applied would not be the treaty-based norm of itself, but rather a pre-existing customary norm.¹⁵⁸

216. In this regard, the Court agrees with the study of the Secretary-General of the United Nations on the question of the non-applicability of statutory limitation to war crimes and crimes against humanity, to the effect that the non-applicability results from the exceptional gravity of such conducts and their difference from crimes against domestic law results in the need for effective punishment of such crimes in accordance with international law; that the universal conscience which revolts against such crimes going unpunished, and because failure to punish them would arouse violent reactions on a very large scale.¹⁵⁹

217. The foregoing interpretation is consequent with contemporary rulings of the International Law Commission of the United Nations, a body tasked with developing and codifying international law, which, in 1996, adopted the Draft code of crimes against the peace and security of mankind.¹⁶⁰

humanity. August 12, 2009, General Riveros *et al.* in the case of Floreal Edgardo Avellaneda *et al.*, *considerandum* I. Similarly, Supreme Court of Justice of Uruguay: Cassation appeal, August 12, 2015. Case file 97-78/2012, Ruling 1.061/2015, *consideranda* III.1.b; Cassation appeal, August 24, 2016. Case file 170-298/2011, Ruling 1.280/2016, *consideranda* III.1 and III.2; Cassation appeal, September 8, 2016. Case file 395-136/2012, Fuling 1.383/2016, *consideranda* III.2 and III.3. In addition, see: expert opinion of Juan Ernesto Méndez, paras. 34 to 48 (evidence file, folios 14072 to 14077).

¹⁵⁸ Cf. UN. Commission on Human Rights. *Study submitted by the Secretary-General on the question of the non-applicability of statutory limitation to war crimes and crimes against humanity*. E/CN.4/906. February 15, 1966, paras. 157-160. Available at <http://undocs.org/E/CN.4/906>.

¹⁵⁹ Cf. UN. Commission on Human Rights. *Study submitted by the Secretary-General on the question of the non-applicability of statutory limitation to war crimes and crimes against humanity*. E/CN.4/906. February 15, 1966, para. 159: "[...] 159. Thus, the principle that there is no period of limitation does not derive only from the intention of the international 'legislator', who has clearly and urgently stressed the need for the sure and effective punishment of serious crimes under international law; it does not derive only from the universal conscience, which revolts against the idea that such crimes can go unpunished; it does not derive only from the state of positive municipal law, which has often hesitated, or even refused, to recognize the institution of statutory limitation in the case of serious crimes; it derives also, and above all, from the fact that none of the reasons usually advanced in favour of statutory limitation for crimes under ordinary municipal law justifies such limitation for the international crimes in question. The latter crimes cannot, from either the legal or the moral standpoint, be placed on the same footing as the former. If a crime under municipal law, however serious, goes unpunished through the operation of the statute of limitations, the fact does not usually make itself felt even in the narrow social environment, in which the crime was committed; the criminal, lawfully released for one or another of the reasons underlying the statute of limitations (remorse, forgiveness, loss of validity of proofs, etc.) quietly resumes his place in society and lives at peace with it. In contrast, impunity for a crime against peace or against humanity or for a serious war crime, whether acquired through statutory limitation or through any other means, arouses violent reactions on a very large scale; consequently, the result might be to expose the guilty party, now immune from any legal prosecution, to the 'private justice' of the victims or of those bound to them by ties of blood, land, race, religion and so on. Because of the 'exceptional' gravity, the 'gigantic' magnitude and, above all, the 'incomprehensible' motives of such international crimes, all these people, whose numbers can be readily imagined in each case, tend to be 'unable ever to forget' and to be undeterred by any obstacle, legal or otherwise, from ensuring that, once the guilty are 'unmasked', they are punished as they deserve. There is, therefore, every reason to consider whether the principle that there is no period of limitation for such crimes is not a rule of *jus cogens*, a peremptory rule, a fundamental rule of the international public order from which States can make no departure even by treaty."

¹⁶⁰ Cf. UN. International Law Commission. *Draft code of crimes against the peace and security of mankind*. A/CN.4/L.532. July 8, 1996. Available at: <https://undocs.org/en/A/CN.4/L.532>. In particular, the draft code established that: "[...] Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law" (Article 1.2); "[...] each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 15 shall rest with an international criminal court. However, a State Party is not precluded from trying its nationals

218. That consistent interpretation was consolidated in international law in 1998 with the adoption of the Rome Statute of the International Criminal Court, establishing that court's jurisdiction with regard to crimes against humanity¹⁶¹ which,¹⁶² evidently, are not subject to statutory limitations.¹⁶³

219. Recently, in 2017, the last version of the Text of the draft articles on crimes against humanity (hereinafter, also, "Draft articles"), adopted by the International Law

for the crime set out in article 16" (Article 8); "[...] the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual" (Article 9); "1. No one shall be convicted under the present Code for acts committed before its entry into force. 2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law" (Article 13). In addition, among the crimes against the peace and security of mankind, the International Law Commission indicated the following as crimes against humanity: "(a) murder; [...] (c) torture; [...] [and] (j) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm" (Article 18).

¹⁶¹ Cf. Statute of the International Criminal Court adopted at Rome on July 17, 1998, and entered into force on July 1, 2002 (hereinafter "the Statute of the International Criminal Court") "Article 5. Crimes within the jurisdiction of the Court. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."

¹⁶² Cf. Statute of the International Criminal Court, "Article 7. Crimes against humanity. 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. 2. For the purpose of paragraph 1: (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy; (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. 3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."

¹⁶³ Cf. Statute of the International Criminal Court. "Article 29. Non-applicability of statute of limitations. The crimes within the jurisdiction of the Court shall not be subject to any statute of limitation."

Commission,¹⁶⁴ reiterated the notion that “crimes against humanity threaten the peace, security and well-being of the world.” It also recalled the “duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity, [c]onsidering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance” (Preamble).¹⁶⁵ Regarding the substantive aspects of the prohibited conducts, the Draft articles included a definition of crimes against humanity that was very similar to that in the Rome Statute. It also established that each State must take the necessary measures to ensure that, under its criminal law, the offenses referred in the draft articles are not be subject to any statute of limitations, and are punishable by appropriate penalties that take into account their grave nature (Article 6).¹⁶⁶

220. According to the International Law Commission, the prohibition of crimes against humanity is clearly accepted and recognized as a peremptory rule of international law.¹⁶⁷ Similarly, the International Court of Justice has indicated that the prohibition of certain acts, such as torture “has become a peremptory norm (*jus cogens*)”,¹⁶⁸ which, furthermore, indicates that the prohibition to commit such acts, that constitute crimes against humanity, in a widespread and systematic manner is also a peremptory norm of *jus cogens*.¹⁶⁹ In this regard, the International Law Commission has explicitly recognized that “[t]he characterization of crimes against humanity as ‘crimes under international law’ indicates that they exist as crimes whether or not the conduct has been criminalized under national law.” In this regard, it indicated that “[t]he Nürnberg Charter defined crimes against humanity as the commission of certain acts ‘whether or not in violation of the domestic law of the country where perpetrated’ (art. 6(c)).”¹⁷⁰

221. This was the exact interpretation of the Inter-American Court in the case of *Almonacid Arellano* (*supra* para. 212), and has been applied to the instant case also. Moreover, it is

¹⁶⁴ Cf. UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, p. 9, para. 45. Available at <https://undocs.org/en/A/72/10>.

¹⁶⁵ UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, p.9.

¹⁶⁶ Cf. UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, p. 13.

¹⁶⁷ Cf. UN. *Report of the International Law Commission on the work of its fifty-third session, 23 April-1 June and 2 July-10 August 2001*, A/56/10 p. 86. Paragraph (5) of the commentary on art. 26 of the Draft articles on responsibility of States for internationally wrongful acts indicates that [...] Those peremptory norms that are clearly accepted and recognized include the prohibitions of [...] crimes against humanity.” Available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf. See, also, UN. International Law Commission. *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*. Report of the Study Group of the International Law Commission finalized by Martti Koskeniemi. A/CN.4/L.682. April 13, 2006, para. 374. This indicates that “Overall, the most frequently cited candidates for the status of *jus cogens* include: (e) crimes against humanity,” Available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

¹⁶⁸ Cf. International Court of Justice (hereinafter “ICJ”). *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgment of July 20, 2012, p. 457, para. 99.

¹⁶⁹ Cf. ICJ. *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of February 3, 2012, p. 141, para. 95; International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”). *Prosecutor v. Furundžija*, Judgment of December 10, 1998, case No. IT-95-17/1-T, para. 153; European Court of Human Rights (hereinafter “ECHR”). *Case of Al-Adsani v. The United Kingdom* [GS], No. 35763/97. Judgment of November 21, 2001, para. 61.

¹⁷⁰ Cf. UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, p. 26, commentary 4 on Article 2.

important to point out that, over recent decades, international¹⁷¹ and national courts,¹⁷² and United Nations bodies¹⁷³ have ruled similarly.

B.1.1. Elements of crimes against humanity

222. Crimes against humanity have been recognized as a crime under international law, together with war crimes, genocide, slavery and aggression. That means that their content, nature and the related responsibilities have been established in international law irrespective of the provisions of the domestic law of the States. The fundamental characteristic of a crime under international law is that it threatens the peace and security of mankind, because it offends the conscience of humanity. Such crimes are planned State crimes, that form part of an evident policy or strategy against a people or a group of individuals. The perpetrators, typically, are State agents complying with this policy or plan, who take part, in widespread and systematic acts of murder, torture, rape and other heinous acts against the civilian population.

223. The Court notes that the Rome Statute of the International Criminal Court established the definition of this legal concept in its article 7, which states that “crime against humanity” means any of the acts listed in that article¹⁷⁴ when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The Court also notes that the International Law Commission and other national and international courts have established the elements of crimes against humanity in the same way as the Rome Statute.

¹⁷¹ Cf. ECHR. *Case of Kolk and Kislyiy v. Estonia*, Nos. 23052/04 and 24018/04. Inadmissibility decision of January 17, 2006; See also, similarly *Case of Vasiliauskas v. Lithuania* [GS], No. 35343/05. Judgment of October 20, 2015, paras. 167, 168, 170 and 172; Extraordinary Chambers in the Courts of Cambodia (hereinafter “ECCC”). *Decision on preliminary objections in the case against Ieng Sary (Ne Bis in Idem and Amnesty and Pardon)*, Case No. 002/19-09-2007/ECCC/TC, Trial Judgment of November 3, 2011, para. 41.

¹⁷² See, in this regard, for example, Supreme Court of Justice of the Nation, Argentina: Appeal. Judgment of November 2, 1995, Case of Erich Priebke No. 16.063/94, *considerandum* 4 and Concurring opinion of Judge Julio S. Nazareno and Eduardo Moline O’Connor, *consideranda* 76 and 77; Appeal. Judgment of August 24, 2004, Case of Arancibia Clavel, Enrique Lautaro, case No. 259, *consideranda* 34 to 38 and Opinion of Judge Antonio Boggiano, *considerandum* 29; Appeal. Judgment of June 14, 2005, Case of Julio Héctor Simón *et al.*, case No. 17.768, Opinion of Judge Antonio Boggiano, *consideranda* 28 and 42; See also: Federal Criminal and Correctional Appeals Chamber, Argentina, Appeal for annulment. September 9, 1999, Case of Videla *et al.*, *considerandum* IV; Federal Criminal Oral Court No. 1 of San Martín, Judgment for crimes against humanity. August 12, 2009, General Riveros *et al.* in the case of Floreal Edgardo Avellaneda *et al.*, *considerandum* I; Federal Criminal Oral Court (La Plata). September 26, 2006, Case of “*Circuito Camps*” *et al.*, case No. 2251/06, *considerandum* IV.A. See also: Supreme Court of Justice of the Republic of Peru. Special Criminal Chamber. Judgment of April 7, 2009, Case of Alberto Fujimori, File No. 17-2001, *consideranda* 710 and 711; Superior Court of Justice of Lima. First Special Criminal Chamber. Judgment of September 15, 2010, File No. 28-2001-10SPE/CSJLI. Similarly, see: Supreme Court of Justice of Uruguay: Cassation appeal, August 12, 2015. Case file 97-78/2012, Judgment 1,061/2015, *considerandum* III.1.b; Cassation appeal, August 24, 2016. Case file 170-298/2011, Judgment 1,280/2016, *considerandum* III.1; Cassation appeal, September 8, 2016. Case file 395-136/2012, Judgment 1,383/2016, *considerandum* III.3.

¹⁷³ Cf. UN. Human Rights Council. *Report of Special Rapporteur torture and other cruel, inhuman or degrading treatment or punishment*. A/HRC/34/54. February 14, 2017, para. 18. Available at: <https://undocs.org/A/HRC/34/54>; International Law Commission *First report on crimes against humanity* by Sean D. Murphy, *Special Rapporteur*. A/CN.4/680. February 17, 2015, para. 39. Available at: <https://undocs.org/en/A/CN.4/680>.

¹⁷⁴ (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

224. In this regard, the International Law Commission, in the Draft code of crimes against the peace and security of mankind, considered that a crime against humanity was the perpetration of specific inhumane acts in a systematic manner or on a large scale by a government or by an organization or group.¹⁷⁵ Thus, it recognizes three general condition: that the act(s) are committed as part of an act "committed in a systematic manner or on a large scale," against the civilian population, and that the perpetrator(s) act "with full knowledge of this inhumane act"; in other words, it is carried out pursuant to a preconceived State plan or policy.¹⁷⁶

225. In the case of *Dusko Tadic*, the International Criminal Tribunal for the former Yugoslavia (hereinafter, also "the ICTY") considered that the requirements for crimes against humanity included: (i) that they were acts against the civilian population; (ii) that they were widespread and systematic acts; (iii) that they were acts undertaken on discriminatory grounds or committed for discriminatory reasons; (iv) that these acts responded to a policy of the State or of organizations, and (v) that the perpetrator was aware of the systematic or wider context in which the act occurred. In addition, and pursuant to the jurisdiction granted to the ICTY by its Charter, such acts should be committed during an armed conflict.¹⁷⁷

226. Meanwhile, the International Criminal Tribunal for Rwanda (hereinafter, also "ICTR") established in the judgment in the *Takayasu* case that the category of crimes against humanity could be broken down into four elements: (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (ii) the act must be committed as part of a widespread or systematic attack; (iii) the act must be committed against members of the civilian population; (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.¹⁷⁸

227. In the judgment in the case of *Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, the Special Court for Sierra Leone (hereinafter, also, "the SCSL") stated that the elements of a crime against humanity are: (i) there must be an attack; (ii) the attack must be widespread or systematic; (iii) the attack must be directed against any civilian population; (iv) the acts of the perpetrator must be part of the attack, and (v) the perpetrator must have

¹⁷⁵ Cf. UN. *Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July, 1996)*. A/51/10. p. 47. Commentaries 3, 4 and 5 on article 18 of the Draft code of crimes against the peace and security of mankind. Available at: http://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf.

¹⁷⁶ For a detailed analysis of the evolution and interpretation of the three general conditions for crimes against humanity, see UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, pp. 33 and ff.

¹⁷⁷ Cf. ICTY. *Prosecutor v. Duško Tadić*. Judgment of May 7, 1997. Case No. IT-94-1-T, paras. 627- 660. In particular, the ICTY referred to the requirements of "widespread" and "systematic" as follows: "It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian "population", and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement" (para. 648). See also: *Prosecutor v. Kupreškić and Others*. Judgment of January 14, 2000. Case of No. IT-95-16-T, paras. 647 to 658.

¹⁷⁸ Cf. ICTR. *Prosecutor v. Jean-Paul Akayesu*. Judgment of September 2, 1998, Case of No. ICTR-96-4-T, para. 578. In addition, the ICTR considered that "[t]he concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims." It added that "[t]he concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy." (para. 580).

knowledge that his acts constitute part of a widespread or systematic attack directed against a civilian population.¹⁷⁹

228. Similarly, the European Court of Human Rights, in a case in which the facts occurred in 1956, recognized as elements of crimes against humanity the presence of discrimination or persecution against a specific group of the civilian population and the existence of a systematic and widespread state policy or action.¹⁸⁰

229. National courts of Argentina,¹⁸¹ Colombia,¹⁸² Peru,¹⁸³ Chile¹⁸⁴ and Guatemala¹⁸⁵ have recognized the following elements as constituting crimes against humanity: the existence of a systematic or widespread attack against the civilian population or a specific group of civilians, which should include inhumane acts committed as part of a coordinated State plan or policy to this end. In addition, some courts have considered relevant the existence of discrimination for political, ideological, religious, ethnic or national reasons.

B.2. Consequence of the perpetration of a crime against humanity

230. As previously indicated (*supra* para. 219), the prohibition of crimes against humanity is a peremptory norm of international law (*jus cogens*). This means that the said prohibition "is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹⁸⁶ Specifically, the first obligation of States is to avoid such conditions occurring. If they do occur, the State's duty is to ensure that such conducts are criminally prosecuted and the perpetrators punished,¹⁸⁷ so that such conducts do not remain in impunity.¹⁸⁸

231. Even if certain conducts that are considered crimes against humanity are not formally defined as such in domestic law, or might even be legal under domestic law, this does not relieve the person who committed the act from his responsibility under international law. In other words, the inexistence of domestic legal provisions that establish and punish

¹⁷⁹ Cf. SCSL. *Prosecutor v. Alex Tamba Brima and Others*. Judgment of June 20, 2007, Case No. SCSL-04-16-T, paras. 214 to 222.

¹⁸⁰ Cf. ECHR. *Korbely v. Hungary* [GS]. No. 9174/02. Judgment of September 19, 2008, paras. 78 to 84.

¹⁸¹ Federal Criminal Oral Court (La Plata). September 26, 2006, Case of "*Circuito Camps*" *et al.*, case No.2251/06; Fourth Chamber of the Federal Criminal Cassation Court. Criminal cassation appeal. February 17, 2012, Case of Gregorio Rafael Molina, case No. 12821; Federal Criminal Oral Court No. 1 of San Martín. Judgment for crimes against humanity. August 12, 2009, General Riveros *et al.* in the case of Floreal Edgardo Avellaneda *et al.*.

¹⁸² Justice and Peace Chamber of the Superior Court of the Bogotá Judicial Circuit. Judgment and comprehensive reparation. December 1, 2011, Case files: 1100160002532008-83194; 1100160002532007-83070 (José Rubén Peña Tobón, *et al.*, petitioners), paras. 71 to 81; Criminal Cassation Chamber of the Supreme Court of Justice of Colombia. Appeal judgment. September 21, 2009, Proceedings No. 32022 (Gian Carlo Gutiérrez Suárez, petitioner), *considerandum* 4 (pp. 190 to 199).

¹⁸³ Supreme Court of Justice of the Republic of Peru. Special Criminal Chamber. Judgment of April 7, 2009, Case of Alberto Fujimori, File No. 17-2001, *consideranda* 710 to 717.

¹⁸⁴ Supreme Court of Chile. Replacement judgment. July 8, 2010, Murder of Carlos Prats and Sofía Cuthbert, Case file No. 2596-09

¹⁸⁵ Constitutional Court of Guatemala. Amparo appeal. December 18, 2014, file 3340-2013, *considerandum* IV.

¹⁸⁶ Cf. Vienna Convention on the Law of Treaties (Vienna, May 23, 1969), Art. 53.

¹⁸⁷ Cf. *Case of Goiburú v. Paraguay*, para. 128.

¹⁸⁸ Cf. *Case of La Cantuta v. Peru*. Merits, reparations and costs, para. 160.

international crimes can never relieve the perpetrators from their international responsibility or the State from punishing such crimes.¹⁸⁹

232. Starting with its first judgment, this Court has emphasized the importance of the State obligation to investigate and punish human rights violations. The obligation to investigate and, when appropriate, prosecute and punish acquires particular importance considering the heinous nature of the crimes committed and the nature of the rights violated,¹⁹⁰ especially in view of the prohibition of torture and extrajudicial executions as part of a systematic attack against the civilian population.¹⁹¹ The special and determinant intensity and importance of this obligation in cases of crimes against humanity¹⁹² means that State may not use: (i) statutory limitations; (ii) the *ne bis in idem* principle; (iii) amnesty laws, or (iv) any similar provision that precludes responsibility, to waive its obligation to investigate and punish those responsible.¹⁹³ In addition, the Court considers that the obligation to prevent and to punish crimes under international law, includes the duty of States to cooperate and they may (v) apply the principle of universal jurisdiction with regard to such conducts.

B.3. The torture and murder of Vladimir Herzog

233. Having established the standards relating to crimes against humanity and their consequences for the States, the Court will now examine the case *sub judice* to establish: (i) whether or not the torture and murder of Vladimir Herzog occurred in a context of crimes against humanity perpetrated by the Brazilian military dictatorship, and (ii) the eventual consequences of this determination for Brazil at the time of the facts and after December 10, 1998. Subsequently, the Court (iii) will summarize the measures taken by the State, and (iv) analyze their compatibility with the American Convention to determine the alleged international responsibility pursuant to Articles 8 and 25 of the Convention, in relation to

¹⁸⁹ Cf. UN. *Report of the International Law Commission covering its second session, 5 June – 29 July 1950*. A/1316, p. 11. Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle II: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.” Available at http://legal.un.org/ilc/documentation/english/reports/a_cn4_34.pdf. International Court of Justice, Judgment of September 7, 1927, Matter of S.S. Lotus (France v. Turkey), Series A, No. 10 (1927), 2 (20); ECHR. *Case of Kolk and Kislyiy v. Estonia*, Nos. 23052/04 and 24018/04. Inadmissibility decision of January 17, 2006. See also: *Case of Vasiliauskas v. Lithuania* [GS], No. 35343/05. Judgment of October 20, 2015, paras. 167, 168, 170 and 172; ECCC. *Decision on preliminary objections in the case against Ieng Sary (Ne Bis in Idem and Amnesty and Pardon)*, Case No. 002/19-09-2007/ECCC/TC, Trial Judgment of November 3, 2011, para. 41. See also, for example, Supreme Court of Justice of the Nation, Argentina: Appeal. Judgment of November 2, 1995, Case of Erich Priebke No. 16,063/94, *considerandum* 4 and Concurring opinion of Judge Julio S. Nazareno and Eduardo Moline O'Connor, *consideranda* 76 and 77; Appeal. Judgment of August 24, 2004, Case of Arancibia Clavel, Enrique Lautaro, case No. 259, *consideranda* 34 to 38 and Opinion of Judge Antonio Boggiano, *considerandum* 29; Appeal. Judgment of June 14, 2005, Case of Julio Héctor Simón *et al.*, case No. 17,768, Opinion of Judge Antonio Boggiano, *considerandum* 42; Federal Criminal Oral Court (La Plata). September 26, 2006, Case of “Circuito Camps” *et al.*, case No. 2251/06, *considerandum* IV.A. Similarly, see also, Constitutional Court of Peru. Judgment of March 18, 2004, Case file No. 2488-2002, *considerandum* 4; Supreme Court of Justice of Uruguay. Cassation appeal, August 12, 2015. Case file 97-78/2012, Judgment 1,061/2015, *considerandum* III.1.b. See also, expert opinion of Juan Ernesto Méndez, para. 42 (evidence file, folio 14075).

¹⁹⁰ Cf. *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166; *Case of Vásquez Durand et al. v. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment of February 15, 2017. Series C No. 332, para. 141.

¹⁹¹ Cf. *Case of Goiburú et al. v. Paraguay*, para. 84; *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para. 137.

¹⁹² Cf. *Case of La Cantuta v. Peru*. Merits, reparations and costs, para. 115; *Case of the Massacres of El Mozote and neighboring places v. El Salvador*. Merits, reparations and costs, para. 208.

¹⁹³ Cf. *Case of Barrios Altos v. Peru*. Merits, para. 41; *Case of Members of the village of Chichupac and neighboring communities in the municipality of Rabinal v. Guatemala*. Preliminary objections, merits, reparations and costs. Judgment of November 30, 2016. Series C No. 328, para. 247.

Articles 1(1) and 2 of this instrument, and 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

i) The torture and murder of Vladimir Herzog and the context at the time of the facts

234. The Court notes that there is no dispute between the parties on this issue. Brazil has acknowledged its responsibility for the arbitrary detention, torture and murder of Vladimir Herzog by State agents in the Second Army's DOI/CODI on October 25, 1975.¹⁹⁴

235. Also, witnesses of the events have testified on numerous occasions that Vladimir Herzog was hooded, subjected to electric shocks by a team of torturers and asphyxiated (*supra* para. 122). The indirect expert report on his death determined that, "first, Vladimir Herzog was strangled, probably with the belt cited by the forensic expert and, then, a gallows system was devised, one end of the belt was tied to the protective grillwork of the window, and the other to Vladimir Herzog's neck by a slip knot. The body was then placed in partial suspension to simulate an actual hanging."¹⁹⁵

236. The dispute exists only with regard to the possibility of prosecuting the perpetrators and to the application of the concept of crimes against humanity in 1975, and provisions such as the Brazilian Amnesty Law, the statute of limitations, the *ne bis in idem* principle, and *res judicata*.

237. According to the jurisprudence of the Inter-American Court and other national and international courts and human rights bodies, the torture and murder of Mr. Herzog would be considered a very serious violation of human rights. However, in view of the need to establish whether the obligation to investigate, prosecute and punish those responsible for the torture and death of Vladimir Herzog as crimes against humanity persisted when Brazil accepted the Court's jurisdiction, the Court must also analyze whether the torture and murder of Vladimir Herzog were: (i) perpetrated by State agents or by an organized group as part of a preconceived plan or strategy; in other words, with full intention and knowledge of the plan; (ii) in a widespread and systematic manner; (iii) against the civilian population, and (iv) with a discriminatory/prohibited purpose. To this end, the Court will examine the evidence provided to this case and the context and the facts that the Court has already found proved in the judgment in the case of *Gomes Lund et al.*

238. First, the Court must identify whether the facts were part of a State plan or strategy. In this regard, the Court considers that it has been proved that:

- a) The 1964 military coup d'état established itself based on a doctrine of national security and the promulgation of national security and emergency laws that "served as a supposed legal framework to provide the increased repression with legal support."¹⁹⁶ The enemy could be anywhere in the country, could even be a Brazilian, and a popular mindset of constant control was established, typical of totalitarian States. To confront the new challenges, it was urgent to create a new repressive apparatus. Thus, different warlike concepts were adopted: adverse psychological

¹⁹⁴ Cf. Answering brief of the State (merits file, folios 349 and 350).

¹⁹⁵ Report of the National Truth Commission (evidence file, folio 3301).

¹⁹⁶ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 85.

war; internal war and subversive war were some of the terms used by the military jurisdiction to prosecute political prisoners;¹⁹⁷

- b) In March 1970, the system was entrenched by an act of the Executive called the "Presidential Internal Security Directive," which became known as the "Internal Security System." Under this directive, all national public administration bodies were subject to the "coordination measures" of the unified command of the political repression machine. The system was implemented on two levels:
1. At the national level, it comprised the SNI and the Information Centers of the Army (CIE), the Navy (CENIMAR) and the Air Force (CISA); the centers were linked directly to the cabinets of the ministers who were members of the military.
 2. At the regional level, Internal Defense Zones (ZDIs) were established, corresponding to the division of the commands of the I, II, III, IV and V Armies. The following were established within each zone:
 - 2.1. Internal Defense Councils and Centers of Operations (respectively, CONDIs and CODIs), consisting of members of the three branches of the Armed Forces and of the Secretariats of Security of the states, whose functions were to coordinate the acts of political repression in the respective ZDIs; and
 - 2.2. In the second half of 1970, Departments of Information Operations (DOI) were established in São Paulo, Rio de Janeiro, Recife and Brasília, and the following year also in Curitiba, Belo Horizonte, Salvador, Belem and Fortaleza. In 1974, a DOI was established in Porto Alegre.¹⁹⁸
- c) The 1971 CIE Interrogation Manual established that, in order to bring a detainee before a court, he should be treated in a way that would not reveal that his confession had been obtained under duress. It also indicated that the purpose of an interrogation of subversives was not to provide information for the criminal justice system; its real purpose was to obtain the most information possible. To achieve this, it was necessary to use interrogation methods that, legally, constituted the use of force.¹⁹⁹
- d) Between 1973 and 1975, journalists of the "Voz Operária" and members of the Brazilian Communist Party (PCB) began to be abducted or detained and, at times, tortured. The so-called "Operation Radar" carried out by the Army's Information Center and the Second Army's DOI/CODI was an offensive by the security agencies to combat and disband the PCB and its members. The Operation did not limit its actions to detaining PCB members, but was also aimed at killing its leaders.²⁰⁰ From 1974 to 1976, dozens of PCB members and leaders were detained, tortured and killed by the Operation, so that almost the whole of its Central Committee were eliminated;²⁰¹

¹⁹⁷ Cf. *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folio 20).

¹⁹⁸ Cf. Report of the National Truth Commission (evidence file, folios 642 and 668 to 671) and Federal Public Prosecution Service, *Crimes da Ditadura Militar*, pp. 56 and 57 (evidence file, folio 14254).

¹⁹⁹ Cf. Report of the National Truth Commission (evidence file, folio 650) and Federal Public Prosecution Service, *Crimes da Ditadura Militar* (evidence file, folio 14290).

²⁰⁰ Cf. *Crimes da Ditadura Militar*, pp. 56 and 57 (evidence file, folio 14254).

²⁰⁰ Cf. Report of the National Truth Commission (evidence file, folio 3317) and Report of the National Truth Commission (evidence file, folio 634).

²⁰¹ Cf. *Direito à Memória e à Verdade*: Special Commission on Political Deaths and Disappearances (evidence file, folio 20) and Report of the National Truth Commission (evidence file, folio 634).

- e) The DOI-CODI/Second Army consisted of 116 men from the Army, the state of São Paulo Military Police, the Civil Police, the Air Force, and the Federal Police. The way the DOI-CODI were structured made it possible to combine efforts between these agencies when necessary. Its members referred to it as “grandmother’s house” (*casa da vovó*),²⁰² and
- f) The legal framework created by the regime gave special attention to ensuring the impunity of the perpetrators of abductions, torture, murders and disappearances, by excluding from judicial control all the acts carried out by the “Revolution’s Supreme Command” and by establishing the competence of the military jurisdiction to prosecute crimes against national security.²⁰³

239. With regard to the widespread or systematic nature of the facts that occurred and their discriminatory or prohibited nature, as well as the fact that the victims were civilians, the Court also finds that it has been proved that, within the temporal framework in which the facts occurred:

- a) The political opponents of the dictatorship – and all those who, in some way, were perceived by the regime as its enemies – were persecuted, abducted, tortured and/or killed.²⁰⁴ Following the issue of Institutional Act No. 5 in December 1968, the State intensified its operations of systematic control and attack on the civilian population. Indeed, the authoritarian instruments that had been imposed on the so-called “subversive enemies” were extended to all social strata, revealing the systemic nature of their use;²⁰⁵
- b) Accordingly, starting in 1970 and up until 1975, the regime carried out the systematic practice of executing or disappearing its opponents, especially those considered most “dangerous” or of most importance in the ranks of opposition organizations and/or those who represented a threat. Over this period, 281 deaths or disappearances of dissidents were recorded, the equivalent to 75% of the total number of deaths or disappearances throughout the dictatorship (369);²⁰⁶
- c) The practice of raids on homes, abductions and torture formed part of the regular methods used by agencies such as the CIE and the DOIs to obtain information.²⁰⁷ The security forces used clandestine detention centers to carry out the torture and murder of members of the PCB considered enemies of the regime. These sites of terror, funded by public resources, were created deliberately to ensure that the agents involved had total freedom to act, without any legal control over what was done there, and even facilitating the possibility of making the bodies disappear;²⁰⁸
- d) The methods used to repress the opposition violated even the authoritarian laws enacted by the 1964 coup d’état because, *inter alia*, the primary purpose of the system was not to produce valid evidence to be used in judicial proceedings, but to disband – at any cost – the opposition organizations. These actions were aimed

²⁰² Report of the National Truth Commission (evidence file, folio 676).

²⁰³ Cf. Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 93 (evidence file, folio 14290).

²⁰⁴ Cf. Report of the National Truth Commission (evidence file, folio 808).

²⁰⁵ Cf. Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 93 (evidence file, folio 14290).

²⁰⁶ Cf. Federal Public Prosecution Service, *Crimes da Ditadura Militar*, pp. 76 and 77 (evidence file, folio 14273 and 14274).

²⁰⁷ Cf. Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 54 (evidence file, folio 14251).

²⁰⁸ Cf. Report of the National Truth Commission, pp. 152 and 153 (evidence file, folios 682 and 683) and Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 80 (evidence file, folio 14277).

especially against organisations involved in armed resistance actions,²⁰⁹ but also against unarmed civilians;²¹⁰

- e) The *modus operandi* of political repression at that time was as follows: using informers, witnesses, undercover agents or the interrogation of suspects, the DOI agents identified a possible members of an organization classified as “subversive” or “terrorist,” The suspect was then abducted by agents of the search and arrest teams from the Operations Section and immediately taken to one of the Interrogation Subsection teams;²¹¹
- f) Following the 1964 coup d’état, torture was used systematically by the Brazilian State, either as a means of gathering information or obtaining confessions (interrogation technique), or as a way of spreading fear (intimidation strategy). It became an essential part of the military system of political repression, based on the arguments of the supremacy of national security and the existence of a “war against terrorism.” It was used regularly by different agencies of the repressive structure, including police stations and military establishments, as well as on clandestine premises in different parts of national territory. The practice of torture was deliberate and widespread, constituting a fundamental element of the repression apparatus assembled by the regime;²¹²
- g) Interrogations, as well as torture and the other punishments, were rigorously controlled by the Section head. Since the DOI/CODIs had many interrogators and these were divided into at least three different teams (A, B, C), the interrogation was always controlled by the head of the Information and Analysis Section. In this way, before beginning the interrogation, the interrogator received a sheet with a list of questions and, at the bottom, indications of the so-called “ammunition” and the treatment to be given to the person interrogated,²¹³ and
- h) Other evidence of the systematic nature of torture was the existence of a field of knowledge on which it was based; the presence of doctors and nurses in the torture centers; the repetition of acts with the same characteristics; the bureaucratization of the crime, with the allocation of its own establishments, resources and personnel, with teams to work shifts while inflicting it, and the adoption of denial strategies.²¹⁴

240. Regarding the nature and egregiousness of the acts, the Court notes that official reports of the Brazilian State documented the following methods of physical and psychological torture used by the dictatorship:

a) Physical torture:

- 1. *Electric shocks*: application of electric shocks to different parts of the body of the person being tortured, preferably the most sensitive parts such as the penis and the anus, attaching one pole to the former and introducing the other in the latter, or attaching one pole to the testicles and placing another

²⁰⁹ Cf. Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 54 (evidence file, folio 14251).

²¹⁰ Cf. Federal Public Prosecution Service, *Crimes da Ditadura Militar*, p. 85 (evidence file, folio 14282).

²¹¹ Cf. Federal Public Prosecution Service, *Crimes da Ditadura Militar*, pp. 73 and 74 (evidence file, folio 14270 and 14271).

²¹² Cf. Report of the National Truth Commission, pp. 343 to 346 (evidence file, folios 873 to 878).

²¹³ Cf. Report of the National Truth Commission, p. 144 (evidence file, folio 674).

²¹⁴ Cf. Report of the National Truth Commission, p. 350 (evidence file, folio 880).

in the ear, or on the toes and fingers, the tongue, etc. In the case of women, the poles were introduced into the vagina and the anus;²¹⁵

2. "*Cadeira do dragão*" (the dragon's chair): a heavy chair that the victim was strapped into to receive electric shocks, with a bar that pushed his legs back and against which they jolted due to the spasms resulting from the electric shocks;²¹⁶
3. "*Palmatória*": the use of a wooden bat with perforations at the rounded ends. It was used preferably on the shoulders, on the soles of the feet and the palms of the hands, the buttocks, etc., resulting in the rupture of veins and causing bleeding and swelling that prevented the victim from walking or holding anything;²¹⁷
4. *Drowning*: One of the most common forms of torture was to pour water, or a mixture of water and kerosene or amonia or any other liquid into the victim's nose, with his head bent backwards. Another form was to close the nostrils tightly and put a hose in the mouth to introduce the water;²¹⁸
5. *Telephone*: a technique consisting in suddenly clapping the cupped hands on both ears of the victim at the same time, which occasionally left him disoriented and could also rupture the eardrums. Some victims were left permanently deaf following this treatment;²¹⁹
6. *Karate session or "Polish corridor"*: the victim, placed in the middle of circle of torturers, was punched, kicked, subjected to karate chops, and hit with wooden clubs, rubber hoses or strips of tires;²²⁰
7. *Use of chemical products*: chemical products were frequently used against the person tortured to force him to speak by altering his awareness, or causing pain and thus obtaining the desired information. Some examples of this technique were the application of acid or alcohol in the detainee's injuries and then turning on the ventilator;²²¹

²¹⁵ The torturers used different devices to apply the electric shocks: a magneto (known as the "*maquininha*" in the OBAN and the "*maricota*" in the DOPS/RS); a field telephone (in prisons); a television (known as the "Brigitte Bardot" in the DEOPS/SP); a microphone (in the DEOPS/SP); the "*pianola*," an apparatus with several keys that permitted a controlled variation in the voltage of the electric current (in the PIC-Brasília and in the DEOPS/SP); and also a direct shock from an electrical outlet of 110 and up to 220 volts. It was very common that the victim, on receiving the shocks, bit his tongue, injuring himself severely. Medical texts indicate that an electric shock applied to the head causes micro brain hemorrhages, destroying brain tissue and causing neuronal loss; at the very least, it caused memory loss and a real reduction in cognitive ability and, at times, permanent amnesia. The intensive application of electric shocks resulted in the death of many political prisoners, particularly those with heart conditions. Report of the National Truth Commission, p. 366 (evidence file, folio 896).

²¹⁶ According to São Paulo political prisoners: "It is like an 'electric chair.' The victim is seated naked with his wrists tied to the arms of the chair and his legs forced back and held there by a bar. When the electric current is connected, the body receives shocks, mainly the buttocks and testicles; the legs are injured by hitting against the bar that restrains them. In addition, there are complementary devices: the 'electric helmet' (a metal bucket placed on the head, where electric shocks are applied); throwing water on the body to increase the intensity of the shock; obliging the victim to eat salt which also increases the shock, causes intense thirst and makes the tongue, which has been bitten by the teeth, burn. All of this accompanied by blows to the body." Report of the National Truth Commission, p. 367 (evidence file, folio 897).

²¹⁷ Cf. Report of the National Truth Commission, p. 368 (evidence file, folio 898).

²¹⁸ Other ways were to submerge the detainee's head in a tank, barrel or bucket of water, forcing his neck down; "*pesqueria*" (the fishing line): when a long rope was tied under the victim's arms and he was thrown into a well and even into rivers or lakes, and the rope was jerked from time to time. Report of the National Truth Commission, pp. 368 and 369 (evidence file, folios 898 and 899).

²¹⁹ Cf. Report of the National Truth Commission, p. 369 (evidence file, folio 899).

²²⁰ Cf. Report of the National Truth Commission, p. 369 (evidence file, folio 899).

²²¹ Cf. Report of the National Truth Commission, p. 369 (evidence file, folio 899).

- 7.1. *Truth serum*: this was usually applied with the victim tied to a bed or stretcher; the drug was injected intravenously, drop by drop. The use of this drug for medicinal purposes is strictly controlled, because it has serious side effects and an overdose can even lead to death;²²²
- 7.2. *"Seasoning with ether"*: the application of a kind of compress soaked in ether, particularly to the most sensitive parts of the body such as the mouth, nose, ears, penis, etc., or the introduction of a wad of cotton or towelling, also soaked in ether, in the anus or vagina of the victim;²²³
- 7.3. *Ether injection*: application of subcutaneous injections of ether that caused shooting pains. Normally, this method of torture caused the necrosis of the affected tissue, and the extent depended on the area affected;²²⁴
8. *Asphyxiation*: obstruction of the respiration resulting in a feeling of asphyxiation, covering the victim's mouth and nose with cotton or towelling material, which also prevented the victim from crying out. The victim experienced dizziness and could faint;²²⁵
9. *Hanging*: the person tortured had a rope or piece of material tightened around his neck, and had the sensation that he was being suffocated; at times, this resulted in loss of consciousness;²²⁶
10. *Crucifixion*: the victim was hung from his bound hands or feet on hooks set into the ceiling or the stairs, leaving him hanging and applying electric shocks, punches and other usual means of torture;²²⁷
11. *Furar poço de petróleo* ("drilling an oil well"): the victim was obliged to place a finger on the ground and run in circles, without moving the finger, until he fell exhausted. All this time, he was punched and kicked and subjected to other acts of violence;²²⁸
12. *Standing on two open cans*: the victim, with bare feet, was obliged to balance on the raw edges of two open cans. At times, this was done until the victim was bleeding. When he lost his balance and fell, the beatings increased;²²⁹
13. *The ice box*: a torture technique of British origin in which the detainee was confined in a cell of approximately 1.5m x 1.5m high, to prevent him standing. The inner door was made of metal and the walls were lined with insulation sheets. There was no hole through which external light or sound could enter. A refrigeration and heating system alternated high and low temperatures. The cell was kept in total darkness most of the time. From time to time, small colored lights in the ceiling flickered rapidly, while a

²²² This was sodium pentothal, a barbiturate (barbiturates and other hypnotic drugs have a progressive effect; first, sedative and then of general anesthesia, and lastly, of gradual respiratory depression). Report of the National Truth Commission, p. 370 (evidence file, folio 900).

²²³ The repeated application of these compresses and wads resulted in burns that caused great pain. Report of the National Truth Commission, p. 370 (evidence file, folio 900).

²²⁴ Cf. Report of the National Truth Commission, p. 370 (evidence file, folio 900).

²²⁵ Cf. Report of the National Truth Commission, p. 371 (evidence file, folio 901).

²²⁶ Cf. Report of the National Truth Commission, p. 371 (evidence file, folio 901).

²²⁷ Cf. Report of the National Truth Commission, p. 371 (evidence file, folio 901).

²²⁸ Cf. Report of the National Truth Commission, p. 371 (evidence file, folio 901).

²²⁹ Cf. Report of the National Truth Commission, p. 371 (evidence file, folio 901).

speaker installed inside the cell issued sounds of cries, car horns and other noises at an extremely high volume. The victim, who was naked, remained in the cell for periods that varied from hours to days, often without food or water.²³⁰

14. *Pau de arara* ("Parrot's perch"): one of the best-known and most used methods, widely applied as a symbolic example of the practice of torture. The victim was suspended from a rod of wood or metal with his arms and feet bound. In this position, other methods of torture were applied, such as near-drowning, beating, sexual abuse and electric shocks;²³¹
 15. *Use of animals*: political prisoners were confronted by the most varied types of animals, including dogs, rats, caimans, snakes and beetles, that were thrown at the victim or even introduced into part of his body;²³²
 16. *Christ's crown*: a steel band around the head, with a pin/spike allowing it to be tightened;²³³
 17. "*Churrasquinho*" (*Barbecue*): this consisted in setting parts of the victim's body on fire after soaking them with alcohol;²³⁴
 18. *Other forms of torture*: these were carried out alone or together and included, burning some part of the body with cigarettes; using pliers to pull out bodily hair (especially pubic hairs), teeth and/or nails; obliging a thirsty victim to drink brine; introducing steel sponges or wool in the anus and then applying electric shocks; tying a nylon thread between the testicles and the toes and obliging the victim to walk; flogging; tying victims to the bars on the cell windows; tying a victim to a boat and dragging him through the water; tying up the penis so the victim could not urinate; suffocation; making victims drink water from the lavatory; whipping, spitting on, keeping in isolation in dirty, damp, cold and unlit cells; using a hammer on a victim's fingers; burying alive; forcing the victim to carry out physical exercises; strangulation; Russian roulette, cutting off ears, mutilation and the most common of all, beatings;²³⁵
- b) Psychological torture: intimidation, extreme and credible threats to the physical integrity and life of the victim or of third parties, and humiliation:²³⁶
1. *Physical-mental torture*: placing the detainee in a straitjacket; obliging him to remain for hours handcuffed or tied to a bed or stretcher; keeping him for many days with his eyes covered or with a hood on his head; keeping the detainee without food, drink or sleep; keeping the victim in solitary confinement, and turning bright lights on the victim;²³⁷
 2. *Threats*: these were used to frighten victims and were the most frequent form of psychological torture. The threats included: making the victim or a

²³⁰ Cf. Report of the National Truth Commission, p. 372 (evidence file, folio 902)

²³¹ Cf. Report of the National Truth Commission, p. 372 (evidence file, folio 902).

²³² In the case of the mice, they were very destructive when introduced into the bodies of the victims because "this animal is unable to move backwards." Report of the National Truth Commission, pp. 373 and 374 (evidence file, folios 903 and 904).

²³³ Aurora Maria Nascimento Furtado was killed in this way. Report of the National Truth Commission, p. 374 (evidence file, folio 904).

²³⁴ Cf. Report of the National Truth Commission, p. 374 (evidence file, folio 904).

²³⁵ Cf. Report of the National Truth Commission, p. 375 (evidence file, folio 905).

²³⁶ Cf. Report of the National Truth Commission, p. 375 (evidence file, folio 905).

²³⁷ Other examples of these techniques are isolation, absolute prohibition to communicate with anyone, and sleep deprivation. Report of the National Truth Commission, p. 375 (evidence file, folio 905).

family member abort; drowning; suffocation; placing animals in the body; obliging the victim to eat faeces; handing over the prisoner to another more violent repressive unit; strangulation; rape of a family member; shooting; killing; detaining a family member; rape; brainwashing and mutilation of some part of the body. There were also death threats involving actions such as: obliging the prisoner to dig his own grave, dance with a corpse, or play Russian roulette, among others,²³⁸ and

3. Threats against family members and friends: including pregnant women and small children or, even, torturing friends in front of the victim, so that he would feel guilty owing to the acts of the torturers and the suffering of those who were dear to him.²³⁹

241. The facts described leave no doubt that the detention, torture and murder of Vladimir Herzog were, indeed, committed by State agents who were members of the Second Army's DOI/CODI in São Paulo, as part of a plan to carry out a widespread and systematic attack against the civilian population who were considered as "opposing" the dictatorship and, in particular, in this case, journalists and supposed members of the Brazilian Community Party. Mr. Herzog's torture and death were not an accident, but rather the consequence of an extremely well-organized repressive machine, structured to act in this way and to eliminate physically any party-based or democratic opposition to the dictatorship, using practices and techniques documented, approved and closely monitored by the heads of the Army and the Executive Power. Specifically, his detention was part of Operation Radar, which had been set up to "combat" the PCB. Dozens of journalists and members of the PCB had been detained and tortured before Mr. Herzog and continued to be detained and tortured afterwards as a result of the systematic action of the dictatorship to dismantle and eliminate its presumed opponents. The Brazilian State, through the National Truth Commission, confirmed this conclusion in the Commission's Final Report published in 2014.

242. The Court concludes that the acts perpetrated against Vladimir Herzog should be considered a crime against humanity, as this has been defined by international law since 1945, at least (*supra* paras. 211 to 228). Also, as indicated in the judgment in the case of *Almonacid Arellano*, at the time of the relevant facts of the case (October 25, 1975), the prohibition of crimes under international law and crimes against humanity had achieved the status of a peremptory norm of international law (*jus cogens*), which imposed on the State of Brazil and, indeed, on the whole international community, the obligation to investigate, prosecute and punish those responsible for such conducts, because they constitute a threat to the peace and security of the international community (*supra* para. 212).

ii) Obligations of the State following the classification of the torture and murder of Vladimir Herzog as a crime against humanity

243. In cases in which it is alleged that facts occurred that constitute torture and extrajudicial execution, it is essential that States conduct an effective investigation into the arbitrary deprivation of the right to life recognized in Article 4 of the Convention, aimed at determining the truth and at the identification, capture, prosecution and eventual punishment of the perpetrators.²⁴⁰ This obligation acquires special significance when State agents are or

²³⁸ Cf. Report of the National Truth Commission, p. 376 (evidence file, folio 906).

²³⁹ Cf. Report of the National Truth Commission, p. 378 (evidence file, folio 908).

²⁴⁰ Cf. *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 143, and *Case of Favela Nova Brasília v. Brazil*, para. 177.

could be involved²⁴¹ because they have a monopoly of the use of force, and when there is a proven context of crimes against humanity. In addition, if the facts that violated human rights are not investigated properly, the public authorities would, in a sense, be facilitating them, which could involve the international responsibility of the State.²⁴²

244. Based on the fact that the crimes perpetrated against Vladimir Herzog occurred in a context of crimes against humanity, in violation of a peremptory norm of international law that, already at the time had *erga omnes* effects, once the State became aware of the acts that constituted torture, it should have opened, *ex officio*, the pertinent investigation in order to establish the corresponding individual responsibilities.²⁴³

iii) Actions taken by the State in this case

245. The Court will now make a brief analysis of the initiatives taken by the State and the members of Vladimir Herzog's family before and after the acceptance of the Court's jurisdiction. The Court recalls that the facts prior to December 10, 1998, serve to determine the situation after that date on which Brazil accepted the Court's competence to determine possible violations of the American Convention on Human Rights.

a. IPM No. 1173-75

246. Owing to the public outcry following Mr. Herzog's death, the Second Army opened an inquiry in the military criminal jurisdiction (IPM No. 1173-75) on October 30, 1975. This investigation – widely characterized as fraudulent – resulted in the version that Vladimir Herzog had committed suicide by hanging himself. Accordingly, the military justice system closed the case in February 1976 (*supra* paras. 128). In this regard, the State acknowledged before this Court that this military criminal investigation "cannot be considered a valid attempt to investigate the facts, and it was not appropriate to meet the obligation to investigate, prosecute and punish."²⁴⁴

247. Although this action by the State does not fall within the Court's contentious jurisdiction, the Court recalls its consistent case law on the restriction of the military jurisdiction's competence to examine facts that constitute human rights violations, in the sense that, under the democratic rule of law, the military criminal jurisdiction must have a restrictive and exceptional scope and be directed at the protection of special legal interests linked to the functions inherent to the armed forces.²⁴⁵ Consequently, the Court has indicated that the military jurisdiction should only try members of the military forces on active duty for the perpetration of crimes or misdemeanors that, owing to their nature, violate the specific legal interests of the military forces.²⁴⁶ The fact that the individuals involved are members of the armed forces or that the events occurred within a military establishment do not signify, *per se*, that military justice should intervene. This is because, owing to the nature of the crime

²⁴¹ Cf. *Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs*. Judgment of November 25, 2003. Series C No. 101, para. 156, and *Case of Favela Nova Brasília v. Brazil*, para. 177.

²⁴² Cf. *Case of the Pueblo Bello Massacre v. Colombia*, para. 145, and *Case of Favela Nova Brasília v. Brazil*, para. 177.

²⁴³ Cf. *Case of the Río Negro Massacres v. Guatemala*, para. 225, and *Case of the Hacienda Brasil Verde Workers v. Brazil*, para. 362.

²⁴⁴ Answering brief of the State, para. 15 (merits file, folio 319).

²⁴⁵ Cf. *Case of Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, para. 117, and *Case of Ortiz Hernández et al. v. Venezuela*. Merits, reparations and costs. Judgment of August 22, 2017. Series C No. 338, para. 148.

²⁴⁶ Cf. *Case of Durand and Ugarte v. Peru*. Merits, para. 117, and *Case of Ortiz Hernández et al. v. Venezuela*, para. 148.

and the legal interest violated, the military criminal jurisdiction is not the competent jurisdiction to investigate and, if appropriate, prosecute and punish the authors of human rights violations; to the contrary, the prosecution of those responsible always corresponds to the common or ordinary system of justice.²⁴⁷

248. In addition, the Court has repeatedly affirmed that the military jurisdiction should observe the following standards or parameters:²⁴⁸ (a) this jurisdiction is not competent to investigate and, if appropriate, prosecute and punish the authors of any violation of human rights;²⁴⁹ (b) it can only try members of the armed forces on active duty,²⁵⁰ and (c) it can only try crimes or misdemeanors (committed by members of the armed forces on active duty) that, due to their nature, violate specific legal interests of the armed forces.²⁵¹

b. Declaratory civil action

249. In view of the fraudulent result of Military Police Investigation No. 1173-75 and the legal impossibility that the State organs would conduct an effective investigation into the torture and death of Vladimir Herzog, his family filed a declaratory action. Despite the civil nature of that proceeding, the trial judgment (*supra* paras. 132 to 134) established that: (i) Vladimir Herzog had died of unnatural causes when he was in the DOI/CODI/SP; (ii) the Union was unable to prove its hypothesis of Mr. Herzog's suicide; (iii) his detention had been illegal; (iv) the supplementary report of the military jurisdiction was worthless because it had been prepared based on the autopsy report that had been proved to have been fabricated; (v) a crime of abuse of authority had been committed, as well as of torture perpetrated against Vladimir Herzog and the other political prisoners who were detained in the DOI/CODI. Lastly, the federal judge determined that the case file should be forwarded to the prosecutor of the military jurisdiction. However, the military prosecutor took no action in this regard. The Union appealed the trial judgment, but it became final on September 27, 1995 (*supra* para. 135).

c. The Amnesty Law and Police Investigation No. 487/92

250. On August 29, 1979, Amnesty Law No. 6683/79 was enacted. In 1992, following the publication of an interview with a known torturer, Pedro Antonio Mira Grancieri, who stated that he alone had been responsible for the interrogation of Vladimir Herzog, the Public Prosecution Service of the state of São Paulo was asked to investigate the participation of Mira Grancieri in the death of Vladimir Herzog. The Public Prosecution Service asked the police to

²⁴⁷ Cf. *Case of the La Rochela Massacre v. Colombia*. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 163, para. 200, and *Case of Ortiz Hernández et al. v. Venezuela*, para. 148.

²⁴⁸ Cf. *Case of Quispialaya Vilcapoma v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2015. Series C No. 308, para. 146.

²⁴⁹ Cf. *Case of Radilla Pacheco v. Mexico*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 273, *Case of Fernández Ortega et al. v. Mexico*. Preliminary objection, Merits, reparations and costs. Judgment of August 30, 2010. Series C No. 215, para. 176, *Case of Rosendo Cantú et al. v. Mexico*. Preliminary objection, Merits, reparations and costs. Judgment of August 31, 2010. Series C No. 216, para. 160, *Case of Escué Zapata v. Colombia*. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 165, para. 105, *Case of the Santa Barbara Campesino Community v. Peru*, para. 245, *Case of Quispialaya Vilcapoma v. Peru*, para. 146, and *Case of Ortiz Hernández et al. v. Venezuela*, para. 148.

²⁵⁰ Cf. *Case of Radilla Pacheco v. Mexico*, para. 272, *Case of Fernández Ortega et al. v. Mexico*, para. 176, and *Case of Rosendo Cantú et al. v. Mexico*, para. 160, *Case of Castillo Petruzzi et al. v. Peru*. Merits, reparations and costs. Judgment of May 30, 1999. Series C No. 52, para. 128, *Case of Quispialaya Vilcapoma v. Peru*, para. 146, and *Case of Ortiz Hernández et al. v. Venezuela*, para. 148.

²⁵¹ Cf. *Case of Radilla Pacheco v. Mexico*, para. 313, *Case of Fernández Ortega et al. v. Mexico*, para. 179, and *Case of Rosendo Cantú et al. v. Mexico*, para. 163, *Case of Castillo Petruzzi et al. v. Peru*. Merits, reparations and costs, para. 128, *Case of Quispialaya Vilcapoma v. Peru*, para. 146, and *Case of Ortiz Hernández et al. v. Venezuela*, para. 148.

open a police investigation. However, a few months later, Mira Grancieri filed an application for *habeas corpus* in favor of himself, which was unanimously declared admissible by the São Paulo Court of Justice in October 1992. Consequently, the police investigation was closed in compliance with the Amnesty Law. In January 1993, the São Paulo Prosecutor General appealed the decision. However, on August 18, 1993, the Superior Court of Justice confirmed the first instance decision. The justices alleged procedural questions to deny the appeal (*supra* paras. 140 to 145).

251. The Court does not have competence *ratione temporis* to determine a violation of the American Convention in relation to these facts. However, it is important to point out that the decision of the São Paulo Court of Justice was issued after the entry into force of the American Convention for the Brazilian State (the Convention was ratified on September 25, 1992). In addition, the Court recalls its considerations on Law No. 6683/79 in the judgment in the case of *Gomes Lund et al.*:

174. Given its evident incompatibility with the American Convention, the provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations lack legal effect. Consequently, they cannot continue to represent an obstacle to the investigation of the facts in this case, or for the identification and punishment of those responsible; nor can they have a similar or equal impact on other cases of serious violations of human rights recognized in the American Convention that have occurred in Brazil

175. Regarding the parties' arguments in relation to whether what is involved is an amnesty, a self-amnesty or a "political agreement," the Court notes, as revealed by the criteria reiterated in the [...] case, that the incompatibility with the Convention includes amnesties of serious human rights violations and is not limited merely to those known as, "self-amnesties." Likewise, as indicated previously, the Court abides by its own *ratio legis*, rather than the adoption proceeding and the authority that issued the Amnesty Law: not to leave unpunished serious violations of international law committed by the military regime. The incompatibility of amnesty laws with the American Convention in cases of gross violations of human rights does not arise from a formal matter, such as their origin, but rather from the substantive aspect, because they violate the rights established in Articles 8 and 25, in relation to Articles 1(1) and 2, of the Convention

d. Special Commission on Political Deaths and Disappearances

252. The Special Commission on Political Deaths and Disappearances (CEMDP), created by Law No. 9140/95, identified – among other matters – those persons who, owing to their participation or because they had been accused of participating in political activities, died from unnatural causes in police establishments or similar locations, or who died as a result of acts of torture perpetrated by law enforcement agents. The CEMDP granted compensation to Vladimir Herzog's family for the facts that happened to him and concluded that, indeed, Mr. Herzog had died in the São Paulo DOI/CODI. The official final report of this Commission was published in 2007 (*supra* paras. 146 to 151).

253. That version of the torture and murder of Vladimir Herzog was published by a State body which, also, identified patterns of widespread and systematic institutional violence by public agents linked to the DOI/CODI, the Army and police forces during the military dictatorship. Based on this information, the Court considers that the State had the obligation to conduct the pertinent investigation to establish the respective individual responsibilities.²⁵² Already, at that time, the *modus operandi* of the military regime's security forces was known

²⁵² Cf., *mutatis mutandi*, *Case of the Río Negro Massacres v. Guatemala*, para. 225.

and also the systematic nature and scope of the plan to “combat subversion” that had been implemented, above all, between 1968 and 1975.

254. In view of the particularities of this case, and the State’s awareness of the definition of the facts under international law, especially after the publication of the CEMDP Report, the State had the obligation to act diligently to avoid crimes such as those described in this report remaining unpunished.

e. Actions of the Federal Public Prosecution Service (Proceeding No. 2008.61.81.013434-2)

255. Without prejudice to the previous consideration on State obligations in the case of conducts that can be characterized as crimes against humanity, the Court will now examine the initiative of the Federal Public Prosecution Service and the response of the Federal Judiciary to the complaint filed by a lawyer as a result of the publication of the CEMDP Report.

256. On receiving the complaint filed by the lawyer, Fábio Konder Comparato, two federal prosecutors with civil competence forwarded it to their colleague with criminal competence. That federal prosecutor ruled in favor of closing the investigation. Although he recognized that “the murder of Vladimir Herzog has all the characteristics of the so-called crimes against humanity, and can be fully characterized as such”; that the Amnesty Law was not applicable to the case, and that the possibility of punishing the crime committed had not extinguished owing to the amnesty, the federal prosecutor considered that the conduct had not been defined by law at the time of the facts. In addition, he understood that substantive *res judicata* existed and, also, that statutory limitations applied to the possible punishment, whether or not the judge was competent. Furthermore, the prosecutor indicated that the American Convention “does not establish clearly any hypothesis on imprescriptibility for the past” and that imprescriptibility could not be established based on that source, because it represented a factor of legal uncertainty (*supra* paras. 152 to 157).

257. Under the Brazilian legal system, the criminal prosecutor’s opinion had to be examined by a judge. The federal judge who intervened admitted the reasoning of the Public Prosecution Service, understanding that substantive *res judicata* existed in the case that made it impossible to continue the investigations because the criminal action had extinguished. However, she considered that the facts should not be considered crimes against humanity because they had not been defined as such when they took place. Her decision also indicated that the laws of Brazil did not allow the creation of crimes by custom, only by law. Lastly, the said judge considered that the action was subject to the statute of limitations because “both murder and genocide, and also torture [...] are not imprescriptible crimes under the Constitution and other provisions of the laws in force” (*supra* paras. 159 and 160). With regard to the intervention of the judge who had closed the investigation in 1992, the federal judge indicated that, by recognizing the existence of a cause for extinction of the possibility of punishment, that decision acquired legal substance, and therefore constituted substantive *res judicata*.²⁵³

B.4. Analysis of the State’s actions

258. In order to analyze the preceding decisions and rulings, the Court will refer to the standards established in this chapter in relation to crimes against humanity and the legal consequences for States when these occur and, in particular, for Brazil since December 10,

²⁵³ Substitute Federal Judge of the First Federal Criminal and Sentencing Court. Decision No. 2008.61.81.013434-2, January 9, 2009, p. 9 (evidence file, folio 4573).

1998, the date on which it accepted the jurisdiction of the Inter-American Court. In this regard, the Court will examine every exclusion of responsibility alleged by Brazil to justify the failure to investigate, prosecute and punish those responsible for the torture and murder of Vladimir Herzog, in order to establish their incompatibility with crimes against humanity in this case.

259. First, it is important to reiterate, pursuant to the Court's previous considerations (*supra* paras. 211 to 228) that the peremptory norm of *jus cogens* prohibiting crimes against humanity existed and was binding for the State of Brazil at the time of the facts. The Court repeats that the main consequence of a peremptory norm of international law is that it does not admit any decision to the contrary and that it can only be amended by a subsequent norm of general international law of the same nature. The second consequence of a peremptory norm is that it involves obligations *erga omnes*. As previously indicated, the first obligation of States under this norm is to prevent this type of crime from occurring. Consequently, States must ensure that such conducts are criminally prosecuted and the authors punished. In the same way, the absence of a formal definition in domestic law of conducts that reach the threshold of crimes against humanity does not exclude the person who committed the act from his liability under international law and the universal jurisdiction in relation to the perpetrators of such crimes (*supra* para. 231). Other consequences that will not be examined in detail in this judgment are the non-applicability of immunities and the excuse of "due obedience." Furthermore, the Court will not refer to the non-derogability of this prohibition in states of emergency.

260. Added to these basic clarifications, the Court has underlined the obligation to investigate and punish serious human rights violations and eventual crimes against humanity.²⁵⁴ In light of the foregoing, the Court will now examine the reasons why, in this case, the State of Brazil is prevented from using devices that permit the impunity of crimes against humanity, such as statutory limitations, the principle of *ne bis in idem*, amnesty laws, and any other similar provision that excludes responsibility.

i) *Imprescriptibility of crimes against humanity*

261. The application of statutory limitations in criminal matters results in the extinction of the possibility of punishment owing to the passage of time and, in general, limits the State's punitive power to prosecute unlawful conduct and punish its authors. It is a guarantee that must be duly respected by a judge with regard to anyone accused of a crime. Nevertheless, exceptionally,²⁵⁵ the application of a statute of limitations to the criminal action is inadmissible and inapplicable in the case of serious human rights violations under international law. The Court's consistent case law has always indicated this.²⁵⁶

262. In addition, the non-applicability of statutory limitations is founded on the fact that certain contexts of institutional violence – added to certain obstacles to the investigation – may result in significant difficulties for the investigation of some human rights violations.²⁵⁷

²⁵⁴ Cf. *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 137.

²⁵⁵ The Court has considered that "serious human rights violations" have their own connotation and consequences. Cf. *Case of Escher et al. v. Brazil. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of June 19, 2012, para. 20.

²⁵⁶ Cf. *Case of Barrios Altos v. Peru*. Merits, para. 41; *Case of Almonacid Arellano v. Chile*, para. 110; *Case of the La Rochela Massacre v. Colombia*, para. 294; *Case of Albán Cornejo v. Ecuador*. Merits, reparations and costs. Judgment of November 22, 2007. Series C No. 171. para. 111; *Case of Vera Vera et al. v. Ecuador. Preliminary objection, Merits, reparations and costs*. Judgment of May 19, 2011. Series C No. 226, párr 117.

²⁵⁷ "The protection of human rights against particularly serious, inadmissible violations that might go unpunished – thus diluting the duty to administer criminal justice stemming from the guarantee obligation of the State – has caused certain facts to be excluded from the ordinary statute of limitations system, even a more strict statute of limitations

In each particular case, taking into account the specific arguments concerning the evidence, the non-applicability of the statute of limitations at a certain moment may have the purpose of preventing the State from evading accountability for the arbitrary acts committed by its own officials in such contexts²⁵⁸ and thus avoiding their repetition.²⁵⁹

263. The Court has affirmed, consistently and repeatedly, that application of the statute of limitations is inadmissible in cases of torture, murders committed in a context of massive and systematic violations of human rights, and forced disappearances,²⁶⁰ because such conducts contravene non-derogable rights and obligations recognized by international human rights law.

264. Specifically, with regard to crimes against humanity, “no rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg or the Tokyo Charters, or in the constituent instruments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leon. In contrast, Control Council Law No. 10, adopted in December 1945 by the Allied Control Council for Germany to ensure the continued prosecution of alleged offenders, provided that in any trial or prosecution for crimes against humanity (as well as war crimes and crimes against the peace) ‘the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945.’”²⁶¹ In addition, in 1967, the United Nations General Assembly noted that “the application to war crimes and crimes against humanity of the rule of municipal law relating to the period of limitation for ordinary crimes is a serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes.”²⁶² The following year, the States adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which recognized the evolution of international law on this matter and determined that “statutory or other limitations shall not apply to the prosecution and punishment of” crimes against humanity.²⁶³ In addition, the Rome Statute

applied on certain conditions and longer terms intended to give extended life to the State’s right to prosecute.” Separate opinion of Judge Sergio García Ramírez with regard to the judgment of the Inter-American Court of Human Rights in the *Case of Albán Cornejo et al. v. Ecuador*. Merits, para. 29.

²⁵⁸ Cf. *Case of Bueno Alves v. Argentina*. Monitoring compliance with judgment. Resolution of the Inter-American Court of Human Rights of July 5, 2011, *considerandum* 40.

²⁵⁹ Cf. *Case of Albán Cornejo v. Ecuador*. Merits, para. 111; *Case of Vera and otra v. Ecuador*, para. 117.

²⁶⁰ See, *inter alia*, *Case of Barrios Altos v. Peru*. Merits, para. 41; *Case of the Gómez Paquiyauri Brothers v. Peru*. Merits, reparations and costs. Judgment of July 8, 2004. Series C No. 110, para. 150, 151 and 152; *Case of the Moiwana Community v. Suriname*. Preliminary objections, merits, reparations and costs. Judgment of June 15, 2005. Series C No. 124, para. 167; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*. Merits, reparations and costs. Judgment of September 1, 2010. Series C No. 217, para. 207; *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para. 171; *Case of Vera Vera et al. v. Ecuador*, para. 117, and *Case of the Hacienda Brasil Verde Workers v. Brazil*, para. 454.

²⁶¹ UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, commentary 34 on article 6 of the Draft articles on crimes against humanity, p. 70, citing Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, para. 5; UN. General Assembly. *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, Resolution 2338 (XXII), December 18, 1967.

²⁶² UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, commentary 35 on article 6 of the Draft articles on crimes against humanity, p. 70, citing UN. General Assembly. *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, Resolution 2338 (XXII), December 18, 1967; see also Resolution 2712 (XXV) of December 15, 1970 (available at: [https://undocs.org/en/A/RES/2712\(XXV\)](https://undocs.org/en/A/RES/2712(XXV))), and Resolution 2840 (XXVI) of December 18, 1971 (available at: [https://undocs.org/en/A/RES/2840\(XXVI\)](https://undocs.org/en/A/RES/2840(XXVI))).

²⁶³ UN. General Assembly. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, Resolución 2391(XXIII), November 26, 1968, Article IV. Available at [https://undocs.org/en/a/res/2391\(XXIII\)](https://undocs.org/en/a/res/2391(XXIII)).

expressly provided that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitation” (*supra* para. 217). Likewise, recent international developments such as the establishment of the Extraordinary Chambers in the Courts of Cambodia and the Regulation on the Special Panels for East Timor expressly define crimes against humanity as crimes that have no statute of limitations.²⁶⁴

265. According to the International Law Commission, “[a]t present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.”²⁶⁵ Furthermore, even though neither the Convention against Torture nor the International Covenant on Civil and Political Rights expressly prohibit the application of the statute of limitations to grave violations of these treaties, the respective committees created to interpret and monitor compliance with the two treaties have established that torture and grave violations of the Covenant should not be subject to any statute of limitations.²⁶⁶

266. In the regional sphere, the European Court of Human Rights has referred to the statute of limitations in cases of gross or massive violations of human rights. In this regard, it has indicated that, based on the seriousness of the crimes, the application of the statute of limitations is contrary to the obligation to ensure the right to life.²⁶⁷ It has also recognized that even with the passage of time, the public interest in obtaining the prosecution and conviction of perpetrators was firmly recognized, in particular in the context of war crimes and crimes against humanity.²⁶⁸

²⁶⁴ Cf. Parliament of the Kingdom of Cambodia. *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, promulgated on August 10, 2001, with amendments adopted on October 27, 2004 (NS/RKM/1004/006), art. 5; United Nations Transitional Administration in East Timor. *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*. UNTAET/REG/2000/15, June 6, 2000, art. 17.1.

²⁶⁵ UN. *Report of the International Law Commission on the work of its sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*. A/72/10, p. 9, para. 45. Available at <https://undocs.org/en/A/72/10>, commentary 35 on Article 6 of the Draft articles on crimes against humanity, p. 71.

²⁶⁶ See, for example, Report of the Committee against Torture, Thirty-seventh session (6-24 November 2006) Thirty-eighth session (30 April-18 May 2007) (A/62/44), Chapter III, Consideration of reports by States Parties under Article 19 of the Convention: Mexico, para. 35, Concluding observation 16, and Italy, para. 40, Concluding observation 19; See also, for example, Report of the Human Rights Committee (Ninety-first session (15 October-2 November 2007) Ninety-second session (17 March-4 April 2008) Ninety-third session (7-25 July 2008) (A/63/40 (Vol. I)), Chapter IV, Consideration of reports submitted by States Parties under Article 40 of the Covenant and of country situations in the absence of a report resulting in public concluding observations, Panama (section A, para. 79, observation 7).

²⁶⁷ ECHR. *Aslakhanova and Others. v. Russia*, Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, Judgment of December 18, 2012, para. 237: “Lastly, the application of the statute of limitations to the bulk of investigations of the abductions committed prior to 2007 has to be addressed. Bearing in mind the seriousness of the crimes, the large number of persons affected and the relevant legal standards applicable to such situations in modern-day democracies, the Court finds that the termination of pending investigations into abductions solely on the grounds that the time-limit has expired is contrary to the obligations under Article 2 of the Convention. The Court also notes that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events, since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.”

²⁶⁸ ECHR. *Aslakhanova et al. v. Russia*, Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, Judgment of December 18, 2012, para. 237, citing *Brecknell v. The United Kingdom* No. 32457/04, Judgment of November 27, 2007, para. 69.

267. Similarly, high courts of Peru,²⁶⁹ Argentina,²⁷⁰ Chile,²⁷¹ Colombia,²⁷² Costa Rica,²⁷³ El Salvador,²⁷⁴ Guatemala,²⁷⁵ Mexico,²⁷⁶ Paraguay²⁷⁷ and Uruguay²⁷⁸ have reaffirmed the principle of the non-applicability of the statute of limitations to crimes against humanity, war crimes and genocide, referring to its nature as a norm of customary international law.

268. Lastly, the Court points out that several countries of the Americas have incorporated legal or constitutional provisions on the non-applicability of statutory limitations to serious

²⁶⁹ Cf. Constitutional Court. Judgment of March 21, 2011, 25% of the legal quorum of members of Congress against the Executive. Case file No. 0024-2010-PI/TC, *considerandum* §7; Superior Court of Justice of Lima. First Special Criminal Chamber. Judgment of September 15, 2010, File No. 28-2001-1°SPE/CSJLI.

²⁷⁰ Cf. Supreme Court of the Nations, *inter alia*: Appeal judgment of November 2, 1995, Case of Erich Priebke No. 16,063/94, *considerandum* 5; Appeal. Judgment of August 24, 2004, Case of Arancibia Clavel, Enrique Lautaro, case No. 259, *consideranda* 12 to 38; and Appeal. Judgment of June 14, 2005, Case of Julio Héctor Simón *et al.*, case No. 17,768, *considerandum* 30. See also: Argentine Federal Criminal and Correctional Appeals Chamber, Appeal. Judgment of September 9, 1999, Massera ref/objections, Case No. 30514, *considerandum* III; Federal Criminal Oral Court No. 1 of San Martín Judgment for crimes against humanity. August 12, 2009, General Riveros *et al.* in the case of Floreal Edgardo Avellaneda *et al.*, *considerandum* I; Argentine Federal Criminal and Correctional Appeals Chamber, Appeal for annulment. September 9, 1999, Case of Videla *et al.*, *considerandum* III; Federal Appeals Chamber of La Plata (Chamber II). Decision of July 17, 2014, FLP 259/2003/17/CA3, *consideranda* VI and VII.

²⁷¹ Cf. Supreme Court of Justice, Criminal Chamber. Cassation judgment on the merits. December 13, 2006, Case No. 559-04, Case of Molco de Choshuenko (Paulino Flores Rivas *et al.*), *consideranda* 2 and 12 to 19; Second Chamber of the Supreme. Cassation judgment on form and merits. November 17, 2004, Case No. 517-2004, *consideranda* 33 and 37; Appeals Court of Santiago, Chile, Case of Sandoval, Judgment of January 4, 2004. Case No. 2182-98, *consideranda* 33 and 37.

²⁷² Cf. Constitutional Court: Judgment on constitutionality. July 31, 2002, C-580/02 and Judgment on constitutionality. August 18, 2011, C-620/11. See also: Council of State, Administrative Contentious Chamber (Third Section, Subsection C). Judgment of September 17, 2013, Case No: 25000-23-26-000-2012-00537-01(45092).

²⁷³ Constitutional Chamber of the Supreme Court of Justice. Consultation on constitutionality. January 12, 1996, File 6543-S-95 Opinion No.0230-96, *considerandum* II.B.2.

²⁷⁴ Cf. Constitutional Chamber of the Supreme Court of Justice of El Salvador. Unconstitutionality. July 13, 2016, File 44-2013/145-2013, *considerandum* IV.

²⁷⁵ Cf. Constitutional Court. General unconstitutionality. November 8, 2016. File No. 3438-2016, *considerandum* IV.

²⁷⁶ Cf. Supreme Court of Justice of the Nation. Amparo review. Judgment of June 10, 2003, Plaintiff: Ricardo Miguel Cavallo, No. 140/2002.

²⁷⁷ Cf. Supreme Court of Justice, Objection of unconstitutionality. May 5, 2008, Judgment No. 195, Basilio Pavón, Merardo Palacios, Osvaldo Vera and Walter Bower ref/ bodily injury in the exercise of public functions.

²⁷⁸ Cf. Supreme Court of Justice, Cassation appeal. August 24, 2016. Case file 170-298/2011, Judgment 1,280/2016, *considerandum* III.

human rights violations; they include Ecuador,²⁷⁹ El Salvador,²⁸⁰ Guatemala,²⁸¹ Nicaragua,²⁸² Paraguay,²⁸³ Panama,²⁸⁴ Uruguay²⁸⁵ and Venezuela.²⁸⁶

269. In sum, the Court notes that, in this specific case, the application of the statute of limitations as an obstacle to criminal prosecution would be contrary to international law and, in particular, the American Convention on Human Rights. This Court finds it clear that there is sufficient evidence to affirm that the non-applicability of the statute of limitations to crimes against humanity is a customary law within international law that was fully established at the time of the facts, as well as at the present time.

ii) *Principle of ne bis in idem and substantive res judicata*

270. The principle of *ne bis in idem* is a cornerstone of the guarantees of the administration of justice and of criminal guarantees according to which a person cannot be subjected to a second trial for the same facts.²⁸⁷

271. The exception to this principle, as in the case of the statute of limitations, arises from the absolute nature of the prohibition of crimes against humanity and the international community's expectation of justice. As the International Law Commission has indicated, this is based on the fact that "an individual may be tried by an international criminal court for a crime against the peace and security of mankind arising out of the same act that was the subject of the previous national court proceedings if the individual was tried by a national court for an 'ordinary' crime rather than one of the more serious crimes under the Code."²⁸⁸ "In such a case, the individual has not been tried or punished for the same crime but for a 'lesser crime' that does not encompass the full extent of his criminal conduct. Thus, an individual could be tried by a national court for murder and tried a second time by an

²⁷⁹ Article 80 of the Constitution of Ecuador (2008) refers to the non-applicability of the statute of limitations for "actions and punishments for the crime of genocide, crimes against humanity, war crimes, forced disappearance of persons, or crimes of aggression against a State."

²⁸⁰ Article 99 of the Penal Code of El Salvador, Decree No. 1030, prohibits the statute of limitations for "torture, acts of terrorism, abduction, genocide, violation of the laws and customs of war, forced disappearance of persons, and persecution based on political, ideological or racial grounds or on sex or religion."

²⁸¹ Article 8 of the National Reconciliation Law of Guatemala, Decree No. 145-96, excludes the statute of limitations for genocide, torture, forced disappearance and "those crimes that may not be subject to statutory limitations or the extinction of criminal responsibilities pursuant to domestic law or the international treaties ratified by Guatemala."

²⁸² Articles 16 and 131 of the Penal Code, Law No. 641 of 2007, excludes from the sphere of application of the statute of limitations the following crimes, among others: slavery and the slave trade; crimes against the international order; crimes of international trafficking of persons; sexual crimes against children and adolescents, and "any other crime that may be prosecuted in Nicaragua pursuant to the international instruments ratified by the country."

²⁸³ Article 5 of the Constitution of Paraguay establishes that "[...] Genocide and torture, as well as the forced disappearance of persons, abduction and murder for political reasons are not subject to the statute of limitations." This provision is reiterated in Article 102(3) of the 1997 Penal Code, Law No. 1,160/97.

²⁸⁴ Article 120 of the Penal Code (2007) prohibits application of the statute of limitations to the crime of forced disappearance, and also to crimes against humanity.

²⁸⁵ Article 75 bis of the Penal Code prohibits application of the statute of limitations to genocide and war crimes, as well as other crimes against the physical integrity of the individual.

²⁸⁶ Article 29 of the Constitution of the Bolivarian Republic of Venezuela prohibits the application of the statute of limitations to serious human rights violations, crimes against humanity and war crimes.

²⁸⁷ Article 8(4) of the American Convention: An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

²⁸⁸ UN. *Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July, 1996)*. A/51/10. p. 38. Commentary 10 on article 12 of the Draft code of crimes against the peace and security of mankind.

international criminal court for the crime of genocide based on the same act.”²⁸⁹ In situations in which “the individual has not been duly tried or punished for the same act or the same crime because of the abuse of power or improper administration of justice by the national authorities in prosecuting the case or conducting the proceedings, [t]he international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process.”²⁹⁰

272. The Court has indicated that, in the case of gross and systematic violations of human rights, the possible impunity of such conducts owing to the absence of investigation gives rise to a particularly serious violation of the rights of the victims. The severity of this violation not only authorizes, but demands, an exceptional limitation to the guarantee of *ne bis in idem* in order to allow the re-opening of the investigations when the decision that is alleged to be *res judicata* was issued as a result of an evident and notorious failure to comply with the obligations to investigate and severely punish such grave violations. In such a situation, the primacy of the rights of the victims over legal certainty and the principle of *ne bis in idem* is even more obvious, because the victims were not only injured by a heinous conduct, but also had to suffer the indifference of the State, which evidently failed to comply with its obligation to clarify such acts, punish those responsible and make reparation to the victims. In such cases, the seriousness of the crime is such that it affects the essence of the social fabric and impedes any kind of legal certainty. Therefore, the Court stresses that, when the judicial authorities examine the judicial remedies filed by those accused of serious human rights violations, they are obliged to determine whether the deviation in the use of a criminal guarantee may disproportionately restrict the rights of the victims, where a clear violation of the right of access to justice eclipses the procedural guarantee of *res judicata*.²⁹¹

273. Recently, in the case of *Marguš v. Croatia*,²⁹² the European Court determined that the principle of *ne bis in idem*, established in article 4 of Protocol No. 7 to the European Convention on Human Rights was not applicable to a situation of serious human rights violations to which an amnesty law had been applied.

274. Taking all the foregoing into account, the Court considers that, in this case, the alleged substantive *res judicata* by virtue of the Amnesty Law is definitively inapplicable.

275. In this regard, the Court notes that, with regard to the 1993 ruling of the Superior Court of Justice, which confirmed the *habeas corpus* of Mira Grancieri and closed the investigation into the torture and murder of Vladimir Herzog, expert witness Maria Auxiliadora Minahim indicated that “there is no judicial error that makes it possible, within the objective and subjective limitations of *res judicata*, to derogate the jurisdictional decision declaring the dismissal of the charges.”²⁹³ However, taking into account the legal considerations set out

²⁸⁹ UN. *Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July, 1996)*. A/51/10. p. 38. Commentary 10 on article 12 of the Draft code of crimes against the peace and security of mankind..

²⁹⁰ Cf. UN. *Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July, 1996)*. A/51/10. p. 38. Commentary 11 on article 12 of the Draft code of crimes against the peace and security of mankind.

²⁹¹ Cf. *Case of Bámaca Velásquez v. Guatemala*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of November 18, 2010, *considerandum* 44. See also: Supreme Court of Justice of the Nation, Argentina. Cassation appeal and unconstitutionality. Judgment of July 13, 2007, *Case of Mazzeo, Julio Lilo et al., consideranda* 33 and 34; Federal Criminal Oral Court No. 1 of San Martín. Judgment for crimes against humanity. August 12, 2009, General Riveros *et al.* in the case of Floreal Edgardo Avellaneda *et al.*, *considerandum* I. Similarly, see, Constitutional Court of Colombia. Judgment of January 20, 2003, C-004/03, *consideranda* 30, 31 and 32 and ECCC. *Decision on preliminary objections in the case against Ieng Sary (Ne Bis in Idem and Amnesty and Pardon)*, Case No. 002/19-09-2007/ECCC/TC, Trial judgment of November 3, 2011, paras. 30, 33 and 34.

²⁹² Cf. ECHR. *Marguš v. Croatia* [GS], No. 4455/10, Judgment of May 27, 2014.

²⁹³ Expert opinion of Maria Auxiliadora Minahim (evidence file, folio 14020).

previously in this section, the Court finds that *res judicata* is not absolute. Also, it should be emphasized that the decision that closed the investigation was not an acquittal issued in accordance with the guarantees of due process. To the contrary, it was a decision on an application for *habeas corpus* taken by a court without jurisdiction,²⁹⁴ based on a law (Law No. 6683/79) that, according to this Court, had no legal force. Furthermore, the decision in question did not respect the legal consequences of the obligation *erga omnes* to investigate, prosecute and punish the perpetrators of crimes against humanity. Consequently, it was a ruling that had no legal force and that that does not alter the legal considerations set forth in this judgment.

276. Additionally, the 2008 decision of the federal judge is not a credible decision resulting from a judicial proceeding respecting judicial guarantees that had the purpose of determining the truth of the facts and the identification of those responsible for the violations denounced. To the contrary, it was a procedural decision to close an investigation. Accordingly, the Court considers that the *ne bis in idem* principle is not applicable. Finally, the Court points out that a decision based on a law that has no legal force because it is incompatible with the Convention does not generate the legal certainty expected of the system of justice.

iii) *Amnesty laws*

277. Some States have alleged amnesties or similar devices in order to obstruct the investigation and, when applicable, the punishment of those responsible for serious human rights violations.²⁹⁵ This Court, the Inter-American Commission on Human Rights, the relevant United Nations bodies and other regional and universal human rights bodies have ruled on the incompatibility with international law and the international obligations of the States of amnesty laws in relation to serious human rights violations.

278. As already indicated, this Court has ruled on the incompatibility of amnesties with the American Convention in cases of serious human rights violations or crimes against humanity with regard to Peru (*Barrios Altos and La Cantuta*), Chile (*Almonacid Arellano et al.*), Brazil (*Gomes Lund et al.*), Uruguay (*Gelman*) and El Salvador (*Massacres of El Mozote and neighboring places*).

279. Under the inter-American human rights system, of which Brazil forms part by sovereign decision, numerous rulings have been made on the incompatibility of amnesty laws with the treaty-based obligations of States in the case of serious human rights violations. These rulings are even clearer when they refer to crimes under international law, because their seriousness and magnitude is evident.

280. In this regard, it is important to point out that, as this Court has established,²⁹⁶ international humanitarian law justifies the enactment of amnesty laws²⁹⁷ when hostilities

²⁹⁴ This was recognized by the Federal Public Prosecution Service and the federal jurisdiction in 2008. The Substitute Federal Judge of the First Federal Criminal and Sentencing Court. Decision No. 2008.61.81.013434-2, January 9, 2009, p. 9 (evidence file, folio 4573).

²⁹⁵ In this case, the Court refers generically to “amnesties” to refer to laws that, regardless of what they are called, pursue the same objective.

²⁹⁶ Cf. *Case of the Massacres of El Mozote and neighboring places v. El Salvador*. Merits, reparations and costs, para. 285.

²⁹⁷ Article 6(5) of Protocol II Additional to the 1949 Geneva Conventions established that: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

cease in non-international armed conflicts to enable the return to peace, provided they do not cover up war crimes and crimes against humanity, which cannot remain unpunished.²⁹⁸

281. In the *universal sphere*, the United Nations Secretary-General, in his report to the Security Council entitled *The rule of law and transitional justice in conflict and post-conflict societies* indicated that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights."²⁹⁹ Similarly, the United Nations High Commissioner for Human Rights has concluded that "amnesties and other juridical arrangements of comparable effect [...] promote impunity [and] pose a major obstacle to efforts to uphold the right to the truth by inhibiting the conduct of full inquiries,"³⁰⁰ and are, therefore, incompatible with State obligations by virtue of different sources of international law.³⁰¹

282. Also, in the universal sphere, the human rights treaty bodies have maintained the same standard on the prohibition of amnesties that prevent the investigation and punishment of those who commit grave human rights violations.³⁰²

283. Amnesties or similar measures have also been considered inadmissible under international criminal law. The International Criminal Tribunal for the Former Yugoslavia considered that it would be senseless to argue, on the one hand, to maintain the prohibition of grave human rights violations and, on the other, to allow State measures that authorize or condone them, or amnesty laws that absolve the perpetrators.³⁰³ It also affirmed that an amnesty enacted under domestic law with regard to the crime of torture, "would not be accorded international legal recognition."³⁰⁴ Similarly, the Special Court for Sierra Leone considered that the amnesty laws of that country were not applicable to serious international crimes.³⁰⁵ This universal trend has been incorporated into the Agreement between the United Nations and the Lebanese Republic and the Agreement between the United Nations and the Kingdom of Cambodia, and also into the Charters that created the Special Tribunal for the Lebanon, the Special Court for Sierra Leone, and the Extraordinary Chambers of the Courts of

²⁹⁸ Cf. *Case of the Massacres of El Mozote and neighboring places v. Guatemala*. Merits, reparations and costs, paras. 286.

²⁹⁹ United Nations Security Council. Report of Secretary-General. *The rule of law and transitional justice in conflict and post-conflict societies*. S/2004/616, August 3, 2004, para. 10. Available at: <https://undocs.org/S/2004/616>.

³⁰⁰ Cf. Human Rights Council of the United Nations. Report of the Office of the United Nations High Commissioner for Human Rights. *Right to the Truth*. A/HRC/5/7, June 7, 2007, para. 20. Available at <https://undocs.org/A/HRC/5/7>.

³⁰¹ Cf. Office of the United Nations High Commissioner for Human Rights. *Rule-of-Law Tools for Post-conflict States. Amnesties*. HR/PUB/09/1, Publication of the United Nations, New York and Geneva, 2009, pp. 11 to 31. Available at https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf. Additionally, regarding the false dilemma between peace or reconciliation and justice, it stated that "[a]mnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict."

³⁰² For a detailed analysis of the interventions of the Human Rights Committee, the Committee against Torture, the Working Group on Enforced Disappearances, the Committee for the Elimination of Discrimination against Women, and the Committee for the Elimination of Racial Discrimination, see, *inter alia*, *Case of Gelman v. Uruguay*, paras. 205 to 208. Several State have enacted domestic laws that prohibit amnesties and similar measure with regard to crimes against humanity.

³⁰³ Cf. ICTY. *Prosecutor v. Furundžija*. Judgment of December 10, 1998, Case No. IT-95-17/1-T, para. 155.

³⁰⁴ ICTY. *Prosecutor v. Furundžija*. Judgment of December 10, 1998, Case No. IT-95-17/1-T, para. 155.

³⁰⁵ Cf. SCSL. *Prosecutor v. Gbao*, Decision No. SCSL-04-15-PT-141 of May 25, 2004, para. 10; SCSL. *Prosecutor v. Sesay, Callon and Gbao*, Judgment of March 2, 2009, Case No. SCSL-04-15-T, para. 54, and SCSL. *Prosecutor v. Sesay, Callon and Gbao*, Sentencing Judgment of April 8, 2009. Case No. SCSL-04-15-T, para. 253.

Cambodia.³⁰⁶ Moreover, these courts recognize that there is a “crystallising international norm,”³⁰⁷ or an “emerging consensus”³⁰⁸ with regard to the prohibition of amnesties in relation to serious international crimes; in particular, as regards total or general amnesties, based on the obligation to investigate and prosecute such crimes and punish those who commit them.

284. In the case of the *regional systems* for the protection of human rights, the European Court of Human Rights has considered that “it was of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings [relating to crimes such as torture, which involve gross human rights violations,] are not time-barred and that the granting of an amnesty or pardon should not be permissible.”³⁰⁹ In other cases, it has stressed that when a State agent is accused of crimes that violate the right recognized in Article 3 of the European Convention (Right to Life), the criminal proceedings and the sentencing should not be obstructed, and the granting of an amnesty is not permissible.³¹⁰ More recently, it applied the same conclusion in the case of *Marguš v. Croatia*.³¹¹

285. Under the African system, the African Commission on Human and Peoples’ Rights has considered that amnesty laws cannot shield the State that adopts them from complying with its international obligations,³¹² and has also indicated that by prohibiting the prosecution of perpetrators of gross human rights violations by granting an amnesty, States not only foster impunity, but also close the possibility that such abuses will be investigated and that the victims of such crimes have an effective remedy to obtain reparation.³¹³

286. In the same way, various Member States of the Organization of American States, through their highest courts of justice, have incorporated the aforementioned standards, complying with their international obligations in good faith. The Court recalls its considerations in other judgments³¹⁴ with regard to decisions of the Argentine Supreme Court of Justice of

³⁰⁶ Cf. Agreement between the United Nations and the Lebanese Republic regarding the Establishment of a Special Tribunal for Lebanon, S/RES/1757(2007), Annex, May 30, 2007, article 16, and Charter of the Special Tribunal for Lebanon. S/RES/1757(2007), Attachment, May 30, 2007, article 6. Available at: [https://undocs.org/S/RES/1757\(2007\)](https://undocs.org/S/RES/1757(2007)). Charter of the Special Court for Sierra Leone dated January 16, 2002, annex to the Agreement between the United Nations and the Government of Sierra Leone regarding the Establishment of a Special Court for Sierra Leone. United Nations, New York (UNTS vol. 2178, No. 38342, p. 137) Article 10; Agreement between the United Nations and the Royal Government of Cambodia for the Prosecution under the laws of Cambodia of Crimes Committed during the Period of Democratic Kampuchea, dated March 6, 2003, United Nations, New York (UNTS vol. 2329, No. 41723, p. 117), Article 11, and Parliament of the Kingdom of Cambodia. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea enacted on August 10, 2001, with amendments adopted on October 27, 2004 (NS/RKM/1004/006), new Article 40.

³⁰⁷ SCSL. *Prosecutor v. Kallon and Kamara*, Decision on jurisdiction: the Amnesty of the Lomé Peace Agreement, March 13, 2004, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), para. 82. See also paras. 66 to 74 and 82 to 84 of this decision.

³⁰⁸ ECCC. *Decision on preliminary objections in the case against Ieng Sary (Ne Bis in Idem and Amnesty and Pardon)*. Case No. 002/19-09-2007/ECCC/TC, Trial judgment of November 3, 2011, para. 53. See also paras. 40 to 55.

³⁰⁹ Cf. ECHR. *Case of Abdülşamet Yaman v. Turkey*, No. 32446/96, Judgment of November 2, 2004, para. 55.

³¹⁰ Cf. ECHR. *Case of Yeter v. Turkey*, No. 33750/03, Judgment of January 13, 2009, para. 70.

³¹¹ Cf. ECHR. *Case of Marguš v. Croatia* [GS], No. 4455/10, Judgment of May 27, 2014, paras. 124 to 141.

³¹² Cf. African Commission on Human and Peoples’ Rights. *Malawi African Association and Others v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, Decision of May 11, 2000, para. 8.

³¹³ Cf. African Commission on Human and Peoples’ Rights. *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, Decision of May 21, 2006, paras. 211 and 215.

³¹⁴ See, *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, paras. 163 to 170 and *Gelman v. Uruguay*, paras. 215 to 224.

the Nation,³¹⁵ the Supreme Court of Justice of Chile,³¹⁶ the Constitutional Court of Peru,³¹⁷ the Supreme Court of Justice of Uruguay,³¹⁸ the Supreme Court of Justice of Honduras,³¹⁹ the Constitutional Chamber of the Supreme Court of Justice of El Salvador,³²⁰ and the Constitutional Court³²¹ and the Supreme Court of Justice of Colombia.³²²

287. As revealed by the preceding paragraphs, all the international human rights bodies and various national high courts of the region that have had occasion to rule on the scope of amnesty laws in relation to gross human rights violations and the incompatibility of such laws with the international obligations of the States that enact them have concluded that these laws violate the international obligation of the States to investigate and punish such violations.

288. The Inter-American Court has established that “amnesty provisions, statutory limitations, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and enforced disappearance are not admissible, and are all prohibited because they contravene non-derogable rights recognized by international human rights law.”³²³

289. In this regard, in cases of serious violations of human rights, amnesty laws are clearly incompatible with the letter and spirit of the Pact of San José, because they contravene the provisions of its Articles 1(1) and 2, by preventing the investigation and punishment of those responsible for such serious human rights violations and, consequently, the access of the victims and their next of kin to the truth of what happened and to the corresponding reparations. Thus, they obstruct the full, prompt and effective reign of justice in the pertinent cases and, to the contrary, they promote impunity and arbitrariness as well as gravely affecting the rule of law. It is for these reasons that it has been declared that, in light of international law, such laws lack legal force.

³¹⁵ Cf. Supreme Court of Justice of the Nation, Argentina. Appeal. Judgment of June 14, 2005, Case of Julio Héctor Simón *et al.*, case No. 17.768, *consideranda* 31 to 34.

³¹⁶ Cf. Second Chamber of the Supreme Court. Cassation judgment on form and merits. November 17, 2004, Case No. 517-2004, *consideranda* 33 to 35; Supreme Court of Justice of Chile, *Case of Claudio Abdón Lecaros Carrasco accused of the crime of abduction*, Case No. 47,205, Appeal No. 3302/2009, Ruling 16698, Appeal judgment, and Ruling 16699, Replacement judgment of May 18, 2010, *consideranda* 1 to 3.

³¹⁷ Cf. Constitutional Court of Peru, *Case of Santiago Martín Rivas*, Special appeal, Case file No. 4587-2004-AA/TC, Judgment of November 29, 2005, paras. 30, 52, 53, 60 and 63.

³¹⁸ Supreme Court of Justice of Uruguay, *Case of Nibia Sabalsagaray Curutchet*, Judgment No. 365 paras. 8 and 9.

³¹⁹ Supreme Court of Justice of the Republic of Honduras, proceedings entitled: “RI20-99–Unconstitutionality of Decree No. 199-87 and Decree No. 87-91.” June 27, 2000.

³²⁰ Cf. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Judgment 24-97/21-98 of September 26, 2000. Also, in 2016, the same Constitutional Chamber declared the unconstitutionality of the Salvadoran Amnesty Law because it prevented compliance with the State obligations of prevention, investigation, prosecution, punishment and reparation of serious human rights violations and crimes against humanity. Constitutional Chamber of the Supreme Court of Justice of El Salvador, judgment 44-2013/145-2013, of July 13, 2016.

³²¹ Cf. Constitutional Court of Colombia. Judgment of July 30, 2002, C-578/02, Review of Law 742, paragraph 2.1.7. - 4.3.2.1.7: “Devices such as the “full stop” laws that obstruct access to justice, blanket amnesties for any crime, self-amnesties (that is, the generous terms that those in power, legitimately or illegitimately, grant themselves and those who were their accomplices in the crimes committed), or any other means that has the purpose of preventing the victims from accessing an effective judicial remedy to assert their rights, have been considered violations of the international obligation of States to provide judicial remedies for the protection of human rights.”

³²² Supreme Court of Justice of Colombia, Criminal Cassation Chamber. Ruling 33118 of May 13, 2010, Record 156, Segovia Massacre.

³²³ Cf. *Case of Barrios Altos v. Peru. Merits*, para. 41; *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 129, and *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 171.

290. In particular, amnesty laws violate the State's international obligation to investigate and punish serious human rights violations by preventing the victims' next of kin from being heard by a judge, in accordance with the provisions of Article 8(1) of the American Convention. In addition, they violate the right to judicial protection established in Article 25 of this instrument precisely due to the failure to investigate, pursue, capture, prosecute and punish the perpetrators of such acts, which results in non-compliance with Article 1(1) of the Convention.

291. In light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties have the obligation to take every possible measure to ensure that no one is denied judicial protection and the exercise of the right to a simple and effective remedy in the term of Articles 8 and 25 of the Convention. Moreover, once it has ratified the American Convention, pursuant to its Article 2, the State must take all necessary measures to derogate any legal provisions that could contravene the Convention, such as those that prevent the investigation of serious human rights violations, because these leave the victims defenseless and result in the perpetuation of impunity; furthermore, they prevent the victims and their next of kin from knowing the truth.

292. That said, it is evident that, from the moment it was promulgated, the Brazilian Amnesty Law referred to crimes committed in a situation where there was no non-international armed conflict, and it has no legal force because it prevents the investigation and punishment of serious violations of human rights and represents an obstacle for the investigation of the facts of this case and the punishment of those responsible. The Court considers that the said law cannot have legal force in this case, and its application by the domestic courts cannot be considered valid. In 1992, when the American Convention was in full force for Brazil, the judges who intervened in the application for *habeas corpus* should have conducted a "control of conventionality" *ex officio* between domestic law and the American Convention; evidently in accordance with their respective competence and the corresponding procedural rules. And these considerations apply to the case *sub judice* even more clearly since the conducts involved reached the threshold of crimes against humanity.

293. Finally, the Court shares the opinion of the International Law Commission that an amnesty adopted by a State would not prevent prosecution by another State with concurrent competence to try the crime.³²⁴ In the State that granted the amnesty, its validity would have to be examined, *inter alia*, in light of that State's obligations under the principles of general international law mentioned in this judgment and, specifically, the obligations contracted when ratifying the American Convention on Human Rights and sovereignly accepting the contentious jurisdiction of this Court.

294. Accordingly, the Court finds that, in situations that involve crimes under international law or crimes against humanity, States are authorized to use the principle of universal jurisdiction in order to comply with the obligation to investigate, prosecute and punish those responsible and with the obligations towards the victims and other persons.

iv) *Universal jurisdiction*

295. The obligation to establish and implement the system of justice in cases of human rights violations falls, fundamentally, to the State where the violations occur. In the case of crimes against humanity, this obligation remains unchanged, because the responsibility to be accountable to society for such conducts belongs, above all, to the responsible State. However, based on the nature and gravity of crimes against humanity, this obligation transcends the

³²⁴ See, for example, ECHR. *Ould Dah v. France*, No. 13113/03, Admissibility decision of March 17, 2009.

territory of the State where the facts occurred. This is because such “inhuman acts, owing to their magnitude and gravity, exceed the limits of what is considered tolerable by the international community, which must necessarily demand that they be punished. Crimes against humanity also transcend the individual, because when the individual is attacked, all humanity is attacked and rejected.”³²⁵

296. In 1927, the Permanent Court of International Justice indicated that though “the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.”³²⁶ Therefore, in cases of international crimes (such as crimes against humanity) a presumption exists in favor of the extraterritorial criminal jurisdiction, and it would be for the State to prove the existence of the rule prohibiting this. In addition, the sixth paragraph of the Preamble to the Rome Statute recalls “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”³²⁷ According to the International Law Commission, “any State may exercise its jurisdiction to prosecute crimes against humanity. States must ensure the effective prosecution of crimes against humanity by taking measures at the national level and facilitating international cooperation. That cooperation is also applicable as regards extradition and reciprocal legal assistance.”³²⁸ Meanwhile, the Inter-American Court has indicated that, “in contexts of systematic human rights violations, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among States to this end.”³²⁹

297. The concept of universal jurisdiction has been developed in recent decades and has been recognized by diverse States, especially following the adoption of the Rome Statute of the International Criminal Court. It may be said that, at the present time: (a) the universal jurisdiction is an accepted customary norm, so that it does not have to be established in an international treaty;³³⁰ (b) it may be exercised with regard to the international crimes

³²⁵ Federal Criminal Oral Court (La Plata). September 26, 2006, Case of “*Circuito Camps*” et al., case No. 2251/06, *considerandum* IV.a.

³²⁶ Permanent International Court of Justice. Judgment of September 7, 1927, *Matter of S.S. Lotus (France c. Turkey)*, Series A, No. 10 (1927), para. 50.

³²⁷ Statute of the International Criminal Court, Preamble.

³²⁸ UN. *Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July, 1996)*. A/51/10. pp. 28-29 and 31-32. Commentary 6 on article 8, and commentaries on article 9 of the Draft code of crimes against the peace and security of mankind.

³²⁹ Cf. *Case of La Cantuta v. Peru*. Merits, reparations and costs, para. 160. Similarly, see: *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, para. 125, and *Case of Goiburú et al. v. Paraguay*, para. 131.

³³⁰ See, *inter alia*, United Nations. *The Princeton Principles on Universal Jurisdiction*, A/56/677, December 4, 2001, Principle 3, Available at: <https://undocs.org/en/A/56/677>, and Institute of International Law. *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Resolution of the Seventeenth Commission at the Krakow Session, 2005, Available at http://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf. Similarly, the principle of *aut dedere aut judicare* refers to the alternative obligation contained in some multilateral treaties to extradite or to prosecute, and its purpose is to guarantee international cooperation in the case of certain criminal conducts. This principle is a way in which States are obliged to exercise their jurisdiction to try certain conducts considered crimes under international law if they refuse to extradite those presumably responsible to the State requesting them. Clearly, it does not matter if the crimes have not been committed in the territory of the State that has refused the extradition and that, by virtue of this principle, has the obligation to prosecute them. That obligation is contained in several international conventions on human rights and international humanitarian law (Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7); International Convention for the Protection of All Persons from Enforced Disappearance (arts. 9 and 11); Inter-American Convention to Prevent and Punish Torture (art. 12); Inter-American Convention on Forced Disappearance of Persons (art. IV); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 18); Articles 49, 50, 129 and 146, respectively of the four Geneva Conventions adopted on

identified in international law as pertaining to international law, such as genocide, crimes against humanity and war crimes;³³¹ (c) it is based solely on the nature of the crime without regard to where the crime was committed, or the nationality of the perpetrator or the victim,³³² and (d) it is of a complementary nature to other jurisdictions.³³³

298. In the *Furundžija* case, the ICTY asserted that “at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”³³⁴ In other words, at the present stage of international law, States are entitled to use this principle as grounds for the competence of their judges in relation to such crimes when those allegedly responsible are present in their territory. If they do so, and to what extent, will depend on their policies in this regard, determined, *inter alia*, by the relevance they give to the protection of human rights and the impact that the prosecution of the crimes based on the principle of universality may have on their foreign policy objectives.³³⁵

299. Since 1945, several countries have prosecuted crimes against humanity in application of the principle of universal jurisdiction.³³⁶ For example, the Spanish Constitutional Court established that the principle of universal jurisdiction (in relation to genocide) forms part of international law and the general obligations of States.³³⁷ In the same way, the Spanish *Audiencia Nacional* has admitted for processing complaints relating to crimes of genocide, terrorism and torture committed in Guatemala between 1978 and 1986 and also complaints of presumed genocide in Tibet, even though it subsequently closed these cases.³³⁸ Also, in the case of *Scilingo*, the Spanish *Audiencia Nacional* invoked the application of the universal

August 12, 1949; and the Convention on the Prevention and Punishment of the Crime of Genocide). According to some authors, this is an international customary norm that is binding for all States. In this regard, see also: UN. International Law Commission *Final report of the Working Group on the obligation to extradite or prosecute (aut dedere aut judicare)*, A/CN.4/L.844, June 5, 2014. Available at <https://undocs.org/A/CN.4/L.844>, and UN. International Law Commission *Fourth report on the obligation to extradite or prosecute (aut dedere aut judicare)*, A/CN.4/648, May 31, 2011. Available at <https://undocs.org/en/A/CN.4/648>.

³³¹ Cf. Institute of International Law. *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Resolution of the Seventeenth Commission at the Krakow Session, 2005. See *Customary International Humanitarian Law – Vol. I: Rules*, ICRC, Cambridge University Press, p. 604 and ff (Rule No. 157). Similarly, the Princeton Principles on Universal Jurisdiction list the following crimes under international law that are subject to this type of jurisdiction: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide, and (7) torture. United Nations. *The Princeton Principles on Universal Jurisdiction*, A/56/677, December 4, 2001, Principle 2.

³³² Cf. UN. *The Princeton Principles on Universal Jurisdiction*, A/56/677, December 4, 2001, Principle 1.

³³³ Cf. Institute of International Law. *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Resolution of the Seventeenth Commission at the Krakow Session, 2005, para. 3.d See also: UN. Report of the Secretary-General to the General Assembly. *The scope and application of the principle of universal jurisdiction*, A/66/93, June 20, 2011. Available at <https://undocs.org/en/A/66/93>, and UN. Report of the Secretary-General to the General Assembly. *The scope and application of the principle of universal jurisdiction* A/70/125, July 1, 2015. Available at: <https://undocs.org/A/70/125>.

³³⁴ ICTY. *Prosecutor v. Furundžija*. Judgment of December 10, 1998, Case No. IT-95-17/1-T, para. 156

³³⁵ Cf. ICTY. *Prosecutor v. Furundžija*. Judgment of December 10, 1998, Case No. IT-95-17/1-T, para. 156.

³³⁶ See also, International Law Commission *First report on crimes against humanity by Sean D. Murphy, Special Rapporteur*, A/CN.4/680, February 17, 2015. Available at: <https://undocs.org/en/A/CN.4/680>.

³³⁷ Spanish Constitutional Court. Judgment of September 26, 2005, STC 237/2005, *consideranda* 3, 4, 6 and 7.

³³⁸ Spanish Supreme Court, Criminal Chamber. Judgment of cassation appeal of February 25, 2003, No. 803/2001; *Audiencia Nacional*, Criminal Chamber. Summary appeal proceeding of January 10, 2006, No. 196/005.

jurisdiction for crimes against humanity with regard to an Argentine citizen.³³⁹ In France,³⁴⁰ Italy³⁴¹ and Germany³⁴² cases involving crimes against humanity were filed and concluded.

³³⁹ *Audiencia Nacional*, Criminal Chamber, Third Section. Judgment of April 19, 2005, No. 16/2005, paras. 5.3, 6.1 and 6.3: "The reason for the usefulness of the existence of crimes against humanity is precisely that it guarantees their prosecution; above all, owing to the extreme difficulties or impossibility of the domestic prosecution of this type of crime and the interest of the international community that such crimes should be prosecuted and punished, according less importance to their specific legal definition, which may be taken care of by domestic laws, but rather establishing an effective international prosecution system. [...] Indeed, one of the essential characteristics of crimes against humanity – from our point of view the one that truly singularizes them – is that they may be prosecuted internationally, over and above the principle of territoriality. It is true that the most neutral and least complicated method, from the point of view of international relations between States, is that it is a general or "*ad hoc*" international court that prosecutes them. However, the essential point is, let us repeat, that this international prosecution, even though it is complementary or subsidiary in nature to the ineffective or inexistent domestic prosecution, is implemented. Thus, when it has not been possible to implement prosecution by an international court due either to its inexistence or to another reason, the principle of necessary prosecution and of the possibility of international prosecution of such crimes remains intact; therefore, in these cases, it is admissible that a national jurisdiction acts in substitution of the international jurisdiction, performing its functions. In essence, there are few differences in the merits or substance between one situation or the other, because the determinant factor is the international nature of the crime and the necessity of prosecuting it assumed by the international community, and if the international community does not directly contribute the means, and does not derogate these basic principles of co-existence, it can be said that not only it is *de facto*, but also *de jure*, allowing this action of the domestic jurisdiction to become an international action. [...] The action of the Spanish jurisdiction in implementation of the principle of universality has been determined by the lack of effective action of Argentine justice, which has resulted in a situation of impunity of those criminally responsible for the facts, a situation that, contrary to what has happened in other countries, has become irreversible, unless the laws of "full stop" and due obedience are definitively annulled. [...] In addition, in this case the action of the Spanish jurisdiction to criminally prosecute the facts is also justified by the existence of Spanish victims. The existence of these victims has been verified in the description of the proven facts, because these were individuals who were detained in the ESMA at the time that the accused was based there. It is true that there is no information that he had any type of direct connection to them, but they were directly affected by his acts, which were inserted in the oft-mentioned 'dirty war' organized against the subversion."

³⁴⁰ Among others, Court of Cassation, France, Criminal Chamber. Inadmissibility of cassation appeal. Judgment of June 3, 1998, Case of Klaus Barbie, Appeal No. 87-84240.

³⁴¹ Cf. Case of Captain SS Erich Priebke. Extradited from Argentina to Italy on November 2, 1995. See Federal Court of Bariloche, May 31, 1995, and Federal Appeals Chamber, August 23, 1995, and Supreme Court of Justice of the Nation, November 2, 1995. Final conviction by the Rome Military Tribunal, on July 22, 1997. The judgment declared that crimes against humanity were not subject to statutory limitations, based on *jus cogens*, even though Italy had not ratified the 1968 Convention on Non-Applicability of Statutory Limitations.

³⁴² See. Among others, Superior Court of Justice of Düsseldorf. Case of Nikola Jorgic, Judgment of September 26, 1997, IV-26/96 2 StE 8/96.

300. In the Americas, courts of Mexico,³⁴³ Argentina,³⁴⁴ United States of America³⁴⁵ and Canada³⁴⁶ have ruled on this matter, and corroborated its application in the criminal sphere. In addition, domestic laws of Bolivia,³⁴⁷ Ecuador,³⁴⁸ El Salvador³⁴⁹ and Panama³⁵⁰ and the Argentine Constitution³⁵¹ have recognized that principle.

301. Brazil, for its part, indicated that it was in favor of universal jurisdiction before the United Nations General Assembly. According to Brazil, "the aim of universal jurisdiction was to deny impunity to individuals responsible for serious crimes defined by international law which, by their gravity, shocked the conscience of all humanity and violated peremptory norms of international law. As a basis for jurisdiction, it was of an exceptional nature compared with the more consolidated principles of territoriality and nationality. Although the exercise of

³⁴³ Cf. Supreme Court of Justice of the Nation. Amparo review. Judgment of June 10, 2003, Plaintiff: Ricardo Miguel Cavallo, No. 140/2002.

³⁴⁴ Cf. Supreme Court of Justice of the Nation, Argentina Appeal. Judgment of June 14, 2005, Case of Julio Héctor Simón *et al.*, case No. 17.768, Opinion of Judge Antonio Boggiano, *consideranda* 28, 29 and 31: "That, even before this international jurisprudence, crimes against the 'law of Nations' were condemned by customary international law and, at the same time, by our Constitution. The gravity of such crimes may provide grounds for universal jurisdiction, as revealed by art. 118 of the Constitution, which establishes the crimes against the law of Nations beyond the borders of the Nation and orders Congress to determine, by a special law, the place where the trial should be held. This presumes that such crimes can be tried in the Republic and, it should be understood, also in other foreign States. Also, that such crimes under international law, against mankind and the law of Nations, owing to their gravity, harm the international order, so that art. 118 should not only be seen as a jurisdictional norm, but substantially, of recognition of the substantive gravity of those crimes ('Nadel' case recorded in Judgments: 316:567, dissenting opinion of Judge Boggiano)." [...] "That according to the concept of universal jurisdiction, without needing to giving an opinion here on comparative foreign practices, such crimes could be tried outside the country in which they were committed. Crimes under international law may provide grounds for the universal jurisdiction of any State pursuant to international custom because they violate a norm of *ius cogens* systematically, violating international law." [...] "That, in this hypothesis, these crimes could be tried in one or more foreign States and not in Argentina, with the consequent infringement of the jurisdictional sovereignty of our country." Federal Criminal Oral Court No. 1 of San Martín. Judgment for crimes against humanity. August 12, 2009, General Riveros *et al.* in the case of Floreal Edgardo Avellaneda *et al.*: "Regarding *non bis in idem* and *res judicata*, which the defense Counsel have also posited, in 'Mazzeo,' the Court stated that 'under international humanitarian law the axiological principles of interpretation acquire pre-eminence to define the guarantee of both *non bis in idem* and *res judicata*.' That this is so 'insofar as the purpose of both the statutes of the international criminal courts and the principles that inspire universal jurisdiction is to ensure that heinous crimes do not remain unpunished. Consequently, without prejudice to giving priority to the national authorities to conduct the trial; if such local trials become a subterfuge to ensure impunity, the subsidiary jurisdiction of international criminal law comes into play with a new trial.'" Appeal. Judgment of November 2, 1995, Case of Erich Priebke No. 16,063/94, *considerandum* 4 and Concurring opinion of Judge Julio S. Nazareno and Eduardo Moline O'Connor, *considerandum* 43: "That this circumstance in no way signifies that the international indictment is left to the intention of individual States expressed in conventions, because it is the instrument that establishes the principles and practices of the legal conscience of mankind from which no State may deviate insofar as the formulation of general international law establishes, with regard to this matter, a sufficiently clear description of the punishable conduct, and also that when it is committed it merits criminal punishment." [...] "That, the fact that the national legislator has not implemented 'adequate criminal sanctions' for this type of crimes does not obstruct the exercise of the other commitments assumed in the international sphere with regard to extradition, because that type of procedure is not aimed at determining the guilt or innocence of the individual requested, but only to establish, as noted in *considerandum* 12, whether his right to remain in the country should cede to the request for international cooperation."

³⁴⁵ United States Court of Appeal, Sixth Circuit. Judgment of October 31, 1985, Demjanjuk v. Petrowsky, 776 F. 2d 571.

³⁴⁶ Supreme Court of Canada. Judgment of March 24, 1994, R. v. Finta, [1994] 1 S.C.R. 701; Superior Court of the Province of Quebec, Criminal Chamber. Judgment of May 22, 2009, Prosecutor v. Désiré Munyaneza, case No. 500-73-002500-052.

³⁴⁷ Penal Code of Bolivia, Law No. 1,768 of March 10, 1997, article 1.7.

³⁴⁸ Penal Code of the Republic of Ecuador. article 14.

³⁴⁹ Penal Code of El Salvador, Law No. 1030 of April 26, 1997, article 10.

³⁵⁰ Penal Code of Panama, Law No. 14 of May 18, 2007, article 19.

³⁵¹ Argentine Constitution, Law No. 24,430 of December 15, 1994, article 118.

jurisdiction was primarily the responsibility of the State concerned in accordance with the principle of the sovereign equality of States, combating impunity for the most serious crimes was an obligation set out in numerous international treaties. Universal jurisdiction should be exercised only in full compliance with international law; it should be subsidiary to domestic jurisdiction and limited to specific crimes; and it must not be exercised arbitrarily or in order to fulfil interests other than those of justice.”³⁵²

302. Bearing in mind the aforementioned precedents, the Inter-American Court considers that when crimes against humanity are perpetrated, the community of States is entitled to apply the universal jurisdiction in order to ensure the effectiveness of the absolute prohibition of these crimes established in international law. Nevertheless, the Court also recognizes that, at the current stage of development of international law, the use of universal jurisdiction is based on a criterion of political, criminal and procedural reasonableness and not on a hierarchical arrangement, because the jurisdiction of the territory where the crime was committed is always preferable.

303. In this regard, when considering whether to exercise the universal jurisdiction to investigate, prosecute and punish perpetrators of crimes such as those in this case, States must comply with certain requirements of customary international law: (i) that the crime to be prosecuted is a crime under international law (war crimes, crimes against humanity, crimes against peace, slavery, genocide), or torture; (ii) that the State in which the crime was committed has not proved that it has made an effort in the judicial sphere to punish those responsible, or its domestic laws prevent the initiation of such efforts owing to the application of devices that exclude responsibility, and (iii) that it should not be exercised in an arbitrary manner or to satisfy interests other than those of justice, in particular, for political purposes.

v) *Predictability/principle of legality*

304. The Court bears in mind that the laws of Brazil, and their interpretation by the relevant branch of the judicial system, understand that the absence of their express definition in the law is an insurmountable obstacle for the investigation and punishment of the acts that originated this case.³⁵³ Nevertheless, the Court is examining this contentious case from the standpoint of international law and its peremptory norms in situations that involve the most serious State crimes that violate non-derogable rights recognized by international human rights law. The Court notes that this case does not refer to an ordinary murder or an isolated act of torture, but to the torture and murder of a person in the custody of the State, as part of a plan established by the most senior State authorities to eliminate the opponents of the dictatorship. This policy was not only extremely violent, but was also evident in the cover-up practiced by medical officers, experts, prosecutors and judges, among others, who ensured its impunity.

305. To counter the argument of legal uncertainty owing to the application of international law without a corresponding domestic norm validating the former, it should be indicated that all the acts committed against Vladimir Herzog were already prohibited by the laws of Brazil.

³⁵² United Nations, General Assembly. *Summary record of the twelfth session of the seventieth session*, A/C.6/70/SR.12, November 5, 2015, para. 62. Available at <https://undocs.org/A/C.6/70/SR.12>. In addition, the State confirmed that “[i]ts courts could exercise universal jurisdiction over the crime of genocide and the crimes, such as torture, which Brazil had a treaty obligation to suppress” (para. 64). However, it indicated that “[u]nder Brazilian law, it was necessary to enact national legislation to enable the exercise of universal jurisdiction over a specific type of crime; such jurisdiction could not be exercised on the basis of customary international law alone without violating the principle of legality.”

³⁵³ In this regard, see expert opinions of Maria Auxiliadora Minahim (evidence file, folios 13987 to 14034) and Alberto Zacharias Toron during the hearing.

Torture was prohibited in the 1940 Penal Code, because that code, in force at the time of the facts defined, *inter alia*, the following crimes that were committed in this case: Bodily injuries;³⁵⁴ Danger to the life or health of another person;³⁵⁵ Failure to offer assistance;³⁵⁶ Ill-treatment³⁵⁷ and Murder.³⁵⁸ In addition, torture was considered an aggravating circumstance in other crimes established in this Penal Code (article 61(II)(d)).³⁵⁹ Also, these definitions of criminal offenses formed part of the national legal conscience, as revealed by the provisions of all Brazil's codes since its independence: Criminal Code of the Empire of Brazil, article 192, in relation to the general aggravating factors of article 16, section I, paragraph 6, and article 17, paragraphs 2, 3 and 4;³⁶⁰ Republican Code, article 294, in relation to article 39, paragraph 5, and article 41, paragraphs 2 and 3.³⁶¹

306. The Court finds that it is totally unreasonable to suggest that the perpetrators of these crimes were not aware of the illegality of their actions and that they could eventually be subject to the action of justice. No one can argue that they are unaware of the wrongfulness of murder or aggravated murder and torture by pleading that they were unaware of its nature as a crime against humanity, because the knowledge of illegality that is sufficient to find someone guilty does not require this awareness, which only contributes to the imprescriptibility of the crime. Generally, it is sufficient that the agent is aware of the unlawfulness of his conduct, especially considering the restrictive provision concerning the relevance of a misunderstanding included in Article 16 of the Penal Code in force at the time of the facts: "[i]gnorance or misunderstanding of the law does not exclude the punishment."

³⁵⁴ 1940 Brazilian Penal Code, article 129: To injure the bodily integrity or health of others.

³⁵⁵ 1940 Brazilian Penal Code, article 132: To expose the life or health of others to direct or imminent danger.

³⁵⁶ 1940 Brazilian Penal Code, article 135: To fail to offer assistance when this is possible without risking one's life to [...] a person who is disabled, destitute, or in grave and imminent danger; or, in such cases, not to request help from the public authorities.

³⁵⁷ 1940 Brazilian Penal Code, article 136: Expose to danger the life and health of persons under one's authority, custody or surveillance, either depriving them of food or essential care, or subjecting them to an excessive or inadequate load, or by abusing of correctional or disciplinary measures.

³⁵⁸ 1940 Brazilian Penal Code, article 121: Murder. § 2 If the murder is committed: I – for payment or promise of reward, or other wrongful reason; II – for a futile reason; III – using poison, fire, explosives, suffocation, torture or other cruel and insidious method, or one that may cause common danger; IV – treacherously, by ambush, or by dissimulation or the use of any other device that makes it difficult or impossible for the victim to defend himself; V – to obtain the perpetration, concealment, impunity or advantage of another crime. Penalty – twelve to thirty years' imprisonment.

³⁵⁹ See Expert opinion of Renato Sergio de Lima (evidence file, folios 14153 and 14154); Report of the National Truth Commission, 2014 (evidence file, folio 808).

³⁶⁰ Law of December 16, 1830. Penal Code of the Empire of Brazil. Murder. Art. 192. To kill someone with any of the aggravating circumstances mentioned in article 16, Nos. 2, 7, 10, 11, 12, 13, 14 and 17.

Art. 16. Aggravating circumstances are: [...] 6. That the offender is superior due to sex, force, weapons, so that the victim cannot defend himself with the probability of being able to repel the attack. [...]

Art. 17. Crimes shall also be considered aggravated: [...] 2. When the physical pain is increased more than ordinary by some special circumstance. 3. When the harm produced by the crime is increased by some especially reprehensible circumstance, 4. When the harm produced by the crime is increased by the irreparable nature of the damage. Available at http://www.planalto.gov.br/ccivil_03/leis/lim/lim-16-12-1830.htm. Cf. Araujo Figueiras Junior, "Código Criminal do Império do Brasil anotado," Rio de Janeiro, 1876, pp. 17, 20 and 214.

³⁶¹ Decree No. 847, of October 11, 1890. Penal Code. Art. 294. To kill someone.

Art. 39. Aggravating circumstances are: [...] § 5 That the offender is superior due to sex, force, weapons, so that the victim cannot defend himself with the probability of being able to repel the attack; [...]

Art. 41. The following shall also be considered aggravating circumstances of a crime: [...] § 2. When the physical pain is increased by acts of cruelty; § 3. When the harm produced by the crime is increased by some especially reprehensible circumstance, or by the irreparable nature of the damage. Available at: <http://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-847-11-outubro-1890-503086-publicacaooriginal-1-pe.html>. Cf. Alvarenga Netto, "Código Penal Brasileiro e leis penais subsequentes", Rio de Janeiro, 1929, pp. 35, 36 and 141.

307. Based on the absolute prohibition of crimes under international law and crimes against humanity, the Court agrees with expert witnesses Roth-Arriaza and Mendez that valid expectations of legal certainty were never created for the perpetrators of such conducts because the crimes were already prohibited by domestic and international law when they were committed. Furthermore, the *pro reo* principle is not applicable or violated because there was never any legitimate expectation of amnesty or statutory limitations that would result in a legitimate expectation of finality.³⁶² The only expectation that effectively existed was the operation of the system of concealment and protection of the security forces' executioners. The Court cannot consider this expectation legitimate and sufficient to disregard a peremptory norm of international law.

308. In addition, the Court reiterates that the alleged "failure to define crimes against humanity" in domestic law has no impact on the obligation to investigate, prosecute and punish the perpetrators. This is because a crime against humanity is not a criminal offense, as such, but rather a classification of criminal conducts that were already defined in all legal systems: torture (or its equivalent), and murder/homicide. The impact of classifying these conducts as a crime against humanity is to prevent the application of procedural devices that exclude responsibility owing to the *jus cogens* nature of the prohibition of such conducts. It is not a new offense. Therefore, the Court finds that the position of the Brazilian Federal Public Prosecution Service was appropriate when indicating that there was a double subsumption; that is, that the unlawful act should be established in both domestic law and international law. In the case of crimes under international law and crimes against humanity, the international element refers to the planned, massive or systematic nature of the attack on the civilian population. That second element, arising from international law, is what justifies the prohibition to apply devices that exclude responsibility (*supra* paras. 229 to 231).

309. The European Court of Human Rights has ruled similarly,³⁶³ asserting that, taking into account the flagrantly illegal character of the ill-treatment and murders that occurred in 1944, the applicant could have predicted that the contested acts could be classified as war crimes and that, regardless of whether the crime was defined in domestic law, it was not possible to ignore the unlawful nature of crimes against humanity.³⁶⁴ The United Nations Human Rights Committee has also declared that "crimes against humanity are not subject to a statute of limitations."³⁶⁵ This same conclusion on crimes against humanity applies, *mutatis mutandi*, to the acts perpetrated against Vladimir Herzog in view of their seriousness and the context in which they took place.

310. Based on the above, the Court finds that the State cannot argue the inexistence of domestic laws, or incompatibility with domestic law in order not to comply with a peremptory and non-derogable international obligation. The Court considers that the State failed to guarantee an effective judicial remedy to investigate, prosecute and punish those responsible for the detention, torture and death of Vladimir Herzog.

B.5. Conclusion

³⁶² Expert opinion of Naomi Roth-Arriaza (evidence file, folio 13957).

³⁶³ ECHR. *Case of Kononov v. Latvia*, No. 36376/04. Judgment of May 17, 2010.

³⁶⁴ ECHR. *Case of Kolk and Kislyiy v. Estonia*, Nos. 23052/04 and 24018/04. Inadmissibility decision of January 17, 2006, and *Case of Vasiliauskas v. Lithuania* [GS], No. 35343/05. Judgment of October 20, 2015, paras. 167, 168, 170 and 172.

³⁶⁵ Concluding observations of the Human Rights Committee: Spain, CCPR/C/ESP/CO/5, of January 5, 2009, para. 9. Available at: <https://undocs.org/en/CCPR/C/ESP/CO/5>.

311. In this case, the Court concludes that the State's jurisdictional authorities who closed the investigation in 2008 and 2009 failed to exercise control of conventionality. Also, in 2010, the decision of the Federal Supreme Court confirmed the validity of their interpretation of the Amnesty Law without considering Brazil's international obligations derived from international law, particularly those established in Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 of this instrument. The Court finds it opportune to recall that the obligation to comply with international obligations, voluntarily assumed, corresponds to a basic principle of the law on the international responsibility of States, supported by domestic and international jurisprudence, according to which States must abide by their international treaty-based obligations in good faith (*pacta sunt servanda*). As this Court has already indicated and as established in Article 27 of the Vienna Convention on the Law of Treaties, States "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The treaty-based obligations of the States Parties are binding for all their powers and organs, which must ensure compliance with the provisions of the Convention and their practical effects (*effet utile*) in the sphere of their domestic laws.³⁶⁶

312. Based on the foregoing considerations, the Inter-American Court concludes that, owing to the failure to investigate, and also prosecute and punish those responsible for the torture and murder of Vladimir Herzog committed in a widespread and systematic context of attacks on the civilian population, Brazil violated the rights to judicial guarantees and judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Zora, Clarice, André and Ivo Herzog. In addition, the Court concludes that Brazil has failed to comply with its obligation to adapt its domestic laws to the Convention, as established in Article 2 thereof, in relation to Articles 8(1), 25 and 1(1) of this treaty and Articles 1, 6 and 8 of the ICPPT due to the application of Amnesty Law No. 6683/79 and other methods of excluding responsibility prohibited by international law in cases of crimes against humanity, pursuant to paragraphs 208 to 310 of this judgment

VII-2 RIGHT TO KNOW THE TRUTH (Articles 8 and 25 of the American Convention)

A. Arguments of the parties and of the Commission

313. The **Commission** argued that it was not necessary to make a separate analysis and to determine an autonomous violation of Articles 4, 5, 7 and 13 of the American Convention based on the failure to comply with the duty to guarantee the truth; in the Commission's opinion that right was already protected under Articles 8(1) and 25.

314. Despite this, the Commission alleged that the right to the truth cannot be restricted by legislative measures such as the enactment of amnesty laws, statutory limitations and *res judicata*, among others.

³⁶⁶ Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*. Advisory Opinion OC- 14/94, of December 9, 1994. Series A No. 14, para. 35; *Case of the Miguel Castro Castro Prison v. Peru*. Merits, reparations and costs. Judgment of November 25, 2006. Series C No. 160, para. 394, and *Case of Zambrano Vélez et al. v. Ecuador*. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 166, para. 104. Also, cf. *Case of Castillo Petruzzi et al. v. Peru*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 17, 1999. Series C No. 59, considerandum 3; *Case of De la Cruz Flores v. Peru*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of September 1, 2010, considerandum 3, and *Case of Tristán Donoso v. Panama*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights, of September 1, 2010, considerandum 5.

315. The **representatives** argued that the State was responsible for violating the right to the truth, insofar as it had concealed relevant information on the case and failed to institute proceedings or take the steps required to clarify the truth about what happened. They indicated that the right to the truth had two dimensions: an individual dimension that safeguarded the rights of the victims and their next of kin, and a collective dimension that protected the right of society to know the truth, accede to information, and reconstruct the collective memory. They proposed that this right should be understood as an autonomous and independent right. In their understanding, even though it was not expressly established in the Convention, the said right emanated from the series of protections established in Articles 1(1), 5, 8, 13 and 25 of the American Convention.

316. According to the representatives, the violation of the right to the truth occurred because the State: (a) published a false version of Mr. Herzog's death; (b) systematically refused access to military documentation, and (c) allowed impunity in order to obstruct knowledge of the truth.

317. Regarding the dissemination of the false version of Mr. Herzog's death, the representatives indicated that the widely publicized version of his death was that he had committed suicide, and a photograph was released to support that version. The cause of death on Mr. Herzog's death certificate was "mechanical asphyxiation by hanging." It was only in 2013 that the cause of death was amended to "injuries and ill-treatment suffered" while being interrogated in the DOI/CODI/SP. The repetition of the false version for many years caused great suffering to Vladimir Herzog's family.

318. In relation to the concealment of military files, the representatives emphasized that the National Truth Commission had stated that this circumstance had been an obstacle to the clarification of the deaths. They added that, regarding the systematic concealment of information about the crimes, the Armed Forces had resisted opening their information files, even during the constitutional democratic period (after 1988) and while the National Truth Commission was functioning (2012-2014).

319. They argued that the State's position of refusing to provide information so as not "to re-open old wounds" violated the right to the truth. They indicated that it was not possible, as affirmed by the Attorney General of the Union when denying the information to the Federal Public Prosecution Service, that no documentation whatsoever existed on the persons who were detained or died in the DOI/CODI/SP.

320. They also underlined that one of the objectives of the public civil action filed by the Public Prosecution Service was the declaration of the obligation of the Armed Forces to hand over all the documents relating to the Second Army's DOI/CODI that they possessed; a request based on the fact that "to date, the Brazilian Army has not given the public access to the files and information so that all the circumstances and all those responsible for the illegal acts carried out by that federal body can be known." In addition, they indicated that the Public Prosecution Service had indicated that the Armed Forces had obstructed access to "almost" all the information on the activities of the Second Army's DOI/CODI.

321. Regarding "impunity as an obstacle to knowing the truth," the representatives acknowledged the historical and informative importance of the work of the National Truth Commission. However, they indicated that this historical truth did not complete or substitute for the State's obligation to establish the truth using procedural mechanisms.

322. They also indicated that clarification of the perpetrators and the circumstances surrounding the practice of the crimes was essential, because the truth, of itself, was an integral component of the delivery of justice, and not merely a sub-product of the trials or other prosecutorial measures.

323. In this regard, the representatives understood that the Brazilian State's systematic refusal to hand over the military documents that could clarify the circumstances of Mr. Herzog's death and identify the perpetrators and the masterminds constituted a violation of the right to the truth and an obstruction of the right to justice in violation of Articles 5, 8, 13 and 25 of the American Convention, in relation to Article 1(1) of this instrument.

324. The **State**, in relation to the dissemination of a false version of Mr. Herzog's death, argued that the judgment in the 1976 declaratory action had affirmed that the version of suicide had not been proved. Similarly, the request for the opening of a police investigation in 1992, based on the judgment in the declaratory action revealed that the State authorities no longer considered that the version of suicide was tenable. It indicated that the rectification of the death certificate in 2013 did not mean that the State's version of suicide had persisted until then, and that, in 2012, in the State's answering brief to the Commission in relation to the admission of the petition in this case, it had acknowledged responsibility for the arbitrary imprisonment and death of Vladimir Herzog.

325. Regarding the lack of access to the military files, the State argued that this fact had not been submitted by the Commission, and therefore the Court should not examine it; also, the allegations were generic. Despite this, the State clarified that an investigative procedure had been conducted within the Armed Forces to determine irregularities in the destruction of public documents from the period from 1964 to 1990, reaching the conclusion that there had been no irregularities. It indicated that the State was unable to produce negative evidence in the sense that files were not being concealed and that, in any case, this was not applicable to the case of Vladimir Herzog, because the circumstances of his death had been clarified since the court's judgment in the 1976 declaratory action, and also in the analysis made by the Special Commission on Political Deaths and Disappearances, and finally in the Report of the National Truth Commission. Additionally, the petitioners had not exhausted domestic remedies, because they had not filed an application for *habeas data*.

326. In relation to impunity as an obstacle to knowing the truth, the State understood that this right was subsumed in the right of the victim and the next of kin to obtain clarification of the facts and the respective responsibilities from the State's competent organs; in other words, access to justice. However, the State argued that it had taken diverse steps in order to identify the truth of what had occurred.

327. The State argued that Article 2 of the Convention revealed that the adoption of public administrative and legislative policies should be entrusted, first, to the democratically elected representatives of the people who, in turn, were subject to domestic law and the Constitution. It therefore asked the Court to recognize that, in light of Article 2 of the Convention, the State had the right to implement such policies in accordance with its "reasonable margin of appreciation," with due discretionary powers to choose the most appropriate means to ensure that the rights protected by the Convention were effective. It indicated that the recognition of that flexibility would not affect the inter-American system, because the Court was able, through control of conventionality, to assess and censure the measures taken by the State.

B. Considerations of the Court

328. The Court finds it pertinent to recall that, pursuant to its consistent case law, everyone, including the next of kin of the victims of serious human rights violations, has the right to know the truth. Consequently, the victims' next of kin and society in general should be informed of everything that happened in relation to such violations.³⁶⁷ Even though, fundamentally, the right to know the truth has been included in the right of access to justice,³⁶⁸ the right to know the truth is very broad and its violations may affect different rights recognized in the American Convention,³⁶⁹ depending on the particular context and circumstances of the case. In this regard, the Court reiterates that this right is included in and protected by Articles 1(1), 8(1), 25, and also – in certain circumstances – Article 13 of the Convention,³⁷⁰ as in the case of *Gomes Lund et al. v. Brazil*.

329. In the instant case, the Court notes that the arguments concerning the presumed violation of the right to the truth include two main elements: (i) the alleged violation of this right owing to the impunity of the detention, torture and murder of Vladimir Herzog, and the dissemination of a false version of the facts, and (ii) the presumed lack of access to the files of the DOI-CODI/SP.

330. The Court notes that, indeed, Brazil has taken various steps to satisfy the right to the truth of the victims in this case and of society in general. The Court assesses positively the creation of the Special Commission on Political Deaths and Disappearances, and the National Truth Commission and their respective reports. Previously, the Court has found that this type of effort contributes to the construction and preservation of the historical memory, the clarification of the facts and the determination of institutional, social and political responsibilities during certain historical periods of a society.³⁷¹ Nevertheless, pursuant to this Court's consistent case law,³⁷² the "historical truth" that may result from this type of effort

³⁶⁷ Cf. *Case of Trujillo Oroza v. Bolivia. Reparations and costs*. Judgment of February 27, 2002. Series C No. 92, para. 100, and *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 341, para. 220.

³⁶⁸ Cf., *inter alia*, *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 181; *Case of Bámaca Velásquez v. Guatemala. Merits*, para. 201; *Case of Barrios Altos v. Peru. Merits*. Judgment of March 14, 2001. Series C No. 75, para. 48; *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 148; *Case of La Cantuta v. Peru. Merits, reparations and costs*. Judgment of November 29, 2006. Series C No. 162, para. 222; *Case of Heliodoro Portugal v. Panama*, paras. 243 and 244; *Case of Kawas Fernández v. Honduras*, para. 117, *Case of Members of the village of Chichupac and neighboring communities in the municipality of Rabinal v. Guatemala*, para. 260, and *Case of Vereda La Esperanza v. Colombia*, para. 220.

³⁶⁹ In this regard, in its study on the right to the truth, the Office of the United Nations High Commissioner for Human Rights indicated that different international declarations and instruments have recognized the right to know the truth linked to the right to obtain and request information, the right to justice, the obligation to combat impunity in the face of gross human rights violations, the right to an effective judicial remedy, and the right to privacy and family life. Cf. Report of the Office of the United Nations High Commissioner for Human Rights. *Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91 of February 8, 2006.

³⁷⁰ Cf. *Case of Gelman v. Uruguay*, para. 243, and *Case of Osorio Rivera and family v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 274, para. 220, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 14, 2014. Series C No. 287, para. 511.

³⁷¹ *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 166, para. 128, and *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 297.

³⁷² *Case of Almonacid Arellano et al. v. Chile*, para. 150; *Case of Chitay Nech et al. v. Guatemala*. Preliminary objections, merits, reparations and costs. Judgment of May 25, 2010. Series C No. 212, para. 234; *Case of Radilla Pacheco v. Mexico*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 179, and *Case of Members of the village of Chichupac and neighboring communities in the municipality of Rabinal v. Guatemala*, para. 287.

can never substitute for or fulfill the State's obligation to establish the truth and ensure the judicial determination of individual responsibilities by criminal judicial proceedings.³⁷³

331. The Court considers that there are different reasons that explain the importance of determining individual responsibilities for serious violations of human rights judicially. On the one hand, truth commissions are not judicial institutions and should never assume such functions. "Although commissions can attribute responsibility, they should not arrogate the authority to make determinations concerning criminal guilt,"³⁷⁴ because they run the risk of violating fundamental rights, such as the presumption of innocence, and even the right to privacy of the victims.

332. The Court also considers that such judicial proceedings play a significant role in making reparation to the victims, who are no longer regarded as passive subjects in relation to the public authorities but "become claimants of rights and participants in the processes by which the content, application and strength of the law are defined."³⁷⁵ In other words, "criminal prosecutions provide recognition to victims as rights holders."³⁷⁶ "The right to truth entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation"³⁷⁷ and, in cases such as this one, a proceeding that officially determines this violation.

333. The Court referred to this issue in particular and expressly in the case of *Gomes Lund et al. v. Brazil*. In that case, the Court established that, in cases of gross human rights violations – and if the investigation of a punishable act is involved – the decision to classify information as secret and to refuse to hand it over could never depend exclusively on a State organ whose members had been attributed with the perpetration of the unlawful act.

334. The Court has also considered that any denial of information must be justified and substantiated, and the State has the burden of proof as regards the impossibility of producing the information. Moreover, when doubt or a legal vacuum exists, the right of access to information should be given priority. In addition, the Court recalls that it has indicated that State authorities may not shield themselves by mechanisms such as State secrets or the confidentiality of information in cases of human rights violations.³⁷⁸ Likewise, the final decision concerning the existence of the documentation requested cannot be left to their discretion.³⁷⁹

335. In this regard, the Court notes that, it was only in 2007, that the State finally disclosed the extrajudicial truth of the facts with the publication of the report of the Special Commission on Political Deaths and Disappearances. Until then, the State institutions – in particular, the Army – maintained a version of the facts that the courts had declared to be false in 1978 when the judgment on the declaratory action was delivered (*supra* paras. 132 to 134). The Court also notes that it was not until 2013 that the victim's family obtained the rectification of the

³⁷³ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 297, and *Case of Members of the village of Chichupac and neighboring communities in the municipality of Rabinal v. Guatemala*, para. 287.

³⁷⁴ UN. *Report of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* A/67/368. September 13, 2012, para. 72.

³⁷⁵ UN. *Report of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* A/67/368. September 13, 2012, para. 66.

³⁷⁶ UN. *Report of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* A/HRC/27/56. August 27, 2014, para. 22.

³⁷⁷ UN. *Report of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* A/HRC/24/42. August 28, 2013, para. 20.

³⁷⁸ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 230.

³⁷⁹ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 202.

cause of death on Vladimir Herzog's death certificate. This signifies that, for 15 years after Brazil had accepted the Court's contentious jurisdiction, Mr. Herzog's family had to support – even though only officially – declarations by public authorities that denied the truth of the facts and, even worse, upheld a lie.

336. In this case, the Court also notes that the National Truth Commission³⁸⁰ placed on record that the Army's refusal to provide access to its files, alleging that they had been destroyed, had been an obstacle to discovering the truth.

337. In accordance with the principle of good faith in access to information, the Court considers that the State cannot waive its positive obligations to ensure the right to the truth and access to public files merely by alleging that the information was destroyed. To the contrary, the State has the obligation to seek that information using all possible means. To comply with this obligation, the State must make a substantive effort and provide all necessary resources to reconstruct the information that presumably was destroyed.³⁸¹ Thus, for example, the State must allow judges, prosecutors and other independent investigation authorities to make on-site visits to the military and intelligence archives. Guaranteeing this type of action is especially essential when the responsible authorities have denied the existence of information that is crucial for discovering the truth and identifying the presumed perpetrators of gross human rights violations, provided there are reasons to presume that this information may exist. The Court considers that all the above is framed within the positive obligation of the State to preserve archives and other evidence concerning gross human rights violations,³⁸² as a way of ensuring the right to free access to information in both its collective and individual dimension.

338. Taking the foregoing into account, as well as its findings in Chapter VII-1, and considering the circumstances mentioned above, the Court finds that, in this case, Brazil has violated the victims' right to know the truth, because it has failed to clarify judicially the violations in this case and has not identified the corresponding individual responsibilities for the torture and murder of Vladimir Herzog by the investigation and prosecution of these facts before the ordinary jurisdiction pursuant to Articles 8 and 25 of the Convention. Furthermore, this right was violated for several years that fall within the Court's competence without the State accepting officially that the version of Mr. Herzog's suicide was false, added to the refusal of the State to present information and to allow access to military files from the time of the facts.

339. Finally, the Court notes that, despite the efforts made by State entities to gain access to the DOI-CODI military archives, their existence has been systematically denied (*supra* para. 318). In particular, the Court observes that the representatives argued that Article 13 of the Convention had been violated due to the denials that occurred during the public civil action proceedings (*supra* para. 320). However, the Court reiterates its opinion in the case of *Gomes Lund* that this was an action that the victims were not able to file; therefore, the Court considers that it is unable to analyze the guarantee of the right of the next of kin to seek and receive information by means of that judicial proceeding. Accordingly, it will not include any

³⁸⁰ Report of the National Truth Commission, pp. 28, 29, 63, 64, 639 (evidence file, folios 1533, 1534, 1593, 1594, 2144).

³⁸¹ IACHR. *The inter-American legal framework regarding the right to access to information*. OEA/Ser.L/V/II, CIDH/RELE/INF. 9/12, March 7, 2011, para. 92.

³⁸² UN. Commission on Human Rights. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher: *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1., February 8, 2005, Principle 3.

further considerations in this regard.³⁸³ Nevertheless, the Court recalls that the State has a positive obligation to ensure access to information and to public archives under the principle of good faith and maximum disclosure.³⁸⁴

VII-3
RIGHT TO PERSONAL INTEGRITY
(Article 5(1)³⁸⁵ of the American Convention)

A. Arguments of the parties and of the Commission

340. The **Commission** emphasized that the next of kin of victims of certain human rights violations may, in turn, be considered victims, because their mental and moral integrity is violated, and that this may be aggravated in the absence of effective remedies. It understood that the consequences of violence and impunity may have a particularly prejudicial effect on the members of victims' families who were children at the time of the facts.

341. It also indicated that, in this case, a presumption *juris tantum* can be applied that permits it to be presumed that the members of Vladimir Herzog's family suffered harm to their mental and moral integrity. It also noted that the State disseminated false information on the circumstances of his death, and this had a particularly serious impact on the mental and moral integrity of his family.

342. In particular, they argued that Clarice Herzog had suffered extreme anguish, fear and apprehension from the time her husband was informed that he would be arrested and up until the present time. It also indicated that it was evident that this right had been seriously impaired in the case of Ivo and André Herzog, the journalist's sons, who at the time of the facts were 9 and 7 years old, respectively.

343. The Commission concluded that the State had violated the right to mental and moral integrity established in Article 5(1) of the American Convention, in relation to the obligations established in Article 1(1) of this instrument, to the detriment of Zora Herzog (who died on November 18, 2006), Clarice, André and Ivo Herzog.

344. The **representatives** argued that, from the circumstances of the facts concerned, it may be concluded that the mental and moral integrity of Zora, Clarice Herzog, André and Ivo Herzog had been harmed.

345. They also referred to the climate of terror and intimidation resulting from the systematic context of violations facilitated and tolerated by the State authorities and added that Clarice had received repeated death threats.

346. In addition, they indicated that Zora Herzog had died in 2006 without her right to know the truth and to obtain justice having been satisfied. In this regard, Clarice Herzog stated that it had been very upsetting to live with the false version of her husband's death for such a long time both for herself, and for Vladimir Herzog's mother and children, and that the family continued to suffer today because they had been unable to obtain justice. Her sons made similar statements. Ivo Herzog stated that the struggles for memory, truth and justice

³⁸³ *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 216.

³⁸⁴ *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 92.

³⁸⁵ Article 5. Right to Humane Treatment 1. Every person has the right to have his physical, mental, and moral integrity respected.

remained a burden they carried, a responsibility, an irreparable scar that differentiated them from other people. André Herzog emphasized that the loss of his father had had numerous consequences on his personal and affective relationships, and described the pain, the exposure, and the burden to the whole family of each new judicial proceeding filed in the search for truth and justice.

347. The representatives concluded that all these facts, taken as a whole, had violated the mental and emotional integrity of Vladimir Herzog's family, and entailed the international responsibility of the State for the violation of Article 5 in relation to Article 1(1) of the American Convention, to the detriment of Zora, Clarice, André and Ivo Herzog.

348. The **State** acknowledged that the State conduct of the arbitrary imprisonment, torture and death of Vladimir Herzog had imposed great pain on his family and, therefore, acknowledged its responsibility for the violation of Article 5(1) of the American Convention. Nevertheless, the State argued that it had made numerous efforts to redress the harm suffered.

349. The State understood that even though all human rights violations may have detrimental effects on the individual, this does not mean that every violation of a right recognized in the Convention entails a violation of Article 5. It indicated that the supposed lack of judicial protection did not involve a violation of Article 5, concluded that, if lack of judicial protection was not established in Article 5, the alleged violation of this article could not be substantiated, because that would create a premise that was not established in the Convention.

350. It argued that, although it could be understood that the denial of the truth had violated Article 5 of the Convention, this had not occurred in the present case because much of the information provided by the parties in relation to the deprivation of liberty, torture and death of Vladimir Herzog had been gathered from proceedings and publications that the State itself had undertaken to try and alleviate the anguish that could arise from the absence of criminal responsibility. The State also pointed out that this case did not refer to a disappeared person whose fate was unknown.

B. Considerations of the Court

351. In numerous cases, the Court has considered that the next of kin of victims of human rights violations may, in turn, be victims.³⁸⁶ In this regard, the Court has considered that the right to mental and moral integrity of the victims' next of kin has been violated owing to the additional suffering they have endured as a result of the specific circumstances of the violations perpetrated against their loved ones and because of the subsequent acts or omissions of the State authorities in relation to the facts.³⁸⁷ In addition, in cases that involve a gross violation of human rights, such as massacres,³⁸⁸ forced disappearances,³⁸⁹

³⁸⁶ Cf. *Case of Castillo Páez v. Peru*. Merits. Judgment of November 3, 1997. Series C No. 34, fourth operative paragraph, and *Case of Vereda La Esperanza v. Colombia*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 341, para. 249.

³⁸⁷ Cf. *Case of Blake v. Guatemala*. Merits. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Vereda La Esperanza v. Colombia*, para. 249.

³⁸⁸ Cf. *Case of the "Mapiripán Massacre" v. Colombia*. Merits, reparations and costs. Judgment of September 15, 2005. Series C No. 134, para. 146.

³⁸⁹ Cf. *Case of Blake v. Guatemala*. Merits, para. 114, and *Case of the Santa Bárbara Campesino Community v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of September 1, 2015. Series C No. 299, para. 274.

extrajudicial executions³⁹⁰ or torture,³⁹¹ the Court has considered that the Commission or the representatives do not need to prove the violation of personal integrity because a *juris tantum* presumption exists.³⁹² Accordingly, it is for the State to disprove this³⁹³ if it considers that the said violation did not occur.

352. The Court has applied this presumption with regard to the direct family, such as mothers and fathers, daughters and sons, wives and husbands, and permanent companions, provided that it responds to the particular circumstances of the case.³⁹⁴

353. Nevertheless, the Court notes that it does not have temporal competence to determine violations in relation to the alleged harm to the personal integrity of the direct family of Vladimir Herzog based directly on his torture and murder. Consequently, the said *juris tantum* presumption cannot be recognized in this case. The Court will therefore have to analyze the testimonial and expert evidence provided to this litigation in order to prove the alleged harm.

354. From the body of evidence,³⁹⁵ the Court finds that the existence and dissemination of a false version of the detention, torture and execution of Vladimir Herzog harmed the integrity of all the members of his family. In addition, the unsuccessful efforts of the family to obtain judicial recognition of their rights caused them anguish and uncertainty, as well as frustration and suffering. In the Court's opinion, this also constituted harm to their mental and moral integrity.

355. In addition, the lack of investigation into the death of their husband and father violated the mental and moral integrity of Vladimir Herzog's wife and children, resulting in extreme anguish and uncertainty, as well as frustration and suffering that subsists to this day. The failure to identify and punish those responsible has meant that the anguish has continued for years, without the victims feeling protected or obtaining reparation.³⁹⁶

356. The Court also notes that even though the State presented some legal arguments on this point, it failed to provide any evidence or arguments that sought to disprove the evidence submitted by the representatives.

357. In view of the foregoing, the Court finds it proved that, as a result of the lack of the truth, and the failure to investigate, prosecute and punish those responsible for the torture and murder of Vladimir Herzog, the victim's direct family have endured profound suffering and anguish to the detriment of their mental and moral integrity.

³⁹⁰ Cf. *Case of La Cantuta v. Peru. Merits, reparations and costs*. Judgment of November 29, 2006. Series C No. 162, para. 218, and *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 444.

³⁹¹ Cf. *Case of Espinoza González v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 297.

³⁹² *Case of Ruano Torres et al. v. El Salvador. Merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 303, para. 177.

³⁹³ Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 119, and *Case of Vereda La Esperanza v. Colombia*, para. 249.

³⁹⁴ *Case of Valle Jaramillo et al. v. Colombia*, para. 119, and *Case of Vereda La Esperanza v. Colombia*, para. 249.

³⁹⁵ Statement by Ivo Herzog (evidence file, folios 14036 to 14045); Statement by André Herzog (evidence file, folios 14575 to 14583); Statement by Clarice Herzog during the hearing and expert opinion of Ana C. Deutsch (evidence file, folio 14183 to 14913).

³⁹⁶ Statement by Ivo Herzog (evidence file, folios 14036 to 14045); Statement by André Herzog (evidence file, folio 14575 to 14583); Statement by Clarice Herzog during the hearing and expert opinion of Ana C. Deutsch (evidence file, folio 14183 to 14913).

358. Consequently, taking into consideration the circumstances of this case, the Court concludes that the State violated the right to personal integrity established in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Zora Herzog, Clarice Herzog, Ivo Herzog and André Herzog.

VIII REPARATIONS (Application of Article 63(1) of the American Convention)

359. Based on the provisions of Article 63(1) of the American Convention,³⁹⁷ the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary law on State responsibility.³⁹⁸

360. Reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of the violations.³⁹⁹

361. The Court has established that the reparations must have a causal nexus to the facts of the case, the violations declared, the harm proved, and the measures requested to repair the respective harm. Accordingly, the Court must observe the concurrence of these factors to rule appropriately and pursuant to the law.⁴⁰⁰

362. Taking into account the violations declared in the preceding chapter, the Court will proceed to examine the claims presented by the Commission and the victims' representatives, together with the arguments of the State, in light of the criteria established in the Court's case law in relation to the nature and scope of the obligation to make reparation, in order to establish measures aimed at repairing the harm caused to the victims.⁴⁰¹

A. Injured party

363. The Court reiterates that, in the terms of Article 63(1) of the Convention, it will consider those it has declared victims of the violation of any right recognized in this instrument to be the injured parties.⁴⁰² Accordingly, the Court considers that Clarice Herzog, Ivo Herzog, André Herzog and Zora Herzog are the "injured parties" and, as victims of the violations declared in

³⁹⁷ Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

³⁹⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 194.

³⁹⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 26, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru*, para. 195.

⁴⁰⁰ Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 193.

⁴⁰¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 to 27, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru*, para. 197.

⁴⁰² Cf. *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of Andrade Salmón v. Bolivia*, para. 190.

Chapter VII of this judgment, they will be considered beneficiaries of the reparations that the Court will now order.

B. Obligation to investigate

- i) *Investigation of the facts, and prosecution and punishment, as appropriate, of those responsible; non-applicability of the Amnesty Law and obstacles to the achievement of justice*

364. The **Commission** asked that the criminal responsibility for the arbitrary detention, torture and murder of Vladimir Herzog should be determined by a thorough and impartial judicial investigation of the facts in accordance with due legal process in order to identify and punish those responsible for such violations, and that the results of the investigation should be published.

365. The Commission also recalled that the State must take into account that crimes against humanity were not subject to amnesties or statutes of limitations and that the State should take all necessary measures to ensure that Law No. 6683/79 (Amnesty Law) as well as other provisions of criminal law, such as statutes of limitations, *res judicata*, the principles of non-retroactivity and *ne bis in idem*, do not continue to represent an obstacle for the criminal prosecution of serious human rights violations such as those of the instant case.

366. The **representatives** asked that the State conduct an investigation into the facts in order to identify the masterminds, perpetrators and accomplices, prosecute them and punish them appropriately. The victim's family should have full access and capacity to act at all procedural stages, pursuant to domestic law and the Convention. In addition, the results of the investigation must be disseminated widely and publicly, so that Brazilian society may know them.

367. The representatives also asked the Court to determine that the State was obliged to guarantee that the Amnesty Law would not continue to be an obstacle to the investigation of the facts of this case, and also that it ensure the investigation, criminal prosecution and punishment of all those responsible for the crimes denounced. In addition, they asked that the Court determine that the Brazilian State must exercise control of the conventionality of its decisions in order to acknowledge that the Brazilian Amnesty Law had no legal force.

368. Furthermore, they indicated that the whole judicial apparatus and other institution of the State must be bound by the Court's decisions when settling pending claims concerning the scope of the Amnesty Law for the criminal prosecution of gross human rights violations and crimes against humanity.

369. Finally, they asked the Court to determine that the State may not use any provision of domestic law, or legal instrument such as the statute of limitations, *res judicata*, the principles of non-retroactivity of criminal laws and *non bis in idem*, or any similar mechanism that excludes responsibility to waive its obligation to investigate, prosecute and punish those responsible for the gross violations of human rights that took place during the military dictatorship in Brazil.

370. The **State** argued that this reparation referred to the facts relating to Vladimir Herzog and, therefore, before Brazil had accepted the Court's contentious jurisdiction. Consequently, the Court did not have temporal competence to examine it. The State also asserted that it was not the Amnesty Law that made it impossible to open the investigation in 2008, and that the previous proceedings, in 1993, did not fall within the Court's temporal competence. In

addition, it indicated that it had been shown that statutory limitations, *res judicata*, the principles of the non-retroactivity of criminal laws, and *non bis in idem*, conform to the Convention.

371. The Court recalls that, in Chapter VII-1, it declared the violation of the rights to judicial guarantees and judicial protection owing to the failure to investigate, prosecute and punish those responsible for the facts of this case. Taking this into account, as well as its case law, the Court establishes that the State should conduct an effective criminal investigation into the facts of this case in order to clarify them, determine the corresponding criminal responsibilities and apply effectively the punishments and consequences established by law.⁴⁰³

372. On this basis, and as in other cases it has examined,⁴⁰⁴ and considering the nature of the torture and murder of Vladimir Herzog as a crime against humanity and the legal consequences of such conducts under international law (*supra* paras. 230 to 232), the Court establishes that the State must re-open, with due diligence, the appropriate investigation and criminal proceedings for the events of October 25, 1975, in order to identify prosecute and punish, as appropriate, those responsible for the torture and murder of Vladimir Herzog, within a reasonable time. In particular, the State must:

- a) Conduct the pertinent investigations taking into account the pattern of human rights violations that existed at the time (*supra* paras. 238 to 240), so that the pertinent investigations and proceedings are conducted taking into consideration the complexity of these facts and the context in which they occurred;
- b) Determine the perpetrators and masterminds of the torture and death of Vladimir Herzog. Moreover, since a crime against humanity is involved, the State may not apply the Amnesty Law to benefit the perpetrators, or any other similar provision, statute of limitations, *res judicata*, *ne bis in idem* or any similar means of excluding responsibility to waive this obligation, in the terms of paragraphs 260 to 310 of this judgment;
- c) Ensure that: (i) the competent authorities conduct the corresponding investigations *ex officio* and that, to this end, they have available and use all the necessary scientific and logistical resources to gather and process the evidence and, in particular, have authority to access the pertinent documentation and information to investigate the facts denounced and conduct promptly those actions and inquiries that are essential to clarify what happened to the person who died and those who disappeared in this case;
(ii) those who take part in the investigation, including the victims' families, the witnesses and the agents of justice, have due guarantees for their safety, and
(iii) the authorities refrain from obstructing the investigation procedure.

⁴⁰³ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 174 and *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 256.

⁴⁰⁴ Among others, cf. *Case of García Prieto et al. v. El Salvador*, para. 112; *Case of Members of the village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 328, para. 212; *Case of Barrios Altos v. Peru. Merits*, para. 41; *Case of Gelman v. Uruguay*, paras. 225 to 226; *Case of Favela Nova Brasília v. Brazil*, para. 292, and *Case of Favela Nova Brasília v. Brazil. Interpretation of the judgment on preliminary objections, merits, reparations and costs*. Judgment of February 5, 2018. Series C No. 345, para. 28.

- d) Ensure full access and capacity to act to the victims and their families at all stages of these investigations, pursuant to domestic law and the provisions of the American Convention, and
- e) Ensure that the investigations and proceedings based on the facts of this case are at all times conducted in the ordinary jurisdiction.

C. Measures of non-repetition

i) Non-applicability of statutory limitations to crimes against humanity

373. The **Commission** asked that the State take into account that the crimes against humanity that occurred in this case, such as torture, are not subject to statutory limitations.

374. The **representatives** asked the Court to determine that the State must take the necessary legislative measures to adapt its domestic law to the international parameters for the protection of the individual, and ensure that no statutory limitations can be applied to the crime of torture.

375. The **State** considered that it was inappropriate and unnecessary to enact a law, because such a law could only establish an obligation of means, but not of results. Furthermore, the enactment of laws depended on the vote of the democratically elected representatives. It also asserted that the Brazilian Senate was processing a bill to amend the Brazilian Penal Code in order to establish that the crime of torture was not subject to statutory limitations or amnesties, and bail could not be granted. The Executive had also submitted a bill that codified the crime of genocide, and defined crimes against humanity, war crimes and crimes against the administration of justice as established by the International Criminal Court.

376. Regarding the non-applicability of statutory limitations to crimes against humanity, in Chapter VII-1, the Court concluded that the application of the statute of limitations in this case represented a violation of Article 2 of the American Convention, because it was decisive in maintaining the facts that had been verified in impunity. The Court has also verified the imprescriptible nature of crimes against humanity in international law (*supra* para. 214). In addition, the Court recalls that, according to its consistent case law,⁴⁰⁵ no statutory limitations can be applied to crimes that involve gross violations of human rights and crimes against humanity (*supra* para. 261). Consequently, Brazil may not apply statutory limitations or any other mechanism that excludes responsibility to this and other similar cases, in the terms of paragraphs 311 and 312 of this judgment. Consequently, the Court considers that Brazil must take the most appropriate measures, in keeping with its institutions, to recognize, without exception, the imprescriptibility of actions filed based on crimes against humanity and crimes under international law, pursuant to this judgment and to the relevant international standards.

D. Measures of satisfaction

i) Acknowledgement of international responsibility by the State

377. The **Commission** asked that the State acknowledge its responsibility for the arbitrary detention, torture and murder of Vladimir Herzog, and for the anguish caused to his family.

⁴⁰⁵ See *inter alia*, *Case of Barrios Altos v. Peru. Merits*, para. 41; *Case of Trujillo Oroza v. Bolivia. Reparations and costs*. Judgment of February 27, 2002. Series C No. 92, para. 106; *Case of Almonacid Arellano et al. v. Chile*, para. 112, and *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs*, para. 111.

378. The **representatives** requested that the Brazilian State organize a public act to acknowledge international responsibility during which the Armed Forces should make an official apology for the arbitrary detention, torture and murder of Vladimir Herzog. The State should acknowledge responsibility for acts and omissions, especially owing to the denial of justice. They considered that senior representatives of the public powers and the Armed Forces should take part in the act, and that it should be prepared and organized with the participation of the victims.

379. The **State** argued that the State's responsibility for the arbitrary detention, torture and death of Vladimir Herzog had been acknowledged by the delivery of the death certificate during a ceremony of the Amnesty Caravan in 2013. It indicated that the request for an apology from the Armed Forces was not possible because this referred to facts prior to 1998 and, therefore, before the State had accepted the Court's jurisdiction.

380. The Court finds it necessary that the State organize a public act to acknowledge international responsibility for the facts of this case in honor of the memory of Vladimir Herzog and to apologize for the failure to investigate, prosecute and punish those responsible for his torture and death. During this act, mention should be made of the human rights violations declared in this judgment. Also, it should take place in a public ceremony in the presence of senior officials of the State and the Armed Forces, and the victims. The State and the victims and/or their representatives must agree on how to comply with this public act of acknowledgment, and also on the details, such as the date and place.⁴⁰⁶

ii) Publication of the judgment

381. The **representatives** asked that the State publish the sections of the judgment that refer to the proven facts, the analysis of the violations of the American Convention, and the operative paragraphs in two national newspapers.

382. The **State** acknowledged the relevance of the publication of the Court's judgments and mentioned that it keeps the judgments delivered in the cases of *Sétimo Garibaldi* and *Gomes Lund et al.* on the website of the Special Secretariat for Human Rights. The State undertook to publish this judgment in the same terms as those two cases. In addition, regarding the publication in national newspapers, the State referred to the high cost of such publications and proposed that, instead of publishing the judgment in national newspapers, the Court order its publication on official websites and its dissemination by the social networks of government agencies. The State considered that this proposal would ensure that the judgment had widespread impact.

383. The Court establishes, as it has in other cases,⁴⁰⁷ that the State should publish, within six months of notification of this judgment: (a) the entire judgment, once, in the Official Gazette, in a legible and appropriate font size; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) the entire judgment and its summary, available for at least one year, on the official websites of the Special Secretariat for Human Rights of the Ministry of Justice and Citizenship, and the Brazilian Army, in a manner accessible to the public, and its dissemination by social networks, as follows: the Twitter and Facebook pages of the Special Secretariat for Human Rights and

⁴⁰⁶ Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 353 and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 336.

⁴⁰⁷ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*, para. 79, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru*, para. 211.

of the Army must promote the website where the judgment and its summary are located by means of a weekly post for one year.

384. The State must advise this Court immediately when it has made each of the publications ordered in subparagraphs (a) and (b) of paragraph 383, irrespective of the one-year time frame for presenting its first report required in the tenth operative paragraph of this judgment. In addition, in the report required in the thirteenth operative paragraph, the State must present evidence of all the weekly posts on social networks ordered in subparagraph (c) of paragraph 383 of this judgment.

E. Other measures of reparation requested by the representatives

385. The **representatives** asked the Court to require the State: (i) to reinforce the measures of protection for individuals in the custody of the State; to ensure the effective implementation of the National Mechanism for Prevention of Torture, and to ensure the transparency and independence of the National Committee to Prevent and Combat Torture; (ii) to ensure the autonomy of forensic experts and to prepare a national protocol of due diligence to combat torture; (iii) to grant land in São Paulo to build a museum; (iv) to strengthen the Program for the Protection of Human Rights Defenders so that it becomes an effective public policy to protect human rights defenders and also communicators; (v) to ensure that all State institutions and authorities are obliged to cooperate by supplying information and full access to all the files and records that may contain information on crimes, the individuals involved and the victims, and that it open investigative and administrative proceedings that lead to the recovery of documentation that is missing or has been destroyed, and determine the guilty parties.

386. The **State** argued that: (i) crimes of torture were not the purpose of this case, and described the legal framework, and current public policies and actions to prevent and combat torture and other cruel, inhuman or degrading treatment or punishment in Brazil; (ii) the request was not legally admissible because the Federal Government could not oblige the federated states to amend their laws. It also asserted that initiatives had already been implemented to create of an autonomous career in the federated states; (iii) it had implemented memory and truth policies; (iv) the Program for the Protection of Human Rights Defenders had its own methodology and criteria and also included cases of communicators; it also asserted that the request to strengthen the Program was very general and would not permit compliance, because the Program was very effective now, and (v) the allegations relating to denial of access to and reconstruction of documents were very general.

387. In this regard, the Court considers that the National Mechanism for the Prevention of Torture has already been implemented and appreciates the initiatives taken by Brazil to preserve the right of Vladimir Herzog to be remembered. Consequently, it finds that it is not appropriate to issue additional measures of reparation in this regard. Also, the autonomy of forensic experts and the preparation or implementation of a national protocol of due diligence to combat torture has not been part of the subject matter of this case; thus, the Court considers this request inadmissible. Regarding the other measures of reparation requested, the Court considers that they were not the subject of this case and, accordingly, finds those requests inadmissible.

F. Compensation

i) Pecuniary damage

388. The **Commission** requested payment of compensation for pecuniary and non-pecuniary damage to the victims in his case.

389. The **representatives** requested payment of US\$4,936,691.26 to Vladimir Herzog's family for loss of earnings, on the basis that, at the time, he received a salary of Cr\$15,870.00, which today is equal to approximately R\$36,446.00 a month, and that life expectancy for a man in Brazil today in 71 years. They also asked the Court to establish, in equity, the value of indirect damage to the family.

390. The **State** argued that, first, the violations suffered by Vladimir Herzog fell outside the Court's temporal competence, which prevented it from establishing reparations as a result of those facts. It also argued that the final amount of a payment to victims established in Law 9140/95 had already been considered adequate in the case of *Gomes Lund et al.* Consequently, it asked the Court to reject the request for compensation for pecuniary damage.

391. The Court recalls that Vladimir Herzog is not a victim in this case; thus, there is no causal nexus between the request to pay compensation for loss of earnings and the purpose of this case.

392. With regard to indirect damage, the representatives have not submitted any evidence about the expenditure involved. However, owing to the search to obtain justice, it is natural that Vladimir Herzog's family had expenses arising from the numerous steps they took during 20 years to advance the case before the domestic and the international courts. Consequently, the Court finds it pertinent to establish compensation, in equity, of US\$20,000.00 (twenty thousand United States dollars) for indirect damage, which should be delivered directly to Clarice Herzog, in representation of all the victims in this case.

ii) Non-pecuniary damage

393. The **Commission** requested payment of compensation for pecuniary and non-pecuniary damage to the victims in this case.

394. The **representatives** requested payment of US\$40,000.00 to each victim as compensation for non-pecuniary damage as a result of the State's failure to comply with its obligation to guarantee the integrity and freedom of expression of Vladimir Herzog, and the denial of justice, truth and reparation to his family.

395. The **State** reiterated its arguments in relation to the pecuniary damage and asked the Court to reject the request to pay non-pecuniary damage.

396. The Court recalls that the violations suffered by Vladimir Herzog fall outside the Court's temporal competence; therefore, the Court finds this request inadmissible. Nevertheless, in its case law, the Court has developed the concept of non-pecuniary damage and has established that this "may include the suffering and anguish caused to the direct victim and his next of kin, the impairment of values of great significance for the individual, and also the alterations of a non-pecuniary nature in the living conditions of the victim or his family."⁴⁰⁸ Based on the circumstances of this case, the violations committed, the suffering caused and experienced at different levels, the time that has elapsed, the denial of justice, the proven violations of personal integrity, and the other consequences of a non-pecuniary nature that

⁴⁰⁸ *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*, para. 84, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 319.

they suffered, the Court will now establish, in equity, compensation for non-pecuniary damage in favor of the victims, which should be paid directly to each of them.

397. The Court finds that the victims in this case were affected by the denial of justice and truth, and this has caused them great suffering that had an impact on their family dynamics. Consequently, the Court establishes, in equity, the sum of US\$40,000.00 (forty thousand United States dollars) each for non-pecuniary damage in favor of Clarice, André, Ivo and Zora Herzog. With regard to Zora Herzog, who died in 2006, the amount established in this paragraph must be paid directly to her heirs.

G. Costs and expenses

398. The **representatives** requested payment of the expenses incurred in the processing of these proceedings, from the submission of the petition before the Commission and including the procedures carried out before the Court.

399. The costs and expenses of CEJIL amounted to US\$161,237.50. The representatives broke this sum down as follows: (i) US\$14,241.13 for meetings and travel; (ii) US\$190.11 for mailing correspondence and photocopies; (iii) US\$977.30 for research material and stationery; (iv) US\$145,239.62 for salaries, and (v) US\$589.34 for notary expenses and translations.

400. The **State** asked that, if the Court did not declare its international responsibility, it should not be sentenced to pay any amount for costs and expenses. However, if it was sentenced to pay costs and expenses, the State indicated that this should be for reasonable amounts that were duly verified to be directly related to the specific case. In particular, Brazil considered that expenses for lawyers' salaries did not comply with this requirements because they were mere estimates that were impossible to corroborate.

401. The Court reiterates that, pursuant to its case law, costs and expenses form part of the concept of reparation, because the activities undertaken by the victims in order to obtain justice, at both the national and the international level, entail disbursements that must be compensated when the international responsibility of the State has been declared in a judgment convicting it. With regard to the reimbursement of expenses, it corresponds to the Court to make a prudent assessment of their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, and also those arising during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provided the amount is reasonable.⁴⁰⁹ As it has indicated on other occasions, the Court recalls that it is not sufficient to merely forward probative documents; rather, the parties must include arguments that relate the evidence to the fact that it is considered to represent and that, in the case of alleged financial disbursements, the items and their justification is clearly established.⁴¹⁰

402. From an analysis of the documentation provided, the Court concludes that some of the amounts requested are justified and authenticated. However, some vouchers refer to general expenses for office material, purchase of inputs, or salaries of lawyers without specifying their

⁴⁰⁹ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82; *Case of Andrade Salmón v. Bolivia*, para. 210.

⁴¹⁰ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of Andrade Salmón v. Bolivia*, para. 211.

relationship to the case, or the specific percentage that corresponds to expenditure in this case. These concepts have been deducted, in fairness, from the calculation made by the Court. In addition, those expenses whose amount is not reasonable will be deducted from the calculation made by the Court.⁴¹¹

403. The Court also considers that the item relating to the fees and travel expenses of members of the petitionary organization have not been justified reasonably, because they merely indicate the percentage supposedly dedicated to the case or meetings on “cases of historical claims,” without detailing or providing an exact justification of the specific relationship with the Herzog case. Consequently, the Court establishes, in equity, that the State must pay US\$25,000.00 (twenty-five thousand United States dollars) to CEJIL for costs and expenses.

404. At the stage of monitoring compliance with this judgment, the Court may require the State to reimburse subsequent reasonable and duly authenticated expenses to the victims or their representatives.⁴¹²

H. Reimbursement of expenditures to the Legal Assistance Fund

405. The representatives of the victims had requested the support of the Victim’s Legal Assistance Fund of the Court to cover the participation in the proceedings of the persons summoned to testify by the Court. They asked for support to cover the expenses of air transport, accommodation and alimentation, and also notarial services for affidavits for presumed victims, experts and witnesses. In an order of the President of February 23, 2017, the request submitted by the presumed victims, through their representatives, to access the Court’s Legal Assistance Fund was declared admissible and the necessary financial assistance was authorized for the presentation of five deponents, either at the hearing or by affidavit.

406. On November 6, 2017, a disbursements report was sent to the State pursuant to article 5 of the Court’s Rules for the Operation of the Fund. The State was given the opportunity to present its comments on the disbursements, which amounted to US\$4,260.95 for the expenses incurred. The State presented its comments on November 30, 2017.

407. The State objected to the item relating to the air transport to San José, Costa Rica, of expert witness Sérgio Gardenghi Suiama. Brazil observed that the flights financed for the expert’s participation in the hearing were: Madrid/San José (May 19, 2017) and San José/Bogotá/Río de Janeiro (May 25, 2017) and requested information on the reasons why the said flights had been chosen in order to resolve any doubts about the compatibility of the expenditure with the principles of article 37 of the Brazilian Constitution.

408. In this regard, the Court notes that, on April 28, 2017, the victims’ representatives advised that, owing to Sérgio Suiama’s previous commitments, this expert would have to travel from Madrid, Spain, on May 19, 2017, to take part in the public hearing on May 24, 2017. The representatives had therefore asked the Court to purchase the air ticket for that date, taking into consideration that the Victims’ Legal Assistance Fund would only pay a per diem from May 22 to 25, as previously stipulated. In this regard, the Court had corroborated that the change in the flight would not represent a significant difference for the Victim’s Legal Assistance Fund and authorized this disbursement. The Court considers that the justification

⁴¹¹ Cf. *Case of J. v. Peru. Preliminary objection, Merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 422; *Case of Lopez Lone v. Honduras*, para. 333.

⁴¹² Cf. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, para. 331 and *Case of Andrade Salmón v. Bolivia*, para. 213.

provided by the representatives and expert witness Suiama was reasonable and the foregoing represented a reasonable expense that was admissible for the Fund.

409. Therefore, owing to the violations declared in this judgment and the fact that the requirements to access the Victim's Legal Assistance Fund were met, the Court orders the State to reimburse the said Fund the sum of US\$4,260.95 (four thousand, two hundred and sixty United States dollars and ninety-five cents) for the disbursements made to ensure the appearance of one victim, one witness and one expert witness at the public hearing in this case. This amount must be reimbursed within six months of notification of this judgment.

I. Method of complying with the payments ordered

410. The State shall make the payment of the compensation for indirect damage, non-pecuniary damage and to reimburse the costs and expenses established in this judgment directly to the persons and organizations identified herein, within the time frames indicated in paragraphs 392, 397, 403 and 409, calculated from the date of notification of this judgment, in accordance with the following paragraphs.

411. If any of the beneficiaries is deceased or dies before they receive the respective compensation, this shall be delivered directly to their heirs pursuant to the applicable domestic law.

412. The State shall comply with its pecuniary obligations by payment in United States dollars, or the equivalent in Brazilian currency, using the exchange rate in force on the New York Stock Exchange (United States of America), the day before payment to make the calculation.

413. If, for causes that can be attributed to any of the beneficiaries of the compensation or their heirs, it is not possible to pay all or part of the amounts established within the time frame indicated, the State shall deposit such amounts in an account or deposit certificate in their favor in a solvent Brazilian financial institution, in United States dollars and in the most favorable financial conditions permitted by the State's banking law and practice. If the payment cannot be made in that currency, it shall be made in Brazilian currency using the exchange rate in force on the New York Stock Exchange (United States of America), the day before payment to make the calculation. If the corresponding compensation is not claimed, after 10 years, the amount shall be returned to the State with the interest accrued.

414. The amounts allocated in this judgment as compensation for indirect damage, non-pecuniary damage and to reimburse costs and expenses shall be delivered to the persons and organizations indicated in full, as established in this judgment, with no deductions due to possible taxes or charges.

415. If the State should fall in arrears, it shall pay interest on the amount owed, converted into Brazilian reals, corresponding to banking interest on arrears in the Federative Republic of Brazil.

**IX
OPERATIVE PARAGRAPHS**

416. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To reject the preliminary objections filed by the State with regard to the inadmissibility of the case by the Court owing to its lack of competence *ratione materiae* concerning the supposed violations of the Inter-American Convention to Prevent and Punish Torture; the failure to exhaust domestic remedies; non-compliance with the time frame for lodging the petition before the Commission; lack of competence *ratione materiae* to review domestic decisions; publication of the Merits Report by the Commission, and lack of competence *ratione materiae* to examine facts other than those submitted by the Commission, in the terms of paragraphs 36 to 38, 49 to 53, 66 to 71, 80 to 83, 88, 97 and 98 of this judgment

2. To declare partially admissible the preliminary objections filed by the State concerning the lack of competence *ratione temporis* in relation to facts prior to its adhesion to the American Convention, facts prior to the date on which the State accepted the jurisdiction of the Court, and facts prior to the entry into force of the ICPPT for the Brazilian State, in the terms of paragraphs 27 to 30 of this judgment

DECLARES:

Unanimously that:

3. The State is responsible for the violation of the rights to judicial guarantees and judicial protection, established in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, of Zora, Clarice, André and Ivo Herzog, owing to the failure to investigate, prosecute and punish those responsible for the torture and murder of Vladimir Herzog committed in a systematic and widespread context of attacks on the civilian population, as well for the application of Amnesty Law No. 6683/79 and other elements to exclude responsibility prohibited by international law in cases of crimes against humanity, in the terms of paragraphs 208 to 312 of this judgment

Unanimously that:

4. The State is responsible for the violation of the right to know the truth of Zora Herzog, Clarice Herzog, Ivo Herzog and Andre Herzog, because it has failed to clarify judicially the facts that violated their rights in this case and has not determined the corresponding individual responsibilities in relation to the torture and murder of Vladimir Herzog, by investigating and prosecuting those facts in the ordinary jurisdiction, pursuant to Articles 8 and 25 of the American Convention, in relation to Article 1(1) of this instrument, in the terms of paragraphs 328 to 339 of this judgment

Unanimously that:

5. The State is responsible for the violation of the right to personal integrity recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, of Zora Herzog, Clarice Herzog, Ivo Herzog and André Herzog, in the terms of paragraphs 351 to 358 of this judgment

AND RULES:

Unanimously that:

6. This judgment constitutes, *per se*, a form of reparation.

7. The State must re-open, with due diligence, the criminal investigation and proceedings in relation to the events of October 25, 1975, to identify, prosecute and punish, as appropriate, those responsible for the torture and death of Vladimir Herzog, based on the nature of these events as a crime against humanity and their corresponding legal consequences under international law, in the terms of paragraphs 371 and 372 of this judgment. In particular, the State shall observe the standards and requirements established in paragraph 372 of this judgment

8. The State must adopt the most appropriate measures, in accordance with its institutions, to ensure, without exception, the imprescriptibility of incipient actions for crimes against humanity and international crimes, in accordance with this judgment and the relevant international standards, pursuant to the provisions of this judgment in the terms of paragraph 376.

9. The State must organize a public act to acknowledge international responsibility for the facts of this case to honor the memory of Vladimir Herzog and recognize the failure to investigate, prosecute and punish those responsible for his torture and death. This act shall be held in keeping with the provisions of paragraph 380 of this judgment

10. The State must make the publications indicated in paragraph 383 of the judgment, and in the terms established in that paragraph.

11. The State must pay the amounts established in paragraphs 392, 397 and 403 of this judgment, for pecuniary and non-pecuniary damage and to reimburse costs and expenses, in the terms of paragraphs 410 to 415 of this judgment

12. The State must reimburse the Victim's Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, in the terms of paragraph 409 of this judgment.

13. The State must, within one year of notification of this judgment, provide the Court with a report on the measures taken to comply with it.

14. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

I/A Court HR. *Case of Herzog et al. v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of March 15, 2018.

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary