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CASE 12.879
REPORT ON THE MERITS

VLADIMIR HERZOG AND OTHERS
BRAZIL

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¹ Commissioner Paulo Vannuchi, a Brazilian national, did not participate in the deliberation or decision of this case, as provided in Article 17.2.a of the Commission’s Rules of Procedure.

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MERITS
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October 28, 2015

I. SUMMARY

1. On July 10, 2009, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition filed against the Federative Republic of Brazil (hereinafter “the State” or “Brazil”) by the Center for Justice and International Law (CEJIL/Brazil), 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 (hereinafter “the petitioners”) in which they alleged the State’s international responsibility for violating the human rights of journalist Vladimir Herzog (hereinafter “the journalist” or “Herzog”) and his next of kin.

2. The petitioners alleged that the State was internationally responsible for the arbitrary detention, torture and death of journalist Vladimir Herzog at an army facility on October 25, 1975, and for the ongoing impunity for these acts because of an amnesty law enacted during the Brazilian military dictatorship. They maintained that these constituted violations of articles I, IV, VII, XVIII, XXI, XXII and XXV of the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”); articles 1, 2, 5, 8, 13 and 25 of the American Convention on Human Rights (hereinafter “the American Convention”), and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter also “the CIPST”).

3. The State pointed out that it had taken a series of measures by which it had acknowledged, at the domestic level, its responsibility for the arbitrary detention, torture and death of journalist Vladimir Herzog by agents of the State. The State asked that when it evaluated the merits of the instant case, the Commission consider the measures the State had taken thus far.

4. On November 8, 2012, the IACHR approved Report No. 80/12 in which it declared the petition admissible with respect to the alleged violation of the rights protected in articles I (right to life, liberty and personal security), IV (right to freedom of investigation, opinion, expression and dissemination), XVIII (right to a fair trial), and XXV (right of protection from arbitrary arrest) of the American Declaration of the Rights and Duties of Man; the rights protected in articles 5.1 (right to have one’s personal integrity respected), 8.1 (judicial guarantees) and 25 (right to judicial protection) of the American Convention, in conjunction with the general obligations established in articles 1.1 and 2 thereof; and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

5. After examining the merits of the case, the Commission concluded that the State is responsible for violation of the rights protected in articles I, IV, VII, XVIII, XXII and XXV of the American Declaration and of the rights protected in articles 5.1, 8.1 and 25.1 of the American Convention, in conjunction with articles 1.1 and 2 thereof. It further concluded that the State is responsible for violation of articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

II. PROCEEDINGS SUBSEQUENT TO THE ADMISSIBILITY REPORT

6. The Commission notified the parties of the Admissibility Report on November 30, 2012; it gave the petitioners three months in which to submit any additional observations they might have on the merits of the petition, and placed itself at the disposal of the parties to facilitate a friendly settlement process.

² Commissioner Paulo Vannuchi, a Brazilian national, did not participate in the deliberation or decision of this case, as provided in Article 17.2.a of the Commission’s Rules of Procedure.

On February 28, 2013, the petitioners requested a three-month extension of the time period given for submitting their additional observations on the merits of the petition. In accordance with Article 37.2 of its Rules of Procedure, the Commission granted the petitioners an extension, set to expire on March 29, 2013. On March 27, 2013 and again on December 2, 2013, the petitioners requested other extensions of two and three months, respectively, for submitting their additional observations on the merits of their petition, a request not granted pursuant to Article 37.2 of the IACHR's Rules of Procedure.

7. The petitioners submitted their additional observations on the merits of the petition on November 21, 2014. Then, on December 11, 2014, the petitioners filed the annexes to the present case. The Commission forwarded the pertinent parts of that brief to the State on January 13, 2015, and requested that it submit its observations within one month. On January 21, 2015, the State requested an extension of the time period provided in Article 37.1 of the Commission's Rules of Procedure. The Commission acceded to the State's request, extending the time period for submitting its observations until May 13, 2015. On May 11, 2015, the State sought a two-month extension, invoking Article 37.2 of the Commission's Rules of Procedure. The Commission granted an extension, which was to expire on July 13, 2015. On July 13, 2015, the State requested an extension, which was denied under Article 37.2 of the Commission's Rules of Procedure.

8. The State presented its observations on the merits of the petition on August 13, 2015. It also expressed its interest in entering into a friendly settlement process. That report was forwarded to the petitioners on August 20, 2015, who were asked to indicate, within one month, whether they would be interested in initiating a friendly settlement process. On September 25, 2015, the petitioners submitted a communication in which they informed the Commission that they were not interested in embarking upon said process with the State. On October 16, 2015 said communication was forwarded to the State.

III. POSITION OF THE PARTIES

A. Petitioners

9. According to the petitioners, the events in this case occurred within the context of the Brazilian dictatorship that began with the *coup d'état* staged on March 31, 1964, and lasted until 1985. They alleged in this regard that throughout this period, the State's security forces engaged in the systematic and widespread practice of grave human rights violations committed against union leaders, political dissidents, journalists, students and others. The practice included arbitrary detentions, torture and extrajudicial executions. They also pointed out that the Brazilian media were subjected to censorship, as a way to ensure that they would not report news that might in any way tarnish the image of prosperity that the *de facto* regime wanted to propagate.

10. Against this backdrop, Vladimir Herzog, a 38-year-old journalist and director of journalism of the public television channel "*TV Cultura*", was supposedly viewed by the military regime as an "enemy of the State" because of the news reports he had made public, particularly a 1974 "historical account" that examined the first decade of the military takeover in Brazil. According to the petitioners, on the night of October 24, 1975, agents of the Second Army's Department of Information Operations of the Center for Internal Defense Operations ("DOI/CODI") in São Paulo summoned Vladimir Herzog to give a statement at that institution's headquarters, and tried to locate and arrest him, without success. Nevertheless, the petitioners report that Vladimir Herzog appeared of his own accord at DOI/CODI headquarters the following day, October 25, 1975, to offer a statement, whereupon he was arbitrarily detained, without any warrant from a competent judicial authority.

11. According to the petitioners, that same day the then-commander of the DOI/CODI publicly disclosed that Vladimir Herzog had died in his cell, supposedly by suicide. The petitioners contend that the journalist's death was an extrajudicial execution carried out by torture, and that it was made to look like a suicide, in line with an established practice during Brazil's military dictatorship. According to the petitioners, his death shocked Brazilian society and raised awareness about the widespread practice of torturing political prisoners.

12. Following Herzog's death, the petitioners say, a military police investigation was launched ("IPM" No. 1.173/75), which determined the cause of death to be suicide by hanging. As a result, the military police investigation was reportedly closed by the military justice system on March 8, 1976. The petitioners maintain that the investigation failed to observe the minimum guarantees of due process and was calculated to support the version of events according to which the journalist had supposedly committed suicide, thus ensuring that the events would continue to remain in impunity.

13. However, the petitioners maintain that Vladimir Herzog's next of kin—Clarice Herzog (widow) and Ivo Herzog and André Herzog (sons)—filed a civil action for a declaratory judgment (*Ação Declaratória* No. 136/76), in which they requested that the Federal Union be declared responsible for the arbitrary detention, torture, and subsequent death Herzog, and sought appropriate compensation. According to the petitioners, the aforementioned civil action was filed after evidence had been discovered that led to the conclusion that Vladimir Herzog's death by torture had been made to look like a suicide—in particular, testimony from other political prisoners who were reportedly in the DOI/CODI facility in São Paulo and heard the journalist being tortured to death.

14. The petitioners point out that the civil action fully established—by means of a judgment issued on October 28, 1978—that Vladimir Herzog was arbitrarily detained, tortured, and killed on DOI/CODI premises in São Paulo. Nevertheless, the petitioners contend that subsequent to that decision, on August 28, 1979, Law No. 6.683 ("the amnesty law" or "Law 6.683/79") was passed, which did away with criminal responsibility for all individuals who had committed "political or related crimes" in the period from September 2, 1961, to August 15, 1979. The petitioners contend that to this day, the amnesty law in question continues to represent an obstacle for the criminal prosecution of serious human rights violations, like those alleged in this petition, and that it is therefore incompatible with the State's obligations under the American Convention.

15. Despite the foregoing, the petitioners describe several subsequent attempts made to have those responsible for Vladimir Herzog's death criminally prosecuted. In this regard, they observe that in 1992 the São Paulo State Public Prosecutor's Office asked the Civil Police to begin an investigation into the journalist death, after an article appeared in the magazine *Isto É, Senhor*, on March 25, 1992. In the article, a DOI/CODI official who went by the alias "Captain Ramiro" stated that he had interrogated Vladimir Herzog in the aforesaid military establishment and that he was involved in his death. The petitioners state that "Captain Ramiro" filed a *habeas corpus* appeal before the Fourth Chamber of the São Paulo Court of Justice, which determined that the police investigation should be closed because of the amnesty law. That decision was reportedly appealed by the São Paulo State Public Prosecutor's Office, but was upheld by the Superior Court of Justice on August 18, 1993.

16. The petitioners observe that, more recently, several supervening events have shed new light on the human rights violations committed during the Brazilian dictatorship. These include the enactment of Law No. 9.140/95, in which the State acknowledged its responsibility for the deaths and disappearances that took place during the time of the military regime; the subsequent creation of the Special Commission on Political Deaths and Disappearances; the 2007 publication of the Special Commission's report, "Right to Memory and Truth"; and the judgment handed down on November 24, 2010, by the Inter-American Court of Human Rights ("the Inter-American Court") in the *Case of Gomes Lund et al. ("Guerrilha do Araguaia")*, among others. The petitioners stress that in the book "Right to Memory and Truth," the State acknowledged its responsibility for Vladimir Herzog's death by torture.

17. The petitioners observe that, based on the aforementioned new facts and based on international law, on March 5, 2008 members of the São Paulo Federal Public Prosecutor's Office—which lacked criminal jurisdiction—asked the São Paulo Attorney General of the Republic to instruct civil servants in the criminal section of the Federal Public Prosecutor's Office to undertake an investigation into Vladimir Herzog's death. According to the petitioners, that request was based on the fact that the federal justice system would have jurisdiction over that investigation, as the DOI/CODI agents were federal agents; that this

involved a crime against humanity with no statutory limitations and not covered by amnesty; and based on the Brazilian State's international obligations, including those established in the American Convention.

18. According to the petitioners, the representative of the Federal Public Prosecutor's Office responsible for the criminal section disagreed with his colleagues and sought to have the case closed. The petitioners indicate that the process was closed based on a decision issued January 9, 2009, by the federal judge in charge. In that judgment, the federal judge recognized that the original jurisdiction belonged to the federal justice system; however, she determined that the decision adopted earlier by the São Paulo State Court constituted material *res judicata* and that the statutory limitations for the crimes perpetrated against Vladimir Herzog had expired. The petitioners observed that the material *res judicata* presumably established by the Superior Court's decision and the improper enforcement of the statute of limitations would constitute further impediments to prosecution of the alleged human rights violations.

19. Thus, according to the petitioners, the enforcement of the Amnesty Law and of the provisions of domestic law would have the effect of depriving Vladimir Herzog and his next of kin of judicial protection and of their right to a hearing by a competent authority. It would also prevent them from obtaining proper reparations. They further stated that the impunity that attends the facts of this case because of the failure to comply with the obligation to investigate also constitutes a continuing violation of articles 4, 5 and 7 of the American Convention, in relation to the general duty established in Article 1.1 thereof. According to the petitioners, this situation is compounded by the fact that the provision "expressly" prohibiting crimes against humanity is *jus cogens*, and requires that those responsible be investigated and punished.

20. The petitioners also argued that if the positive measures necessary to give practical effect [*effet utile*] to the provisions of the American Convention and to the jurisprudence of the Inter-American Court are not adopted, the State would also incur international responsibility by its omission. They pointed out that such a violation would be permanent and last until a diligent, impartial and effective investigation of the facts is conducted, with a view to identifying, prosecuting and punishing all those responsible.

21. Here, the petitioners made reference to the Inter-American Court's judgment in the case of *Gomes Lund et al.* where, according to the petitioners, the Court held that Law 6.683/79 cannot continue to constitute an obstacle to the investigation and punishment of those responsible for serious human rights violations. The petitioners also observed that the Inter-American Court of Human Rights had held that this same operative paragraph of the judgment would have effects for other serious human rights violations that happened in Brazil. Thus, according to the petitioners, this would apply to the case of Vladimir Herzog, inasmuch as his torture and arbitrary execution constitute serious violations of human rights. They also observed that the legal obstacles that the national authorities used in the case of Vladimir Herzog were the same as those that the Inter-American Court had rejected in its judgment in the *Case of Gomes Lund et al.* According to the petitioners, that judgment had become international *res judicata* and therefore binding upon all organs of the State.

22. According to the petitioners, the continued impunity and lack of complete information concerning the circumstances surrounding the death of Vladimir Herzog prevented his family and society from knowing the truth of what happened, in violation of the right to the truth.

23. The petitioners allege that the circumstances of the events denounced in the present case caused harm to the mental and moral integrity of Vladimir Herzog's mother, Zora Herzog who, according to the petitioners, died on November 18, 2006, his widow Clarice Herzog, and his two sons, André and Ivo Herzog.

24. As for the Vladimir Herzog's sons, André and Ivo Herzog, who at the time of the events of this case would have been seven and nine years old, respectively, the petitioners alleged that the "negative impact" caused by the arbitrary detention, torture and death of Herzog, and the harm caused by the alleged impunity, were "particularly hard" because they were children at the time.

25. Finally, in a communication dated September 25, 2015, the petitioners stated that the facts denounced in the present case had “not changed” since their last communication on November, 2014, and that no criminal complaint had been brought that would be the first step toward filing formal criminal charges and criminal prosecution. They observed that the inaction had thus “perpetuated decades of unending impunity.” The petitioners also reiterated that in Brazil, the amnesty law, the enforcement of “measures intended to preclude criminal liability, the statute of limitations and *res judicata* continued to be legal obstacles to the investigation, prosecution and punishment of the agents of the State who suppressed political dissent during the civil-military dictatorship in Brazil.”

B. State

26. The State alleged that it had not committed any omission with respect to the facts denounced in the present case, and that at the domestic level, it had even formally recognized its responsibility for the 1975 arbitrary detention, torture and killing of Vladimir Herzog by agents of the State at the DOI-CODI/II Army facility. Here, the State made reference to the 1978 court ruling handed down by the federal justice system in which Brazil was held responsible for those events. The State further maintained that it had adopted a series of reparation and non-repetition measures related to Vladimir Herzog’s death. The State pointed out that in March 1996, the Special Commission on Political Deaths and Disappearances recognized the State’s responsibility for the death of Vladimir Herzog, in accordance with the provisions of Article 4, I, “b” of Law No. 9.140/95, and that as a result, it had awarded pecuniary damages of R\$100,000 (one hundred thousand *reais*) to his widow, Clarice Herzog. The State observed that Herzog’s death revealed the human rights violations committed against political prisoners during the military dictatorship opening the dialogue leading to Brazil’s democratization.

27. The State also referenced various initiatives taken with a view to preserving the right of Vladimir Herzog to be remembered, such as the launch in 2007 of the book titled “Right to Memory and Truth,” produced by the Special Commission on Political Deaths and Disappearances, which includes an account of the journalist’s professional career and the circumstances of his death. The State also observed that in 2009 it supported the creation of the “Vladimir Herzog Institute” with the goal of helping to protect the right to life and the right of access to justice. In December 2011, the Secretariat of Human Rights of the Office of the President of the Republic awarded the Vladimir Herzog Institute the national human rights prize, in the “Truth and Memory” category, for its project “Resisting Is Necessary” (*Resistir é preciso*), sponsored by the federal government. Moreover, the State pointed out that this project would be “compiling and disseminating information about the journalists and newspapers that fought the dictatorship between 1964 and 1979 –the year the Amnesty Law took effect.”

28. The State highlighted the creation of the National Truth Commission (hereinafter “CNV”) on May 16, 2012, under the Office of the Chief of Staff of the President of the Republic. It indicated that the Commission was instituted through Law 12.528 of November 18, 2011, for the purpose of “examining and shedding light on the serious human rights violations committed between 1946 and 1988” with a view to promoting national reconciliation and the realization of the right to memory and the historic truth. The State alleged that although Article 4, paragraph 4 of that Law mentions that the “activities of the National Truth Commission shall not be jurisdictional or prosecutorial in nature,” it understands that the CNV did have the authority “to identify the authorship [of violations] and make the results of its conclusions public.”

29. The State also reported that at the end of its mandate, on December 10, 2014 the National Truth Commission presented a three-volume Report that addressed cases like that of Vladimir Herzog. Here, Brazil pointed out that the report contained information on the circumstances of his death, the list of State agents that could be responsible for the “serious human rights violations” committed in his case, and his bibliography. In its final report, the CNV wrote that “there is no longer any doubt concerning the circumstances surrounding the death of Vladimir Herzog, who was unlawfully detained, tortured and killed by agents of the State in the Second Army’s DOI-CODI facilities in São Paulo in October 1975”.

30. The Brazilian State also reported that in 2012 the Second Chamber of Public Records of the São Paulo State Court [2ª *Vara de Registros Públicos do Tribunal de Justiça do Estado de São Paulo*] ordered

that Vladimir Herzog's death certificate [*assento de óbito*] be corrected. According to the State, the Judge ordered that the record be corrected to show that Vladimir Herzog had died of injuries and mistreatment suffered while in Army custody.

31. The State indicated that in its conclusions and recommendations concerning the case of Vladimir Herzog, the CNV had recommended that the criminal investigations be continued with a view to identifying and establishing the responsibility of the agents involved. In this regard, Brazil indicated that the CNV's final report had recommended establishment of a permanent body, with the authority to follow up on the CNV's actions and recommendations. Added that the CNV's efforts serve not just to prevent a recurrence of such violations, but also support the strengthen of criminal investigation procedures and the criminal cases brought by the Federal Public Prosecutor's Office.

32. According to the State, three bills currently before the National Congress and two constitutionality control cases now before the Federal Supreme Court (hereinafter the "STF") are seeking amendment of Law No. 6.683/79 (Amnesty Law).

33. On the matter of legislative reform, the State reported that with the bills known as PL 573/2011 the Legislative Branch was working toward an "authentic interpretation" of the provision contained in Article 1, paragraph 1 of the Amnesty Law, to ensure that the concept of "related crime" "[d]oes not include crimes committed by public officials, be they military or civilian, against persons who committed or are suspected of having committed political crimes." For its part, the PL 7.357/2014 seeks to exclude from the Amnesty Law "[t]he public agents, militaries and civilians who have done crimes of torture, kidnapping, private detention, summary execution, hiding body or assault." On April 9, 2014 it was determined that it was attached to the PL 573/2011. Reference was also made to the bill referred to as PL 237/2013 which defines the expression "related crime" contained in Article 1, paragraph 1 of the Amnesty Law in the manner described above, and establishes that the statutory limitation or other bases for extinction of the ability of the State to enforce punishment, shall not apply to crimes not included in the legally granted amnesty.

34. As for the cases before the Federal Supreme Court, the State indicated that there are two cases currently before the Supreme Court (STF) claiming non-compliance with a fundamental precept (ADPF) [*"Arguição de Preceito Fundamental"*].

35. The State reported that on April 20, 2010, the Federal Supreme Court (STF) delivered a judgment in ADPF 153, but the Brazilian Bar Association [*"Ordem dos Advogados do Brasil"*] filed a motion for clarification [*"embargos de declaração"*] that has not yet been decided. Likewise, claimed that on March 21, 2011, the Bar Association petitioned the STF asking that when delivering its decision on the motion for clarification, it address "specifically the enforceability, in [Brazil], of the judgment delivered by the Inter-American Court on November 24, 2010 in the *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*.

36. Brazil indicated that ADPF 320 was filed in May 2014, seeking a finding from the STF declaring that the Amnesty Law, "in general, does not apply to crimes involving serious human rights violations committed by public officials, be they military or civilian, against persons who committed or are suspected of having committed political crimes; and, in particular, that the Law does not apply to the authors of continuing or permanent crimes, since the effects of this provision expired on August 15, 1979 (Article 1)." The ADPF also requested that the Brazilian State comply "fully" with the twelve operative paragraphs of the Inter-American Court's judgment in the *Case of Gomes Lund et al.*

37. The State reported that the ADPF 320 was accumulated to ADPF 153 due to the subject identity between the two processes.

38. According to the State, pursuant to the resolution points 3 and 9 of the judgment that the Inter-American Court of Human Rights delivered in the *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, the Federal Public Prosecutor's Office had since adopted an institutional standard of "investigating and bringing criminal cases against State agents involved in serious human rights violations that occurred during

the dictatorship.” The State indicated that since 2011 around 290 criminal inquiries had been instituted and 12 criminal complaints had been brought against 24 civilian and military agents on charges related to the concealment of dead bodies, kidnapping, homicide, armed criminal conspiracy, procedural fraud and transporting explosives.

39. As for the aforementioned complaints brought by the Federal Public Prosecutor’s Office, Brazil observed that they concerned “the context of the systematic and generalized attack on the civilian population in which the crimes were committed and their classification as crimes against humanity.” It also observed that those criminal acts are being investigated and tried before the “courts of ordinary jurisdiction” and not in the “military justice system”, in keeping with paragraph 257 of the Inter-American Court’s judgment in the *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*.

40. The State also indicated that the “Transitional Justice” Working Group was created in the Second Coordination and Review Chamber of the Prosecutor’s Office in 2011 to address the issues of criminal law that compliance with the Inter-American Court’s judgment in the *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brasil* raised.

41. According to the State, following the December 2014 publication of the Report of the National Truth Commission, that Working Group compiled the names of the 434 persons that the Report lists as having been killed or disappeared during the military dictatorship, in order to establish whose cases were not among those being investigated in 290 criminal inquiries [*Procedimentos Investigatórios Criminais*] already instituted. It also pointed out that those inquiries involved some 340 victims. Once it had completed its review, the Working Group filed an administrative complaint with the “natural prosecutors”, members of the Public Prosecutor’s Office who have legally established jurisdiction, to request that investigations be undertaken with respect to 102 victims.

42. Finally, Brazil observed that the activities of the Federal Public Prosecutor’s Office are not confined to crimes committed during the “*Guerrilha do Araguaia*” and pointed out that it would use a “broad interpretation” of the finding in the Inter-American Court’s judgment. It also reported on the agreement that the Office of the Attorney General of the Republic and the Office of the Attorney General of the Argentine Nation had entered into for the purpose of establishing the first joint investigation team focusing on “Operation Condor”.

43. The State pointed to other measures being taken in relation to the right to the truth and to memory, and to transitional justice. Those measures are reportedly being implemented by the Ministry of Justice’s Amnesty Commission, the Secretariat on Human Rights of the Office of the President of the Republic and the Federal Public Prosecutor’s Office.

44. On the subject of the Amnesty Commission, the Brazilian State made reference to the Political Amnesty Memorial in Brazil, which is reportedly in the implementation phase. . It pointed out, *inter alia*, that the Memorial will have a documentation and search center where the general public will have access to the files of the Amnesty Commission. It also reported on the “*Projeto Caravanas de Anistia*” [Amnesty Caravans Project], which consists of traveling hearings to examine amnesty requests, followed by educational and cultural activities. In addition to reporting on the Amnesty Commission’s publications, the State made reference to the “*Ciclo 50 anos*”, an event involving multiple activities to mark the 50 years that have passed since the staging of the “civil-military coup.”

45. Brazil also reported on the activities conducted by the Secretariat on Human Rights, which include, *inter alia*, the Human Rights in Film Series, whose 2014 theme was “Memory and Truth” covering the 50 years that have passed since the ’64 coup, the “Right to Memory and Truth Project” and the Dictatorship Memories Portal.

IV. PRELIMINARY OBSERVATION: ACKNOWLEDGEMENT OF RESPONSIBILITY

46. In its brief of September 2012, the State wrote that “to begin with, it is worth repeating that the Brazilian State acknowledges the violations committed against Vladimir Herzog.” It maintained that its argument that the petition was inadmissible did not mean that it was “questioning the gravity of the acts perpetrated against Vladimir Herzog. Nevertheless, the State still has to challenge the petitioners’ claims that the State has been negligent, that it has not acknowledged its responsibility and that it has not sought to redress the victims.” It also recognized “the need to more thoroughly investigate the circumstances and facts of Vladimir Herzog’s homicide, including the question of who committed those violations.” The State also notes that Herzog’s death revealed grave violations of human rights committed against political prisoners during the military dictatorship.

47. Then, in its brief of August 2015, the State again emphasized that it had taken a series of measures through which it acknowledged, at the domestic level, its responsibility with respect to the arbitrary detention, torture and murder of journalist Vladimir Herzog by agents of the State on Army premises. Those measures, according to the State, included the pecuniary damages paid to Clarice Herzog, the journalist’s widow; the judgment handed down by the judicial branch in 1978 in which the federal government’s responsibility in these events was acknowledged; the facts established in the report published in 2007 containing the findings of the Special Commission on Political Deaths and Disappearances (CEMDP) and those established in the final report presented by the National Truth Commission on December 10, 2014. It also underscored the three bills currently before Congress and the two cases before the Federal Supreme Court (STF) claiming non-compliance with a fundamental precept (ADPF) [*“Arguição de Preceito Fundamental”*], all seeking amendment of the Amnesty Law. Brazil also reported that pursuant to operative paragraphs 3 and 7 of the judgment delivered by the Inter-American Court of Human Rights in the *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, the Federal Public Prosecutor’s Office had since adopted an institutional standard of “investigating and bringing criminal complaints against State agents involved in the serious human rights violations that occurred during the dictatorship.”

48. The State also observed that these measures demonstrate the “State’s firm resolve to make full reparations for the human rights violations claimed by the petitioners.”

49. In their brief of November 2014, the petitioners expressed appreciation for the State’s acknowledgment of responsibility in this international proceeding and asked the IACHR “to take these statements into consideration in its analysis of the merits of the present case.” Nevertheless, they stated that “it is self-evident that the various statements made by the Brazilian State in connection with its acknowledgement of responsibility in this case are not sufficiently clear. The State does not spell out which of the facts alleged by [the petitioners] it accepts as true, nor does not it specify for which violations of the rights of the victim and his next of kin it accepts blame.”

50. The Commission observes that although the State failed to specify precisely which facts it was admitting and which alleged violations it was acknowledging, its willingness to concede these facts is obvious from its acknowledgement of the events and the violations resulting from the arbitrary detention, torture and murder of journalist Vladimir Herzog. To this extent, the State’s acknowledgement is its admission of these facts and a concession to the legal claims contained in the petition in this regard. The IACHR also observes that the State neither contested nor objected to the facts of the present case, which have been duly established.

51. As the Commission has stated on other occasions, acknowledgement of responsibility makes a positive contribution toward the course of this process, to the effectiveness of the principles that inspire the Inter-American System for the Protection of Human Rights and the conduct to which States are bound in this matter.

52. Therefore, the IACHR considers that the dispute regarding the international State responsibility for the arbitrary detention, torture and murder of journalist Vladimir Herzog, perpetrated in the context of serious human rights violations against political prisoners during the military dictatorship, and

of the resulting violation of articles I, IV and XXV of the American Declaration, to his detriment, has been laid to rest. It does, however, find that the acknowledgement is ambiguous with regard to the legal consequences of the failure to investigate, try and punish those responsible for the arbitrary detention, torture and murder of Vladimir Herzog, particularly the alleged violations of the rights of the journalist's next of kin, thus necessitating a full analysis of the facts and all elements of the merits of the case.

V. PROVEN FACTS

53. In application of Article 43(1) of its Rules of Procedure, the Commission will examine the arguments and evidence presented by the parties and any information that is a matter of public knowledge.³ The latter may include laws, decrees and other standards in effect in Brazil at the time of the events of the present case and summaries of the published judicial proceedings into its facts. The IACHR also notes that to establish the facts contained in the next section, it will rely on the findings of the Special Commission on Political Deaths and Disappearances, which appear in the report titled "Right to Memory and the Truth, published by the Special Secretariat on Human Rights of the Office of the President of the Republic in 2007, and the Report of Brazil's National Truth Commission, published on December 10, 2014.

54. Likewise, in keeping with Article 38 of its Rules of Procedure,⁴ and given the scope of the State's acknowledgment of responsibility, the IACHR shall presume to be true any facts that were alleged and that Brazil did not contest, as long as other evidence does not lead to a different conclusion.

A. Context and background

55. As the State has acknowledged, the facts of the present case occurred amid a context of serious human rights violations committed during the civil-military dictatorship that came to power in Brazil following the *coup d'état* on March 31, 1964,⁵ and lasted 21 years.⁶

56. In its judgment in the Case of Gomes Lund et al. v. Brazil, the Inter-American Court of Human Rights observed that "close to 50 thousand persons were detained in the first few months of the dictatorship; around 20 thousand prisoners were subject to torture; there are 354 dead and disappeared persons of the political opposition; 130 expelled from the country; 4,862 persons whose mandates and political rights were ceased, and hundreds of peasants were murdered."⁷ More recently, Brazil's National Truth Commission documented 434 politically motivated deaths and disappearances that occurred in Brazil and abroad.⁸

57. As the official documents indicate, the serious human rights violations committed during the military dictatorship were part of a policy of repression designed and executed by the State through the

³ Rules of Procedure of the IACHR, Article 43(1). "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge."

⁴ Rules of Procedure of the IACHR, Article 38. "The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the period set by the Commission under the provisions of Article 37 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion." El referido dispositivo corresponde al Artículo 39 del Reglamento aprobado en 1980 y vigente a la fecha de presentación de la petición, así como al Artículo 39 del Reglamento aprobado en 2000 que estaba vigente en la decisión de admisibilidad.

⁵ Corte IDH. *Caso Gomes Lund y otros ("Guerrilha do Araguaia") Vs. Brasil*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2010. Serie C No. 219, párr. 2 y 85; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 21; Relatório da Comissão Nacional da Verdade. Volume I. Parte I, "A Comissão Nacional da Verdade". Capítulo 1 – A criação da Comissão Nacional da Verdade (E) Comissões da verdade: a experiência internacional, fls. 41, párr. 77, del 10 de diciembre de 2014.

⁶ Relatório da Comissão Nacional da Verdade. Volume I. Parte II, "As estruturas do Estado e as graves violações de direitos humanos". Capítulo 3 – Contexto histórico das graves violações entre 1946 e 1988 (E) O golpe de 1964, fls. 97, párr. 62, del 10 de diciembre de 2014.

⁷ Corte IDH. *Caso Gomes Lund y otros ("Guerrilha do Araguaia") Vs. Brasil*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2010. Serie C No. 219, párr. 87.

⁸ Relatório da Comissão Nacional da Verdade. Volume III – Mortos e desaparecidos políticos. Introdução. fls. 26, del 10 de diciembre de 2014.

branches of the Armed Forces, the military and civilian police, and the judicial branch of government, all for the purpose of eliminating any resistance to the coup and to the regime that took power. As with other regimes in power in the region at the time,⁹ the Brazilian dictatorship mounted a “massive repressive apparatus”¹⁰ based on the Doctrine of National Security [*Doutrina de Segurança Nacional*].¹¹

58. The Brazilian military dictatorship was not an isolated event in Latin America; instead it fit into the broader global geopolitical context of the so-called “Cold War”. In Latin America, with few exceptions, in the 1960s and 1970s the countries of the Southern Cone –Paraguay (1954), Brazil (1964), Argentina (1966 and 1976), Uruguay (1973) and Chile (1973)- lived under military dictatorships that all applied a strategy of anti-Communism through the “Doctrine of National Security”.¹² Here, the Inter-American Court has written that most of the dictatorial governments in the Southern Cone region came to power or were in power during the 1970s [...] The ideological basis of all these regimes was the “national security doctrine,” which regarded leftist movements and other groups as “common enemies...”¹³

59. Based on the Doctrine of National Security, a succession of “National Security Laws” were issued under the military regime in Brazil¹⁴. The main legal support of the military regime in Brazil was the so-called “Institutional Act” (*Ato Institucional*, hereinafter “the AI”).¹⁵

60. The escalation of the repressive legal system in Brazil gradually drew reactions from various quarters of the public. The student movement, in particular, vigorously demonstrated its opposition, which peaked in the form of massive 1968 demonstrations¹⁶.

61. In response to the increase of popular manifestation against the military regime, on December 13, 1968 President Costa e Silva issued AI-5. Unlike the other AIs, AI-5 did not have a time limit, “it was dictatorship unmasked.”¹⁷ The National Congress was closed and the possibility of summary dismissals and of being summarily terminated while in office was reinstated and political rights and the constitutional rights to freedom of expression and of association could be suspended. The military regime’s legal system also allowed one to be barred from the practice of one’s profession (which affected the practice of

⁹ Corte IDH. *Caso Goiburú y otros vs. Paraguay*. Sentencia del 22 de septiembre de 2006. Serie C No. 153; Corte IDH. *Caso Barrios Altos vs. Perú*. Sentencia de 14 de marzo de 2001, Serie C N° 75; Corte IDH. *Caso Almonacid Arellano y otros Vs. Chile*. Sentencia de 26 de septiembre de 2006 (Excepciones Preliminares, Fondo, Reparaciones y Costas). Serie C, n° 154; Corte IDH. *Caso Gelman Vs. Uruguay*, Sentencia del 24 de febrero de 2011. (Fondo y Reparaciones), Serie C, n° 221.

¹⁰ Relatório da Comissão Nacional da Verdade. Volume III – Mortos e desaparecidos políticos. Introdução. fls. 23, del 10 de diciembre de 2014.

¹¹ Corte IDH. *Caso Gomes Lund y otros (“Guerrilha do Araguaia”) Vs. Brasil*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2010. Serie C No. 219, párr. 85; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 22.

¹² Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. Caso 11,552 - *Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 53.

¹³ Corte IDH. *Caso Goiburú y otros Vs. Paraguay*, Sentencia de 22 de septiembre de 2006. Serie C No. 153, párr. 61.5.

¹⁴ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. Caso 11,552 - *Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 54; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 19.

¹⁵ Los Actos Institucionales eran normas de excepción emitidas a través de Decretos del Poder Ejecutivo, es decir, del propio gobierno militar, que podían incluso reformar materia constitucional, otorgándole al régimen total libertad para cambiar o suspender derechos establecidos en la Constitución de 1946. Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. Caso 11,552 - *Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 54.

¹⁶ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. Caso 11,552 - *Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 59; GASPARI, Elio. *A Ditadura Envergonhada*. São Paulo, Companhia das Letras, 2004, fls. 277-283; y Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 24 y 25.

¹⁷ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. Caso 11,552 - *Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 60.

journalism); confiscation of property was allowed and the guarantee of *habeas corpus* was suspended in the case of political crimes against national security.¹⁸

62. In March 1970, during the term of President Médici, the then Minister of the Army, General Geisel (later President of the Republic), codified the Army's police activity in a document called "Presidential Directive on Internal Security" ["*Diretriz Presidencial de Segurança Interna*"]. In July 1970, General Geisel notified the generals under his command that, on instructions from President Médici, the Army would be taking command of security activities and would therefore have greater authority than the Navy and Air Force; it would also be taking over administration of civilian security. Two months later, the Ministry of the Army created the Intelligence Operations Detachments [*Destacamentos de Operações de Informações- DOI*]. Despite the primacy of the Army, a collective body was also created to ensure that all three branches of the Armed Forces participated in the Internal Defense Operations Center [*Centros de Operações de Defesa Interna-CODI*].¹⁹

63. According to the report of the National Truth Commission (CNV), in January 1970 DOI/CODI were set up in various capital cities across the country,²⁰ to function as "intelligence units specializing in operations and subordinate to the commanders of each force."²¹ According to a 1977 study of the Armed Forces, the purpose of the CODI was to "ensure the necessary coordination in planning and executing the internal defense measures, at the various levels of Command."²² For their part, the DOI were charged with making arrests and conducting investigations and interrogations.²³

64. The CEMDP concluded that "under the command of a high-ranking Army officer, the DOI-CODI became the primary perpetrator of political repression in the country."²⁴ The CEMDP pointed out that the Second Army's DOI-CODI in the state of São Paulo had itself been responsible for over 6,000 arrests and at least 64 cases of disappearances or deaths.²⁵

65. In 1974, General Ernesto Geisel became president, at a time when the regime's image was eroding abroad in the wake of countless complaints of human rights violations, which the Catholic Churchy was particularly instrumental in making public.²⁶ President Geisel took power with the goal of trying to restore the "legitimacy" lost during the administration of former President Médici. The new president made promises of a slow and gradual "openness" and a relative easing of the restrictions on freedom of the press.²⁷

¹⁸ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. *Caso 11,552 - Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 60; Véase también: GASPARI, Elio. *A Ditadura Envergonhada*. São Paulo, Companhia das Letras, 2004, fls.340; y Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 26.

¹⁹ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. *Caso 11,552 - Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 63.

²⁰ Relatório da Comissão Nacional da Verdade. *Volume I. Parte II, "As estruturas do Estado e as graves violações de direitos humanos"*, Capítulo 4 – Órgãos e procedimentos da repressão política. fls 112, párr. 1, del 10 de diciembre de 2014.

²¹ Texto original: "unidades de inteligência, especializadas em operações e subordinadas aos comandantes de cada força. Os DOI-CODI eram comandados por oficial do Exército". Relatório da Comissão Nacional da Verdade. *Volume I. Parte II, "As estruturas do Estado e as graves violações de direitos humanos"*, Capítulo 4 – Órgãos e procedimentos da repressão política, (B) Órgãos de repressão do Exército, fls 138, párr. 101, del 10 de diciembre de 2014.

²² PEREIRA, Freddie Perdígão. *O Destacamento de Operações de Informações (DOI) – Histórico Penal no Combate a Subversão – Situação Atual e Perspectivas*. Monografia. Escola de Comando e Estado Maior do Exército, Rio de Janeiro, 1977, fls. 20.

²³ Relatório da Comissão Nacional da Verdade. *Volume I. Parte II, "As estruturas do Estado e as graves violações de direitos humanos"*, Capítulo 4 – Órgãos e procedimentos da repressão política, (B) Órgãos de repressão do Exército, fls 138, párr. 101, del 10 de diciembre de 2014.

²⁴ Texto original: "[c]hefiado por um alto oficial do Exército, o DOI-CODI assumiu o primeiro posto na repressão política no país". Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 23.

²⁵ Petición Inicial de la Acción Civil Pública No. 2008.61.00.011414-5, de fecha 12 de mayo de 2008, fls. 12 y 13.

²⁶ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. *Caso 11,552 - Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 71; Véase también: Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 27.

²⁷ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. *Caso 11,552 - Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 71; Véase también: Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 27.

66. In its Final Report, the National Truth Commission (CNV) wrote the following:

By its end, Geisel's presidency was characterized –perhaps more so than the previous governments– by the two currents that flowed through the entire dictatorial regime. The first was repressive violence on various levels: press censorship, detentions, torture and murders. Later, Geisel himself would try to rationalize the violence when, in interviews with historians documenting his career under the 1964 authoritarian regime, admitted to having considered torture necessary in certain cases: “there are circumstances in which the individual is forced to use torture to extract certain confessions and to avoid a greater evil.” A second current was the institutional re-invention intended to protect the authoritarian nature of the regime in certain circumstances.²⁸

67. Under Geisel's government, the widespread offensive that the military regime's security agencies were waging against the Brazilian Communist Party began to be disclosed. The Final Report of the National Truth Commission (CNV) states that in January 1975, the regime undertook “police actions against the Brazilian Communist Party (PCB). Dozens of members were rounded up and tortured.”²⁹ Although the PCB was one of the opposition organizations that had not joined the “armed resistance”,³⁰ in 1974 and 1975 “the security agencies physically eliminated almost every member of the PCB's central committee.”³¹ Against that backdrop, at least 12 journalists were detained in October 1975 in the “DOI/CODI/SP” because of their activism or suspected activism in the PCB.

68. The CEMDPA observed the following in this regard:

[...] hundreds of members of this party were detained. On March 3, 2004, Isto É reported that the number may have been as high as 679. If the military regime's strategy up to that point was to exterminate opponents involved in the armed resistance, the central focus then shifted to the PCB, which had always positioned itself as opponents of the guerrilla movement but which was capable of keeping intact a party structure that could become a threat if Geisel's outreach should materialize in the form of real political openness. The idea, then, was to neutralize the PCB before democracy was restored.³²

69. The “repressive agencies” operated “with complete impunity and [their activities] were covered up through legal tricks like amnesty.”³³ The complaints of deaths, disappearances and torture during

²⁸ Texto original: “Até o final do mandato, a Presidência de Geisel será caracterizada – talvez mais do que as anteriores – por um duplo movimento que atravessa todo o período ditatorial. O primeiro dizia respeito a vigilância repressiva em vários níveis: censura a imprensa, prisões, tortura e assassinatos. Mais tarde, o próprio Geisel legitimaria a violência quando, em depoimento concedido a historiadores sobre sua trajetória no regime autoritário de 64, admitiu considerar a tortura necessária em determinados casos: ‘Há circunstâncias em que o indivíduo é impelido a praticar a tortura, para obter determinadas confissões e, assim, evitar um mal maior.’”

Um segundo movimento era o da reinvenção institucional casuística que visava resguardar o caráter autoritário do regime em circunstâncias diversas”. Relatório da Comissão Nacional da Verdade. Volume I. Parte II, “As estruturas do Estado e as graves violações de direitos humanos”. Capítulo 3 – (J) O controle da política, fls. 105, del 10 de diciembre de 2014.

²⁹ Texto original: “[a]ções repressivas contra o Partido Comunista Brasileiro (PCB). Dezenas de militantes foram presos e torturados”. Relatório da Comissão Nacional da Verdade. Volume I. Parte II, “As estruturas do Estado e as graves violações de direitos humanos”. Capítulo 3 – (J) O controle da política, fls. 104, de 10 de diciembre de 2014.

³⁰ PEREIRA, Freddie Perdigão. O Destacamento de Operações de Informações (DOI) – Histórico Penal no Combate a Subversão – Situação Atual e Perspectivas. Monografia. Escola de Comando e Estado Maior do Exército, Rio de Janeiro, 1977, fls. 1.

³¹ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 27, 373 y 374.

³² Texto original: “[...] começou a se tornar pública uma extensa ofensiva dos órgãos de segurança do regime militar contra o PCB que se alongaria até janeiro de 1976, quando foi morto sob torturas o operário metalúrgico Manoel Fiel Filho. No computo geral dessa investida, que mais tarde receberia o nome de Operação Radar, Operação Marumbi ou Operação Barriga Verde, dependendo do estado atingido, centenas de integrantes desse partido foram presos, atingido uma cifra que a revista IstoÉ de 31/03/2004 calculou em 679. Se até aquele momento a estratégia do regime militar tinha sido exterminar os opositores envolvidos com a resistência armada, o foco central da repressão passaria então a ser o PCB, que sempre se posicionou contra as ações de guerrilha e tinha conseguido preservar uma estrutura partidária que, para o aparelho de repressão, se tornaria uma ameaça caso a distensão de Geisel evoluísse para uma verdadeira abertura política. Tratava-se, pois, de neutralizar o PCB antes da volta a democracia”. Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 373-374.

³³ Texto original: “[t]otal impunidade e acobertamento até mesmo de determinados dispositivos legais”. Arquidiocese de São Paulo. Projeto “Brasil: Nunca Mais”, tomo I – O Regime Militar. Pétropolis: Editora Vozes, 1985, fls. 34.

this dictatorial period were “quickly denied, censored in the press and often times became a problem for those who reported them.”³⁴ According to the project “Brazil: Never Again” [“Brasil: Nunca Mais”], “[t]he Public Prosecutor’s Office acted more as the judicial arm of the police agencies of political repression than as a guardian of the law and the body responsible for public prosecution.”³⁵ Similarly, the technical expertise apparatus was also harnessed to work “under the same system of police repression.”³⁶ The CNV’s Final Report stated that “military justice became the dictatorship’s principal vehicle for enforcing its policy and exercising punitive authority, especially with the arrival of AI-2 [Institutional Act No. 2] which expanded its powers so that it could investigate and prosecute civilians accused of crimes against the national security.”³⁷

70. On March 15, 1979, General João Baptista de Oliveira Figueiredo became President of the Republic.³⁸ On August 28 of that year, Law 6.683 (hereinafter the “amnesty law” or “Law 6.683/79”) was enacted, which extinguished the criminal liability of all individuals who had committed “political or related crimes” during the period from September 2, 1961 to August 15, 1979.³⁹ The purpose of the amnesty law was to pardon those citizens who had been prosecuted on the basis of the emergency laws enacted by the military regime. However, the concept of “related crimes” was included, in theory, to accommodate the agents of the State involved in the practice of torture and killing.⁴⁰

71. Here, the CEMDP found that upon adoption of Law 6.683/79, “the prevailing official interpretation [...] became the idea that no criminal liability attached to crimes committed by agents of the political repression.”⁴¹ The National Truth Commission observed the following:

[...] the military institutions were liberal in applying the Amnesty Law to military personnel -even in cases that occurred subsequent to the law’s enactment- and routinely ignored or legitimized serious human rights violations reported by political detainees, their families and lawyers. The federal and state regular courts uncovered significant abuse of the right of defense by the Union and the agents of repression being prosecuted. Also observed was a pattern on the part of the courts –particularly the higher courts, and following an interpretation by the Federal Supreme Court that persists to this day- to regard the amnesty law as an impediment precluding prosecution and investigation of serious human rights violations committed by the agents of the repression during the dictatorship.⁴²

³⁴ Texto original: “[p]rontamente desmentida, censurada na imprensa e, muitas vezes, acarretava problemas para os denunciantes”. Arquidiocese de São Paulo. Projeto “Brasil: Nunca Mais”, tomo I – O Regime Militar. Pétropolis: Editora Vozes, 1985, fls. 34.

³⁵ Texto original: “[o] Ministério Público agia mais como braço judicial dos organismos policiais de repressão política do que como fiscal da lei e verdadeiro titular da ação penal”. Arquidiocese de São Paulo. Projeto “Brasil: Nunca Mais”, tomo IV – As Leis Repressivas. Pétropolis: Editora Vozes, 1985, fls. 20.

³⁶ Texto original: “[a]trelado e subordinado ao sistema de repressão policial”. Câmara Municipal de São Paulo. CPI – Perus/Desaparecidos. In: Vala clandestina de Perus: desaparecidos políticos, um capítulo não encerrado da história brasileira. São Paulo: Instituto Macuco, 2012, fls. 172.

³⁷ Texto original: “De modo semelhante, observou-se que a Justiça Militar se consolidou como a principal instância punitiva política da ditadura, especialmente com o advento do AI-2, na medida em que suas atribuições foram ampliadas para processar e julgar civis incurso em crimes contra a segurança nacional”. Relatório da Comissão Nacional da Verdade. Volume I. Parte IV – “Dinâmica das graves violações de direitos humanos: casos emblemáticos, locais e autores O Judiciário” Capítulo 17 – O Judiciário na ditadura (D) Considerações finais sobre a apreciação judicial acerca de graves violações de direitos humanos fls. 41, párrs. 68-70, del 10 de diciembre de 2014.

³⁸ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. *Caso 11,552 - Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 109.

³⁹ Brasil. Presidência da República. Ley No. 6.683, de 28 de agosto de 1979. Disponible en: http://www.planalto.gov.br/ccivil_03/leis/L6683.htm

⁴⁰ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. *Caso 11,552 - Julia Gomes Lund y Otros (Guerrilha do Araguaia)*, del 26 de marzo de 2009, párr. 110; Véase también: Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 28.

⁴¹ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls.35.

⁴² Texto original: As instituições militares; aplicou extensivamente – e a fatos posteriores – a Lei da Anistia aos militares; e perpetrou uma omissão e legitimação sistemática em relação às graves violações de direitos humanos denunciadas por presos políticos, seus familiares e advogados.

Na Justiça comum federal e estadual, vislumbrou-se um significativo abuso do direito de defesa por parte da União e dos agentes da repressão processados. Observou-se, também, um comportamento dos órgãos judicantes – notadamente, das instâncias superiores –, no mais das vezes, pautado na interpretação do STF, que persiste, ainda na atualidade, por entender a Lei da Anistia como

B. Concerning journalist and public intellectual Vladimir Herzog

72. Journalist Vladimir Herzog (also known as “Vlado” to friends and family) was born on May 27, 1937 in the city of Osijek, Croatia. In 1946 he and his parents, Zora and Sigmund Herzog, immigrated to Brazil.⁴³ Herzog studied philosophy at the University of São Paulo and embarked upon his career in journalism in 1959⁴⁴ as a reporter, editor and news chief for the newspaper *O Estado de São Paulo*. He also participated in the “Teatro de Arena” and “Cinema Novo”, cultural movements geared toward depicting the country’s reality.⁴⁵ In 1963, he started working in television, as a news editor.⁴⁶ That year, he directed a well-known short documentary on the plight of the fisherman on Copacabana Beach in Rio de Janeiro.⁴⁷

73. On February 15, 1964, he married Clarice Ribeiro Chaves,⁴⁸ a student in social sciences and reporter for the newspaper *Última Hora*. After the *coup d’état*, in 1965 the couple moved to London, where the journalist worked as a producer and broadcaster for the BBC.⁴⁹ His two sons, Ivo and André, were born in London.⁵⁰ Vladimir Herzog returned to Brazil in late 1968,⁵¹ following a time of “personal and professional triumphs.”⁵²

74. Upon his return to Brazil, Vladimir Herzog was appointed cultural editor of the magazine *Visão*,⁵³ and worked there for five years.⁵⁴ While working at *Visão*, Vladimir Herzog joined the journalism team at the public television channel *TV Cultura*, where he worked since 1972,⁵⁵ first as editor of the team for the program “*Hora da Notícia*” and then as director of the department of “television journalism.”⁵⁶ During

um óbice ao processamento e à apuração de graves violações de direitos humanos perpetradas pelos agentes da repressão durante a ditadura.

Relatório da Comissão Nacional da Verdade. Volume I. Parte IV – “Dinâmica das graves violações de direitos humanos: casos emblemáticos, locais e autores O Judiciário” Capítulo 17 – O Judiciário na ditadura (D) Considerações finais sobre a apreciação judicial acerca de graves violações de direitos humanos fls. 41, párrs. 68-70, del 10 de diciembre de 2014.

⁴³ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 407- 408; DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 35.

⁴⁴ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014.

⁴⁵ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 47-48; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 408.

⁴⁶ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014.

⁴⁷ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 47-48.

⁴⁸ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 49-50.

⁴⁹ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 408.

⁵⁰ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 56.

⁵¹ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 58; Comissão de Familiares e Desaparecidos Políticos. “1975: Vladimir Herzog”. In: Dossiê Ditadura: Mortos e Desaparecidos Políticos no Brasil, 1964-1985. 2ª edición, 2007, fls. 626.

⁵² Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014.

⁵³ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014.

⁵⁴ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 60; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls.408.

⁵⁵ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014.

⁵⁶ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 63-64; Comissão de Familiares e Desaparecidos Políticos. “1975: Vladimir Herzog”. In: Dossiê Ditadura: Mortos e Desaparecidos Políticos no Brasil, 1964-1985. 2ª edición, 2007, fls. 626; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls.408.

⁵⁶ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 63; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls.408.

those years, Vladimir Herzog pushed the concept of the social responsibility of the press⁵⁷ and came under surveillance by agents because of his supposed activism in the Brazilian Communist Party.⁵⁸ He also made an important report on the first decade of military regimen⁵⁹.

75. In September 1975, a month before he was murdered, Herzog rose to the position of news director at *TV Cultura*.⁶⁰ The military intelligence agencies which were operating covertly inside station, described the journalist “as a problem for the military regime”⁶¹ and reported that his return to television was evidence that “a process of leftist infiltration was resuming at that State-subsidized television channel.”⁶² This view was shared publicly by state representatives who accused the public channel of pro-Communist propaganda.⁶³

C. Arbitrary detention, torture and death of Vladimir Herzog

76. On October 17, 1975, a colleague of Vladimir Herzog, journalist Paulo Sergio Markun, was detained by agents from the Second Army’s Intelligence Operations Detachment/Center for Internal Defense Operations in São Paulo (DOI/CODI/SP). On October 19, 1975, Paulo Sergio Markun asked his father to inform Vladimir Herzog that he, too, was being targeted as a PCB activist and would probably be detained.⁶⁴ On October 20, 1975, Markun’s father warned Vladimir Herzog that he would be summoned for interrogation.⁶⁵

77. The journalist reported what happened to Dr. Rui Nogueira Martins, President of the Father Anchieta Foundation (a sponsor of *TV Cultura*). Herzog also went to the Office of the São Paulo State Secretary for Culture, which had ties to TV Cultura, to report what happened to the State Secretary at that time, Mr. José Mindlin. However, Herzog was only received by the advisor to the Secretary.⁶⁶

78. On the night of October 24, 1975, two persons in civilian dress came to Vladimir Herzog’s home and told Clarice Herzog that they were looking for her husband to report some news. Clarice Herzog told them that her husband was at *TV Cultura*, and they could find him there. She also alerted her husband to what had happened.⁶⁷ That same night, two agents from the DOI/CODI/SP went to the *TV Cultura* television station where they asked Herzog to accompany them to the detachment where he was to give testimony⁶⁸

⁵⁷ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls.408.

⁵⁸ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1794, del 10 de diciembre de 2014.

⁵⁹ NERY, João Elias. “*Páginas de Cultura, resistência e submissão: livros na revista visão*”. Em *Questão*, Porto Alegre, v. 13, n. 2, jul/dez 2007, fls. 290. DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora *Civilização Brasileira*, 2012, fls. 60.

⁶⁰ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora *Civilização Brasileira*, 2012, fls. 66; GASPARI, Elio. *A Ditadura Encurralada*. São Paulo, Companhia das Letras, 2004, fls. 173.

⁶¹ Texto original: “[r]evela monitoramento dos órgãos de informação sobre Herzog, caracterizado como problema para o regime militar. Informe de la Comissão Nacional da Verdade. Volume I. Parte III, “Métodos e práticas nas graves violações de direitos humanos e suas vítimas”. Capítulo 11 – (E) Execuções e mortes decorrentes de tortura, fls. 474, del 10 de diciembre de 2014.

⁶² Texto original: “[a] reabertura de um processo de infiltração de esquerda naquele veículo de comunicação subsidiado pelo governo do estado”. Informe de la Comissão Nacional da Verdade. Volume I. Parte III, “Métodos e práticas nas graves violações de direitos humanos e suas vítimas”. Capítulo 11 – (E) Execuções e mortes decorrentes de tortura, fls. 474, del 10 de diciembre de 2014.

⁶³ Diário Oficial do Estado de São Paulo. *Imprensa Oficial*. São Paulo. 9 de octubre de 1975, fls. 62.

⁶⁴ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 921 (número de folhas ilegíveis) – Declaração de Paulo Sergio Markun en el Inquérito Policial No 704/92, del 30 de junio de 1992.

⁶⁵ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 577 – Declaração de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

⁶⁶ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 577 – Declaração de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

⁶⁷ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 577 – Declaração de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

⁶⁸ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 466 – Declaração de Paulo Pereira Nunes en la Ação Declaratória No. 136/76, del 26 de mayo de 1978.

“[o]n suspicion of belonging to and orchestrating contacts with members of the PCB.”⁶⁹ The directors of the television station told the agents that Vladimir Herzog’s presence was essential on the program being aired. After receiving instructions from Colonel Audir Santos Maciel, it was agreed that the journalist would report “voluntarily” to the DOI/CODI/SP the following morning.⁷⁰

79. At 8:00 am on October 25, Vladimir Herzog reported to the DOI/CODI/SP in the company of journalist Paulo Pereira Nunes.⁷¹ Upon arrival they were received by a soldier who, after checking their identification documents and speaking with someone by intercom, told Herzog that he was to stay and Pereira Nunes was to go.⁷²

80. Witnesses said that upon arrival at the DOI/CODI/SP they were given a beltless, one-piece suit and shoes, but no laces or socks.⁷³ They also stated that at the entrance, a “black cloth hood” was placed over their heads.⁷⁴ According to witnesses Rodolfo Osvaldo Konder and George Benigno Jathay Duque Estrada, two journalists who were also being held at the DOI/CODI/SP on October 25, 1975, were taken to an interrogation room where Vladimir Herzog was present; the victim was dressed in the same uniform, without a belt and with a black-cloth hood over his head.⁷⁵ According to the witnesses, they were able to identify Herzog and his investigator because, when they entered the interrogation room they were ordered to remove the hoods.⁷⁶ In the internal process it was established that the police investigator assigned to Herzog was Pedro Antonio Mira Grancieri, who in August 1986 was named Chief of Police at a São Paulo police station.⁷⁷

81. In this October 25, Mira Grancieri summoned Konder and Duque Estrada to confirm Herzog’s identity. He was sitting on an electric shock seat referred to as the “dragon’s throne”⁷⁸ inside the interrogation room.⁷⁹ Both were coerced into advising Vladimir Herzog that it was “useless to hide

⁶⁹ Texto original: “sob a suspeita de integrar e articular contatos com membros do PCB”. Relatório da Comissão Nacional da Verdade. Volume I. Parte III, “Métodos e práticas nas graves violações de direitos humanos e suas vítimas”. Capítulo 11 – (E) Execuções e mortes decorrentes de tortura, fls. 474, del 10 de diciembre de 2014.

⁷⁰ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 537 – Declaración de Audir Santos Maciel em el Inquérito Policial Militar, del 5 de noviembre de 1975; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 577 – Declaración de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

⁷¹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 577 – Declaración de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 989– Sentencia proferida en la Ação Declaratória No. 136/76, del 27 de octubre de 1978; Relatório da Comissão Nacional da Verdade. Volume I. Parte III, “Métodos e práticas nas graves violações de direitos humanos e suas vítimas”. Capítulo 11 – (E) Execuções e mortes decorrentes de tortura, fls. 474, del 10 de diciembre de 2014.

⁷² Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 466 – Declaración de Paulo Pereira Nunes en la Ação Declaratória No. 136/76, del 26 de mayo de 1978.

⁷³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 433 – Declaración de George Benigno Duque Estrada en la Ação Declaratória No. 136/76, del 16 de mayo de 1978; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 921 (número de hojas ilegibles) – Declaración de Paulo Sergio Markun en el Inquérito Policial No 704/92, del 30 de junio de 1992; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 887-888 – Declaración de Rodolfo Osvaldo Konder en el Inquérito Policial No 704/92, del 3 de junio de 1992.

⁷⁴ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 276 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁷⁵ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 434 – Declaración de George Benigno Duque Estrada en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

⁷⁶ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁷⁷ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 567/569 – Declaración de Pedro Grancieri en el Inquérito Policial Militar, del 21 de noviembre de 1975; Petición de Clarice Herzog y otros, de fecha 16 de mayo de 1978, en la Ação Declaratória No. 136/76 (CF. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 2, fls. 429); reportaje titulada “Eu, Capitão Ramiro, interroguéi Herzog”, revista “Isto é Senhor”, edición del 25 de marzo de 1992; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 892– Declaración de Rodolfo Osvaldo Konder en el Inquérito Policial No 704/92, del 3 de junio de 1992; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 433 – Declaración de George Benigno Duque Estrada en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

⁷⁸ Según el testigo George Benigno Duque Estrada, “trono de dragão”, era una silla blanca, con una placa de metal en el lugar del asiento. Además, indicó que tomó conocimiento que dicha silla era utilizada para dar choques en los detenidos. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 434 – Declaración de George Benigno Duque Estrada en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

⁷⁹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 434 – Declaración de George Benigno Duque Estrada en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

information”⁸⁰ and to “tell what you know because the information that the interrogators were after (...) had already been supplied by persons detained before” them.⁸¹ Nevertheless, Herzog insisted that “he didn’t know anything.”⁸² Konder and Duque Estrada were removed from the cell and taken to an adjoining room, where they could hear the journalist’s screams and Mira Grancieri yelling: “Vladimir Herzog has to acknowledge his involvement in one of the cells of the Brazilian Communist Party.”⁸³

82. Rodolfo Osvaldo Konder testified that “from there [they were able] to hear the screams clearly, first that of the interrogator and then the screams of Vladimir; [they also] heard when the interrogator asked for the “electric prod” [pimentinha] and for help from a team of torturers.”⁸⁴ Konder said that someone turned on a radio so that Herzog’s screams under torture and the sound of the radio combined.⁸⁵ He also stated that “at a certain point, Vladimir’s voice changed, as if something had been introduced into his mouth; his voice was muffled, as if someone had put a gag on him.”⁸⁶ He also stated that thereafter, the screams stopped.⁸⁷

83. Vladimir Herzog was found dead some hours later, on October 25, 1975.⁸⁸ According to the case file, Rodolfo Osvaldo Konder was the last witness to see Herzog alive,⁸⁹ when he was summoned for a “face-to-face” [acareação] with the victim.⁹⁰ In his statement on these events, Osvaldo Konder recounted the following:

The interrogator left the room again and later returned and took [him] by the arm to take [him] to the room where Vladimir was being held, allowing him, once again, to take off the hood. Vladimir was sitting on the same chair, with the hood over his head. But by now he appeared to be especially nervous; his hands were trembling and his voice was very weak. The interrogator then asked Vladimir to talk to [Konder] about the meeting. (...) The interrogator then made a gesture signaling that they - [Konder] and the interrogator- were to leave the room again. (...) [Konder] wait[ed] some hours until (...) the same interrogator, now very nervous, [dictated] a statement [to him] to the effect that [they] had convinced Vladimir Herzog to make his statement voluntarily.⁹¹

⁸⁰ Texto original: “não adiantava sonegar informação”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁸¹ Texto original: “[a] dizer o que sabia, inclusive porque as informações que os interrogadores desejavam, (...) desejavam ver confirmadas já tinham sido dadas por pessoas presas antes de nós”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁸² Texto original: “não sabia de nada”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁸³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 434 – Declaración de George Benigno Duque Estrada en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

⁸⁴ Texto original: “de la, podíamos ouvir nitidamente os gritos, primeiro do interrogador e depois de Vladimir e ouvimos quando o interrogador pediu que lhe trouxessem a ‘pimentinha’ e solicitou a ajuda de uma equipe de torturadores”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁸⁵ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁸⁶ Texto original: “a partir de um determinado momento, o som da voz de Vladimir se modificou, como se tivessem introduzido alguma coisa em sua boca; sua voz ficou abafada, como se lhe tivessem posto uma mordaca”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁸⁷ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 279 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁸⁸ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls.408; Relatório da Comissão Nacional da Verdade. Volume II. Parte IV, “Dinâmica das graves violações de direitos humanos: casos emblemáticos, locais e autores O Judiciário”. Capítulo 15 – (A) Unidades militares e policiais, fls. 758, del 10 de diciembre de 2014; Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

⁸⁹ Texto original: “[s]eguramente deve ter sido a ultima pessoa a vê-lo[a Herzog] com vida”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 892– Declaración de George Benigno Jathay en el Inquérito Policial No 704/92, del 3 de junio de 1992.

⁹⁰ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 433 – Declaración de George Benigno Duque Estrada en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

⁹¹ Texto original: “O interrogador saiu novamente da sala e dali a pouco voltou para me apanhar pelo braço e me levar ate a sala onde se encontrava Vladimir, permitindo mais uma vez que eu tirasse o capuz. Vladimir estava sentado na mesma cadeira, com o capuz enfiado na cabeça, mas agora me parecia particularmente nervoso, as mãos tremiam muito e a voz era débil. Então o interrogador pediu a Vladimir que me falasse a respeito dessa reunião. (...) O interrogador então fez um gesto para que nós - eu e o interrogador -

84. That same day, the Second Army published an official note to the effect that “at around 16:00 hours, they went to the room where they had left [Vladimir Herzog] unguarded and found him dead. He had hanged himself with a strip of cloth.”⁹²

85. Furthermore, according to the official note, proceedings conducted at the Second Army’s facilities “uncovered the structure and activities of the Committee of the State Communist Party;”⁹³ Vladimir Herzog was identified by “his comrades” as “an activist in and member of a basic cell of journalists belonging to that Party.”⁹⁴ He was therefore “invited to make statements to clarify the matter”⁹⁵; he arrived in the company of a “fellow journalist at 8:00 a.m. on the 25th of this month.”⁹⁶ The official note indicates that although initially “reluctant” [*relutado*] to admit “[h]is ties and criminal activities,”⁹⁷ Vladimir Herzog acknowledged his participation in the PCB after a “face-to-face [*acareação*] with journalists Rodolfo Osvaldo Konder and George Benigno Jathay Duque Estrada, “[w]ho advised him to tell the whole truth, since that is what they had done.”⁹⁸ The note also states that he was permitted to write “his statements in his own hand”⁹⁹ and that the paper was later found “in pieces” alongside his body.¹⁰⁰

86. Finally, the note states that “the Secretariat of Security was asked to perform the necessary tests, and the experts confirmed how the suicide had occurred.”¹⁰¹ In effect, a forensics report was prepared on October 25 by Officer Motoho Chiota, in which he concluded that “the scenario in which the corpse was discovered was typical of a suicide by hanging.”¹⁰² It was also prepared an autopsy certificate signed by the forensic doctors of the Institute of Legal Medicine of the state of São Paulo, Arildo Viana and Harry Shibata.¹⁰³ An infamous and controversial photograph showing Vladimir Herzog “hanging by a strip of cloth from the window of the cell in which he was being held, with his legs bent,” was also attached to the forensics report, as proof of the suicide.¹⁰⁴

87. On October 27, 1975, the newspaper *Folha de São Paulo* published the communique that the Second Army released in connection with Herzog’s death. The headline read “Second Army announces

sássemos novamente. (...) esperei algumas horas até que (...) o mesmo interrogador, muito nervoso, nos ditou uma declaração, em que dizíamos ter convencido Vladimir Herzog a prestar espontaneamente seu depoimento”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

⁹² Texto original: “Cerca das 16:00hs, ao ser procurado na sala onde for a deixado desacompanhado, foi encontrado morto, enforcado, tendo para tanto utilizado uma tira de pano”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 493, Nota Oficial do Comando do II Exército.

⁹³ Texto original: “[a] estrutura e as atividades do ‘Comite Estadual do Partido Comunista’”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

⁹⁴ Texto original: “[m]ilitante e integrante de uma cédula de base de jornalistas do citado ‘Partido’”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

⁹⁵ Texto original: “[c]onvidado a prestar esclarecimentos”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

⁹⁶ Texto original: “[c]olega de profissão, as 08:00hs do dia 25 do mês fluente”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

⁹⁷ Texto original: “[s]uas ligações e atividades/criminosas”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

⁹⁸ Texto original: “[q]ue o aconselharam a dizer toda a verdade, pois, assim já o haviam procedido”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

⁹⁹ Texto original: “[s]uas declarações de próprio punho”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 492, Nota Oficial do Comando do II Exército.

¹⁰⁰ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 493, Nota Oficial do Comando do II Exército.

¹⁰¹ Texto original: “Foi solicitada a Secretaria de Segurança a necessária pericia/técnica, positivando os Srs. Peritos a ocorrência de suicídio”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 493, Nota Oficial do Comando do II Exército.

¹⁰² Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 126, Pericia del local donde fue encontrado el cadáver; Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1795, del 10 de diciembre de 2014.

¹⁰³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 4, fls. 827/829, Atestado de examén forense y examén necroscópico, del 25 de octubre de 1975; Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1795, del 10 de diciembre de 2014.

¹⁰⁴ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, “Mortos e desaparecidos políticos”, fls. 1795, del 10 de diciembre de 2014.

journalist's suicide."¹⁰⁵ The newspaper published "[t]he note with the official version of the death."¹⁰⁶ This was how the false version of his death was engineered."¹⁰⁷

88. Clarice Herzog was informed of Vladimir Herzog's death on the night of October 25, 1975.¹⁰⁸ According to the statement that Clarice Herzog gave in the 1975 military police inquiry (*infra* párr. XX), the persons who informed her of her husband's death did not tell her the circumstances under which Vladimir Herzog had died.¹⁰⁹ She also described how she went to the Institute of Legal Medicine, but neither she nor other family members were allowed to see Vladimir Herzog's body. Clarice Herzog stated that she was not permitted to have other physicians examine the body "before it was prepared for burial according to the rites of the Jewish faith."¹¹⁰ One individual from the Jewish Congregation who was conducting the funeral services, told her that: "[h]e had orders from superiors that he was not to allow [Herzog's body to be examined by other physicians], further alleging that there were undercover police inside the hospital and that had she insisted she would have been taken into custody."¹¹¹ Clarice Herzog also said that all she was able to see was Vladimir Herzog's face inside the closed casket, during the wake held in the "Albert Einstein" Jewish hospital on October 26, 1975.¹¹² On October 27, 1975, Vladimir was buried in the "Butanta Jewish Cemetery", with "hundreds of people" in attendance.¹¹³

89. Among those attending the funeral were four journalists who were being held at the DOI/CODI/SP.¹¹⁴ The morning of October 27, 1975, the journalists were instructed to attend Vladimir Herzog's funeral and, if they did, "they could even spend the night at home that night."¹¹⁵ According to one of the journalists attending the funeral, "the idea was apparently to show that the other journalists were fine."¹¹⁶ According to the testimony of journalist Rodolfo Osvaldo Konder, while at the funeral, George Benigno Jathay Duque Estrada and he learned that their names had been mentioned in the official note issued by the Second Army as having "informed on Vladimir Herzog."¹¹⁷ He also stated that upon their return to the DOI/CODI/SP, they demanded "that the note be corrected," only to be threatened by a person identified as "Dr. Paulo". According to Konder, "Dr. Paulo" told them that "the Second Army's note had placed them in an extremely dangerous situation, because they could at any moment be 'executed' by members of the Communist Party."¹¹⁸

¹⁰⁵ Relatório da Comissão Nacional da Verdade. Volume I. Parte III, "Métodos e práticas nas graves violações de direitos humanos e suas vítimas". Capítulo 11 – (E) Execuções e mortes decorrentes de tortura, fls. 473, del 10 de diciembre de 2010.

¹⁰⁶ Relatório da Comissão Nacional da Verdade. Volume I. Parte III, "Métodos e práticas nas graves violações de direitos humanos e suas vítimas". Capítulo 11 – (E) Execuções e mortes decorrentes de tortura, fls. 473, del 10 de diciembre de 2014.

¹⁰⁷ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, "Mortos e desaparecidos políticos", fls. 1794, del 10 de diciembre de 2014.

¹⁰⁸ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 578 – Declaración de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

¹⁰⁹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 578 – Declaración de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

¹¹⁰ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 578 – Declaración de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

¹¹¹ Texto original: "[h]avia recebido ordens de autoridades superiores para não permitir [que o seu corpo fosse examinado por outros médicos], alegando ainda que havia policiais a paisana no Hospital e que se a declarante insistisse, seria presa". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 578 – Declaración de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

¹¹² GASPARI, Elio. *A Ditadura encurralada*. São Paulo, Companhia das Letras, 2004, fls. 179; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 578 – Declaración de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975; DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 238.

¹¹³ DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 242.

¹¹⁴ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 280, Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

¹¹⁵ Texto original: "[p]oderíamos incluso dormir em [sua] casa naquela noite". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 280 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

¹¹⁶ Texto original: "O objetivo, aparentemente, era mostrar que os outros jornalistas estavam bem". DANTAS, Audálio. *As duas guerras de Vlado Herzog*. Rio de Janeiro. Editora Civilização Brasileira, 2012, fls. 243.

¹¹⁷ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 2, fls. 280, Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

¹¹⁸ Texto original: "[a] nota do Segundo Exército nos havia colocado numa situação extremamente perigosa, porque a qualquer momento poderíamos ser 'justicados' por elementos do Partido Comunista". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 280 – Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

90. The Special Commission on Political Deaths and Disappearances stated that Vladimir Herzog's torture and death became "the straw that broke the camel's back and unleashed a strong reaction among the public, the press and civil society as a whole protesting the repeated use of discredited claims (of suicide) to try to cover up what had become routine practice in the dungeons of the regime."¹¹⁹ Upon learning of Vladimir Herzog's death, a number of journalists "brought newsrooms all over São Paulo to a standstill."¹²⁰ The Journalists Union started a round-the-clock vigil and 30 thousand protesting students paralyzed the Pontifical Catholic University (PUC), the University of São Paulo and the Getulio Vargas Foundation.¹²¹ Despite the attempt by the commander of the Second Army to close the main avenues leading to "Praça da Sé" to avoid demonstrations during an ecumenical service held at the "Catedral da Sé," to pay tribute to the journalist, around 8,000 people attended the service.¹²² The assassination of Vladimir Herzog was thus "one of the most widely publicized and documented during the years of the dictatorship and is regarded as a turning point in the resistance movement."¹²³

D. Domestic proceedings

i. The investigation by the Military Police

91. Because of the impact that news of Vladimir Herzog's death had on public opinion, on October 30, 1975 the General Commander of the Second Army issued Order [Portaria] No 03-SJ to "determine the circumstances surrounding the suicide of journalist [Vladimir Herzog]."¹²⁴

92. The military police investigation began on October 31, 1975, and was headed by Brigadier General Fernando Guimarães de Cerqueira Lima.¹²⁵ Participating was the Military Prosecutor [Promotor] representing the Military Prosecutor General's Office, who at the time was the Legal Advisor to the Second Army Command.¹²⁶ Furthermore, the record of the autopsy signed by Arildo Viana and Harry Shibata on October 27, 1975,¹²⁷ and the report dated October 25, 1975 on the autopsy performed after the death of Vladimir Herzog, were sent to the IPM.¹²⁸ According to the report, "Capitão Ubirajara" was the person who discovered the body of Herzog at the DOI/CODI/ SP.¹²⁹ The autopsy report also states that his death was by

¹¹⁹ Texto original: "[c]omo gota d'água para que se afluísse um forte repúdio da opinião pública, na imprensa e na sociedade civil como um todo, contra a repetição de encenações aviltantes (de suicídio) para tentar encobrir a verdadeira rotina dos porões do regime". Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 27.

¹²⁰ Texto original: "[p]aralisaram muitas redações em São Paulo". Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 408.

¹²¹ Comissão de Familiares e Desaparecidos Políticos. "1975: Vladimir Herzog". In: *Dossiê Ditadura: Mortos e Desaparecidos Políticos no Brasil, 1964-1985. 2ª edição, 2007, fls. 627*.

¹²² Comissão de Familiares e Desaparecidos Políticos. "1975: Vladimir Herzog". In: *Dossiê Ditadura: Mortos e Desaparecidos Políticos no Brasil, 1964-1985. 2ª edição, 2007, fls. 627*; Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 408.

¹²³ Texto original: "[f]oi um dos mais divulgados e documentados do período da ditadura, sendo considerado um marco na luta de resistência". Comissão de Familiares e Desaparecidos Políticos. "1975: Vladimir Herzog". In: *Dossiê Ditadura: Mortos e Desaparecidos Políticos no Brasil, 1964-1985. 2ª edição, 2007, fls. 627*.

¹²⁴ Texto original: "[a]purar as circunstâncias em que ocorreram o suicídio do jornalista [Vladimir Herzog]". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 494, Portaria de instauração do Inquérito Policial Militar, del 31 de octubre de 1975. Ver también, Relatório da Comissão Nacional da Verdade. Volume III. Parte III, "Mortos e desaparecidos políticos", fls. 1795, del 10 de diciembre de 2014.

¹²⁵ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 491 y 494, Despachos del 25, 30 y 31 de octubre de 1975.

¹²⁶ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 495, Despacho en el Inquérito Policial Militar, del 31 de octubre de 1975.

¹²⁷ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 4, fls. 827/829, Atestado de examen forense y examen necroscópico, del 25 de octubre de 1975.

¹²⁸ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 125/128, Pericia del local donde fue encontrado el cadáver.

¹²⁹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 125, Pericia del local donde fue encontrado el cadáver.

suicide. Later, expert Harry Shibata testified at trial that he never saw Vladimir Herzog's body.¹³⁰ (infra párr. 105)

93. In the investigation's framework, the journalists George Benigno Duque Estrada and Rodolfo Osvaldo Konder, who had been in custody at the Second Army's DOI/CODI/SP since October 24, 1975, testified as witnesses in the presence of authorities from the headquarters of the Second Army Command on October 31, 1975.¹³¹ The case file indicates that years later, in the state police inquiry open in 1992 (infra párr. 118), Konder stated the following: when he was interrogated about the events as part of the military investigation, he was already under stress because of the circumstances of the torture. Moreover, the only persons present when he testified were military personnel; no attorney was present to represent him. Mindful that he would have to return to the DOI/CODI following his testimony, he thought that the prudent course of action was not to reveal the truth, i.e., the truth about his torture and Vladimir's torture.¹³² For his part, Duque Estrada stated in 1992 that the majority of the statements he made during the military police investigation "[we]re false, because they were words put in his mouth by the Military Prosecutor in that military police investigation [...], especially the witness' statement to the effect that Vladimir had not been tortured, when in fact he was."¹³³ Duque Estrada also stated that "when he gave his testimony, he was not represented by counsel and was very much aware of the fact that he would have to go back to the DOI/CODI/SP, which is why he tempered his accusations for fear of what might happen to him when he went back there."¹³⁴

94. General Fernando Cerqueira requested that other measures be taken "so that there could be no criticism of how [the military police investigation] was run."¹³⁵ He ordered an additional forensic report,¹³⁶ which was assigned to experts Armando Canger Rodrigues and Arildo de Toledo Viana, who on November 10, 1975 corroborated the version given at the time and stated, inter alia, that "no evidence was present of any kind of mortal injury capable of classifying the cause of death as violence or as death due to some natural pathological cause." They concluded that "death was from asphyxiation by hanging."¹³⁷ New witnesses were also heard, among them Lieutenant Colonel Audir Santos Maciel,¹³⁸ journalists Luiz Weis,¹³⁹ Anthony Jorge Andrade de Christo,¹⁴⁰ and Paulo Sergio Markun,¹⁴¹ the police investigator with the Second

¹³⁰ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 441- Declaración de Harry Shibata en la *Ação Declaratória* No. 136/76, del 16 de mayo de 1978.

¹³¹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 495, Despacho en el Inquérito Policial Militar, del 31 de octubre de 1975.

¹³² Texto original: "[q]uando foi interrogado a respeito dos fatos, já vinha abalado pelas circunstâncias de torturas já descritas anteriormente, sendo ouvido somente na presença de militares, sem acompanhamento de qualquer advogado; que, ciente de que deveria retornar ao DOI CODI após ali ser ouvido, o depoente, logicamente, achou prudente não revelar a verdade real dos fatos, qual seja, a sua tortura e a [tortura] de [V]ladimir". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 888 verso, Declaración de Rodolfo Osvaldo Konder en el Inquérito Policial No 704/92, del 3 de junio de 1992.

¹³³ Texto original: "[a] maior parte das afirmações ali contidas, são inverídicas, já que impostas pelo Procurador que atuou naquele IPM [...], principalmente quanto ao fato de ter sido mencionado pelo depoente que [V]ladimir não havia sido torturado, ja que realmente o havia sido". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 891 verso, Declaración de George Benigno Jathay en el Inquérito Policial No 704/92, del 3 de junio de 1992.

¹³⁴ Texto original: "quando do depoimento, o fez sem acompanhamento de advogado e ja ciente que deveria retornar ao DOI CODI a seguir, razão pela qual também moderou suas acusações, por receio do que lhe poderia acontecer no retorno aquele órgão". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 891 verso, Declaración de George Benigno Jathay en el Inquérito Policial No 704/92, del 3 de junio de 1992.

¹³⁵ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, "Mortos e desaparecidos políticos", fls. 1796, del 10 de diciembre de 2014.

¹³⁶ Relatório da Comissão Nacional da Verdade. Volume III. Parte III, "Mortos e desaparecidos políticos", fls. 1795, del 10 de diciembre de 2014.

¹³⁷ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 553 - Parecer Médico-Legal No. 241/75, del 10 de noviembre de 1975.

¹³⁸ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 537/539, Declaración de Audir Santos Maciel en el Inquérito Policial Militar, del 5 de noviembre de 1975.

¹³⁹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 535/536, Declaración de Luis Weis en el Inquérito Policial Militar, del 4 de noviembre de 1975.

¹⁴⁰ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 545/548, Declaración de Anthony Christo en el Inquérito Policial Militar, del 7 de noviembre de 1975.

¹⁴¹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume Volume 3, fls. 542/544, Declaración de Paulo Markun en el Inquérito Policial Militar, del 7 de noviembre de 1975.

Army's DOI/CODI, Pedro Antonio Mira Grancieri,¹⁴² and Clarice Herzog.¹⁴³ Journalist Marco Antonio de Souza Rocha was also called to testify.¹⁴⁴

95. According to the testimony given by Lieutenant Colonel Audir Santos Maciel on October 24, 1975, DOI agents went to Vladimir Herzog's home on October 24, 1974, "to invite him to come to the DOI to explain journalists' involvement and participation in the PCB."¹⁴⁵ Pedro Antonio Mira Grancieri stated that he was the only person who questioned Herzog. He also said that the journalist did not suffer "any abuse or physical or moral coercion" while at the DOI.¹⁴⁶ He also said that he had no "knowledge of any fact that would suggest that VLADIMIR HERZOG's cause of death was not [...] suicide by hanging."¹⁴⁷

96. Years later, journalists Luiz Weis, Anthony Jorge Andrade de Christo and Paulo Sérgio Markun, who were also in custody at the Second Army's DOI/CODI/SP, stated that they felt coerced and intimidated by the military authorities when they gave their testimony.¹⁴⁸ Clarice Herzog, for her part, stated, *inter alia*, that she knew that Herzog was tortured but refused "to give the names of the persons who recounted these events to her, for fear that they might be killed."¹⁴⁹ For her part, Zora Herzog, the journalist's mother, stated that her written statements had been tampered with.¹⁵⁰

97. Vladimir Herzog's death certificated was issued on December 9, 1975. It lists "death by hanging" as the cause of death.¹⁵¹

98. On December 16, 1975, *General* Fernando Cerqueira, who was heading up the military police investigation, issued a report in which he concluded that Herzog's cause of death had been "voluntary suicide by hanging."¹⁵² In December 1975, the Commander of the Second Army ordered the investigation closed.¹⁵³

99. On January 23, 1976, Clarice Herzog presented an out-of-court statement made by journalist Rodolfo Osvaldo Konder, dated November 7, 1975, and asked that it be added to the investigation.¹⁵⁴ In that statement, Mr. Konder declared, *inter alia*, the torture that he had suffered at the DOI/CODI/SP, the contacts he had with Vladimir Herzog inside the DOI/CODI/SP by order of Mira Grancieri, and stated that he had heard

¹⁴² Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 567/569, Declaração de Pedro Grancieri en el Inquérito Policial Militar, del 21 de noviembre de 1975.

¹⁴³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 576/580, Declaração de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

¹⁴⁴ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 546/547, Declaração de Marco Antonio de Souza Rocha en el Inquérito Policial Militar, del 7 de noviembre de 1975.

¹⁴⁵ Texto original: "[a] fim de convidá-lo a comparecer ao DOI para prestar esclarecimentos sobre o envolvimento [...] a participação [...] de jornalistas no PCB". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 537, Declaração de Audir Santos Maciel en el Inquérito Policial Militar, del 5 de noviembre de 1975.

¹⁴⁶ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 567/569, Declaração de Pedro Grancieri en el Inquérito Policial Militar, del 21 de noviembre de 1975.

¹⁴⁷ Texto original: "nao tem conhecimento de qualquer fato que possa concluir que a morte de VLADIMIR HERZOG tenha ocorrido senao por voluntario suicidio por meio de enforcamento". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 569, Declaração de Pedro Grancieri en el Inquérito Policial Militar, del 21 de noviembre de 1975.

¹⁴⁸ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 445 y Volume 5, fls. 918-verso, Declaração de Anthony Christo, en el Inquérito Policial No. 704/92; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 448 y Volume 5, fls. 921-verso, Declaração de Paulo Sergio Markun en el Inquérito Policial No. 704/92, del 30 de junio de 1992; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 916-verso, Declaração de Luis Weis en el Inquérito Policial No. 704/92, del 3 de junio de 1992.

¹⁴⁹ Texto original: "[s]e recusa[va] a fornecer o nome das pessoas que a informaram, com medo de que essas pessoas [viesses] a ser mortas". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 578, Declaração de Clarice Herzog en el Inquérito Policial Militar, del 27 de noviembre de 1975.

¹⁵⁰ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 575, Declaração de Zora Herzog en el Inquérito Policial Militar, del 5 de noviembre de 1975.

¹⁵¹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 629, Certidão de óbito de Vladimir Herzog, del 9 de diciembre de 1975.

¹⁵² Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 163 Relatório do Inquérito Policial Militar, del 16 de diciembre de 1975.

¹⁵³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 133, Solução do Quartel General do II Exército, del 17 de diciembre de 1975.

¹⁵⁴ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 4, fls. 652, Requerimento de Clarice Herzog, del 23 de enero de 1976.

screams and the “interrogator’s” orders for the “electric prod” [*Pimentinha*], an instrument used to apply electric shock to torture detainees.¹⁵⁵

100. The Military Prosecutor alleged that the out-of-court statement given by journalist Rodolfo Osvaldo Konder should be disallowed as the military investigation was not a judicial proceeding¹⁵⁶ and ultimately there was no reason to accept the statement.¹⁵⁷ Thus, on February 12, 1976, it was determined that “because no crime has been committed”, the investigation should be closed.¹⁵⁸ On March 8, 1976, that decision was confirmed by the Judge Advocate of Military Justice.¹⁵⁹

ii. Declaratory action filed by Vladimir Herzog’s next of kin

101. On April 19, 1976, Clarice Herzog and her two sons, Ivo and André, both minors, filed a Declaratory Action with the São Paulo Federal Court asking the court “to find the Federal Union responsible for the arbitrary detention of Vladimir Herzog, the torture to which he was subjected and his death.”¹⁶⁰ In their civil action, they stated that because Vladimir Herzog was on the premises of the Second Army’s DOI/CODI/SP, the Federal Union was responsible for his physical safety¹⁶¹ and that the Second Army’s official note reporting his death did not “accurately portray the events that transpired in the DOI/CODI facilities on October 25, 1975.”¹⁶² To illustrate the contradiction, they made reference to the statement made by Rodolfo Osvaldo Konder who said that “like all the others, the one-piece suit they gave him [Vladimir] to wear inside the DOI/CODI facilities did not have a belt.”¹⁶³

102. On July 2, 1976, the Federal Union presented its defense argument based on the legal opinion [*parecer*] from the Army Prosecutor’s Office and requested that the action filed be declared inadmissible.¹⁶⁴ In that opinion, the Army Prosecutor’s Office argued that in the March 8, 1976 ruling of the military court, the Judge Advocate had decided that the case was to be closed on the grounds that “[n]o crime was involved in the suicide of former journalist Vladimir Herzog.”¹⁶⁵ It [the Federal Union] also observed that “what happened was that Vladimir Herzog appeared before the authorities of his own free will; it was not a detention.”¹⁶⁶ It also wrote that the arguments made in the declaratory action filed by Clarice Herzog are “inconsistent”¹⁶⁷ regarding the journalist’s torture and death, and indicated that the cause of his death was

¹⁵⁵ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 278-279, Declarações a termo de Rodolfo Osvaldo Konder, del 7 de noviembre de 1975.

¹⁵⁶ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 129, Parecer do Ministério Público Militar solicitando el archivo, del 12 de febrero de 1976.

¹⁵⁷ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 4, fls. 654, Parecer do Ministério Público Militar, del 10 de febrero de 1976.

¹⁵⁸ Texto original: “[p]or inexistencia de crime a punir”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 129, Parecer do Ministério Público Militar solicitando el archivo, del 12 de febrero de 1976.

¹⁵⁹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fl 130/132, Decisão del archivo del Inquérito Policial Militar, del 8 de marzo de 1976.

¹⁶⁰ Texto original: “[d]eclare a responsabilidade da Uniao Federal pela prisao arbitraria de Vladimir Herzog, pelas torturas a que foi submetido e por sua mort[e]”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 2, fls.333, Petición de Clarice Herzog y otros, de fecha 16 de mayo de 1978, en la Ação Declaratória No. 136/76.

¹⁶¹ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 2, fls.328, Petición de Clarice Herzog y otros, de fecha 16 de mayo de 1978, en la Ação Declaratória No. 136/76.

¹⁶² Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 2, fls.326, Petición Inicial de la Ação Declaratória No. 136/76, del 19 de abril de 1976.

¹⁶³ Texto original: “[o] macacão que lhe deram para vestir nas dependências do DOI, a exemplo de todos os outros, não tinha cinto”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 2, fls.327, Petición de Clarice Herzog y otros, de fecha 16 de mayo de 1978, en la Ação Declaratória No. 136/76.

¹⁶⁴ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 1, fls. 88/123, Parecer do Ministério do Exército en la Ação Declaratória No. 136/76, del 26 de mayo de 1976.

¹⁶⁵ Texto original: “[n]ão houve participação criminosa no suicídio do ex jornalista Vladimir Herzog”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 1, fls. 90, Parecer do Ministério do Exército en la Ação Declaratória No. 136/76, del 26 de mayo de 1976.

¹⁶⁶ Texto original: “[u]ma apresentação espontânea de Vladimir Herzog as autoridades não uma prisão”. Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 1, fls. 115, Parecer do Ministério do Exército en la Ação Declaratória No. 136/76, del 26 de mayo de 1976.

¹⁶⁷ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 1, fls. 116, Parecer do Ministério do Exército en la Ação Declaratória No. 136/76, del 26 de mayo de 1976.

“voluntary suicide by hanging and not some act attributed to agents of the Federal Union.”¹⁶⁸ It therefore rejected the contention that the State bore any blame.¹⁶⁹

103. On March 16, 1978, the Federal Judge rejected the Federal Union’s preliminary arguments and scheduled a hearing to take testimony from witnesses.¹⁷⁰ The Federal Union appealed that decision, but the appeal was denied.¹⁷¹

104. In a brief dated May 16, 1978, Herzog’s next of kin asked that the Second Army clarify the information regarding the presence of an agent by the name of “*Ubirajara*” in the DOI/CODI/SP on the day of Vladimir Herzog’s death;¹⁷² they also requested that the person responsible for his “interrogation” be ordered to appear for trial.¹⁷³ That same day, May 16, the hearing¹⁷⁴ was held with six witnesses testifying;¹⁷⁵ of these, four had been in custody at the Second Army’s DOI/CODI/SP and stated that they had been subjected to physical and psychological torture.

105. At that hearing, physician Harry Shibata, one of the experts who signed the autopsy done on the body, confessed that “he had never seen Vladimir Herzog’s body.”¹⁷⁶ Journalist Anthony Christo testified that “he was not confirming the testimony given in the military police investigation; the witness stated that he had been tortured at the DOI/CODI facilities; he also said that he saw others who also appeared to have been tortured; that these statements were not included in his testimony based on the argument that they did nothing to shed light on the facts; that Prosecutor Durval was the one who claimed that these statements were not germane to the investigation; that the person making the statement signed his testimony under coercion.”¹⁷⁷

106. Paulo Sergio Markun also confirmed that the Military Prosecutor had altered his testimony. He stated the following: “during the IPM the witness was asked if he had any reason to suspect that Vladimir Herzog had been tortured; the witness answered yes, because he and his wife were tortured; in response, the Prosecutor told [the witness] that his were subjective allegations and none of those statements appeared in the transcript of his testimony [*termo de declarações*].”¹⁷⁸

107. Journalist Duque Estrada stated that “[V]ladimir Herzog spoke with an investigator who had a tattoo on his arm in the shape of anchor. The investigator had summoned the witness and Rodolfo Oswald

¹⁶⁸ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 1, fls. 118, Parecer do Ministério do Exército en la Ação Declaratória No. 136/76, del 26 de mayo de 1976.

¹⁶⁹ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 1, fls. 121, Parecer do Ministério do Exército en la Ação Declaratória No. 136/76, del 26 de mayo de 1976.

¹⁷⁰ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 2, fls. 268/270, Despacho saneador en la Ação Declaratória No. 136/76, del 16 de marzo de 1978.

¹⁷¹ Tribunal Regional Federal da 3ª Região, Sentencia de los Embargos infringentes No. 89.03.7264-2 del 18 de mayo de 1994.

¹⁷² Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls.426/427, Petición de los autores en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

¹⁷³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls.429/430, Petición de los autores en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

¹⁷⁴ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls.431/452, Audiência de instrução e julgamento en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

¹⁷⁵ Los seis testigos que habían declarado fueron: George Benigno Jatahy Duque Estrada, Professor Godofredo da Silva Telles Junior, Harry Shibata, Antony Jorge Andrade de Christo, Paulo Sérgio Markun y Sérgio Gomes da Silva. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1002 – Sentencia proferida en la Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁷⁶ Texto original: “[e]m nenhum local viu o corpo de Vladimir Herzog”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 441– Declaración de Harry Shibata en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

¹⁷⁷ Texto original: “[n]o confirmava o depoimento prestado no inquérito policial militar; que o depoente declarou que havia sido torturado em dependências do DOI CODI; que declarou também ter visto outras pessoas parecendo torturadas; que essas declarações não foram reduzidas a termo sob alegação de que não eram importantes para esclarecimento dos fatos; que o Procurador Doutor Durval foi quem afirmou não ser importantes (sic) essas declarações para apuração dos fatos; [...] que o depoente assinou o termo sob coação”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 445/446, Declaración de Anthony Christo en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

¹⁷⁸ Texto original: “[d]urante o IPM foi perguntado ao depoente se ele tinha razoes para supor que [V]ladimir Herzog tinha sido torturado ao que o depoente afirmou que tinha pelo fato de ter sido torturado bem como sua esposa; ao que o Promotor respondeu que apresentava alegações subjetivas e que nenhuma dessas afirmações constou no termo de declarações”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 448, Declaración de Paulo Markun en la Ação Declaratória No. 136/76, del 16 de mayo de 1978.

Konder to identify Vladimir Herzog; that Vladimir Herzog was dressed in a one-piece Brazilian Army uniform and had a black hood over his head; that Vladimir's uniform had no belt; [...] that the witness and Rodolfo Oswaldo Konder were taken from the room and seated on two chairs facing the door to the room on the first floor; that from where the witness was sitting he could hear screams which he attributes to the interrogators and Vladimir Herzog."¹⁷⁹ Mr. Duque Estrada also observed that when he exited "Vladimir Herzog's interrogation got underway [...] the doors were open [...] and many screams were coming from inside that room."¹⁸⁰

108. On May 24, 1978, the Commander of the Second Army answered the memorandum from the Federal Judge in which the latter again called for Pedro Antonio Mira Grancieri and "*Capitão Ubirajara*" to appear as witnesses. In his reply, the Commander informed the Judge that he had "taken steps to recall Mr. PEDRO ANTONIO MIRA GRANCIERI from the area in MATO GROSSO where he was on a mission";¹⁸¹ the Commander pointed out, however, that because of the autonomous nature of his assigned mission, "it is absolutely impossible to locate him at the present time, so that I cannot produce him as a witness".¹⁸² As for "*Capitão Ubirajara*", the Commander reported that he had ordered that the data necessary to identify him be compiled.¹⁸³ On May 26, 1978, the plaintiffs withdrew their request that Pedro Antonio Mira Grancieri and "*Capitão Ubirajara*" be called as witnesses. They stated that the memorandum from the Commander of the Second Army revealed "the intention to conceal the persons truly responsible for Vladimir Herzog's death."¹⁸⁴

109. On June 15, 1978, the Federal Union presented its "Memorial" in which it requested that the Declaratory Action be judged "out of order since the alleged victim's suicide was not caused by any action or omission on the part of the authorities sufficient to cause a legal person under public law to be deemed liable."¹⁸⁵ For his part, the "ad hoc" representative of the Public Prosecutor's Office presented his "Memorial" in which he argued in favor of the admissibility [*opinando pela procedencia*] of the Declaratory Action.¹⁸⁶ The Federal Union then filed for a writ of mandamus [*Mandado de Segurança*] with the Federal Court of Appeals, asking the court to order that the "reading and publication" of the judgment in the case be suspended. On September 21, 1978, the Federal Court of Appeals, *en banc*, dismissed the petition seeking a writ of mandamus.¹⁸⁷

¹⁷⁹ Texto original: "[c]onversou com [V]ladimir Herzog com um investigador que tinha uma tatuagem no braço em forma de ancora, que convocou o depoente e Rodolfo Oswaldo Konder para identificação de [V]ladimir Herzog; que [V]ladimir Herzog estava vestido com um macacão do Exército Brasileiro e capuz preto na cabeça; que o corpo de Vladimir não tinha nenhum cinto; [...] que o depoente e Rodolfo Oswaldo Konder foram retirados da sala e colocados em duas cadeiras em frente a porta que dá acesso a sala do primeiro andar; que no lugar onde se achava o depoente podia ouvir os gritos que ele depoente atribuí aos investigadores e ao próprio [V]ladimir Herzog". Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 434, Declaración de George Duque Estrada en la Acción Declaratória No. 136/76, del 16 de mayo de 1978.

¹⁸⁰ Texto original: "[d]epois da retirada do depoente começou o interrogatório de [V]ladimir Herzog [...] e o depoente classifica esse período como um período de pancadaria porque as portas eram abertas [...] e havia muitos gritos no interior". Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls. 434/435, Declaración de George Duque Estrada en la Acción Declaratória No. 136/76, del 16 de mayo de 1978.

¹⁸¹ Texto original: "[p]rovidências para interrupção do serviço a cargo do Sr. PEDRO ANTONIO MIRA GRANCIERI na área de MATO GROSSO". Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 460, Ofício en la Acción Declaratória No. 136/76, del Comandante del II Ejército, del 24 de mayo de 1978.

¹⁸² Texto original: "[p]ela autonomia do trabalho de que é incumbido, é totalmente impossível localizá-lo de momento, o que me impede de apresentá-lo". Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 460, Ofício en la Acción Declaratória No. 136/76, del Comandante del II Ejército, del 24 de mayo de 1978.

¹⁸³ Texto original: "[o] levantamento de dados". Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 460, Ofício en la Acción Declaratória No. 136/76, del Comandante del II Ejército, del 24 de mayo de 1978.

¹⁸⁴ Texto original: "[a] preocupação de se ocultar os verdadeiros responsáveis pela morte de Vladimir Herzog". Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 464, Prosseguimento da audiência de instrução e julgamento en la Acción Declaratória No. 136/76, del 26 de mayo de 1978.

¹⁸⁵ Texto original: "[i]mprocedente, com a aplicação das considerações legais, já que o suicídio da suposta vítima não induz a nenhuma ação ou omissão das autoridades, capazes de caracterizar a responsabilidade da Pessoa Jurídica de Direito Público". Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 472/473, Memorial de la Unión Federal en la Acción Declaratória No. 136/76, del 15 de junio de 1978.

¹⁸⁶ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1003 - Sentencia proferida en la Acción Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁸⁷ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1003 - Sentencia proferida en la Acción Declaratória No. 136/76, del 27 de octubre de 1978.

110. On October 27, 1978, the Federal Judge delivered a ruling in which he affirmed, *inter alia*, that “it is irrefutable fact in the present case that Vladimir Herzog [...] died an unnatural death while on the premises of the Intelligence Operations Detachment of the Center for Internal Defense (DOI/CODI), a subordinate organ and component of the Second Army.”¹⁸⁸ The judge also wrote that “it is irrefutable fact that Vladimir Herzog was found in his cell, in partial suspension, hanging by a belt of green fabric, the same color as the one-piece uniform he was wearing, clothing he was given by the agents charged with guaranteeing his physical safety.”¹⁸⁹ Continuing, the judge wrote that “there was no good reason why the detainee should be wearing a belt,” since when he was found dead, he was dressed in a one-piece uniform.¹⁹⁰ Furthermore, the witnesses gave “coherent” testimony that “detainees at the DOI/CODI did not wear belts and did not have shoe laces or socks, and no evidence to the contrary was produced at trial.”¹⁹¹

111. As for the report on the autopsy done on Vladimir Herzog, the judge wrote that Dr. Harry Shibata, testified that “he never saw the body of Vladimir Herzog.”¹⁹² Thus, the judge held that the autopsy report and the additional examination ordered in the military police investigation, have no legal “efficacy.”¹⁹³ As for the military police investigation, the judge wrote that its evidentiary value “is merely informative; in other words, the information it contains is for the Public Prosecutor’s Office and only has probative value if repeated at trial or if the information is consistent with the evidence produced in court.”¹⁹⁴ The judge also wrote that the statements “most favorable” to the Federal Union’s account of Vladimir Herzog’s death were not repeated at trial and “contradict the evidence produced under the adversarial principle.”¹⁹⁵ He pointed out that the Federal Union failed to prove that the suicide had occurred.¹⁹⁶

112. The judge also pointed to the unlawfulness of the journalist’s detention, writing “no reference is made to any investigation in which Vladimir was suspected of some crime, to any arrest warrant or to any competent authority who issued it; nor is any mention made of a communication sent to the competent judge concerning his detention.”¹⁹⁷ As for the Public Administration’s civil liability, the judge wrote that “from the moment the husband and father of the parties bringing the declaratory action was unlawfully detained at the facilities of the Second Army’s DOI/CODI, the Federal Union unquestionably became responsible for his physical and moral safety [...]”¹⁹⁸

¹⁸⁸ Texto original: “É fato incontroverso nos presentes autos que Vladimir Herzog, [...] sofreu morte não natural, quando se encontrava nas dependências do Destacamento de Operações de Informações do Centro de Defesa Interna (DOI/CODI), órgão subordinada e componente do II Exército”¹⁸⁸. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1004 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁸⁹ Texto original: “[f]ato incontroverso que Vladimir Herzog foi encontrado em sua cela em suspensão incompleta, enforcado por uma cinta de tecido verde, da mesma cor do macacão que trajava, vestimentas que lhe foram entregues pelos próprios agentes policiais encarregados de zelar pela sua integridade física”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1132 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹⁰ Texto original: “[n]ão havia qualquer motivo viável para que o detento portasse cinta, posto que o macacão que vestia quando foi encontrado morto, era inteiriç[o]”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1132 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹¹ Texto original: “[d]e forma coerente e sem que tivesse produzido nos autos qualquer prova em contrário, que os presos do DOI/CODI não portavam cintos, cadarços nos sapatos ou mesmo meias”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1132 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹² Texto original: “[e]m nenhum lugar viu o corpo de Vladimir Herzog”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1137 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1140 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹⁴ Texto original: “[é] meramente informativo, ou seja, as informações contidas em seu bojo dirigem-se ao Ministério Público e só adquirem valor probatório se repetidas em Juízo ou se tais informações forem coerentes com as provas produzidas judicialmente”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1142 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹⁵ Texto original: “[s]e contrapõem frontalmente a prova colhida sob a égide do principio do contraditório”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1143 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹⁶ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1143 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹⁷ “[n]ão ha qualquer menção a existência de inquérito em que Vladimir Herzog tenha sido indiciado, ou mandato de prisão, a autoridade competente que o tenha expedido e mesmo a comunicação de prisão ao juiz competente”. Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1129 - Sentencia proferida na Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹⁸ Texto original: “[a] partir do momento em que o marido e pai dos As. [autores] foi ilegalmente preso nas dependências do DOI/CODI do II Exército, é isento de dúvidas que a União Federal assumiu a responsabilidade pela sua integridade física e moral

113. Based on the foregoing, the Federal Judge deemed the Declaratory Action well-founded, and held that “a legal relationship existed between plaintiffs and respondent in the form of the latter’s obligation to pay the former material and moral damages for the death of journalist Vladimir Herzog.”¹⁹⁹ The judge also decided to send some parts of the case to the Prosecutor General of Military Justice [*Procurador Geral da Justiça Militar*] to undertake the appropriate legal measures.²⁰⁰ According to the Federal Judge, the proceedings in the declaratory action revealed that the crime of abuse of authority had been committed and “vehement revelations” of torture came to light “not just of Vladimir Herzog, but of other political detainees as well, on the premises of the Second Army’s DOI/CODI.”²⁰¹ Thus, based on the Code of Criminal Procedure and on the understanding that “over and above respondent’s civil liability, this Court has an obligation to inform the Public Prosecutor’s Office of any crimes brought to this court’s attention in the course of discharging its function,”²⁰² the judge ordered that the judgment and the witnesses’ statements be sent to the Office of the Prosecutor General of Military Justice [*Procurador Geral da Justiça Militar*].²⁰³

114. On November 17, 1978, the Federal Union filed an appeal to challenge that decision.²⁰⁴ On February 14, 1979, the plaintiff filed her response to the appeal [*contrarrrazões ao recurso de apelação*].²⁰⁵ In 1983, the Federal Court of Appeals, by a majority vote, declared that a legal relationship existed between plaintiffs and respondent “consisting of the obligation to pay damages for the harm caused by the journalist’s death.”²⁰⁶ However, it did not fix the amount of damages, stating that “these claims are best redressed in an ordinary suit for damages, if the plaintiffs so desire.”²⁰⁷ Given that ruling by the Federal Court of Appeals, the Federal Union filed a motion for reconsideration,²⁰⁸ the purpose of which was to have the Federal Court *en banc* hear the appeal

115. It was not until May 18, 1994 that the Federal Regional Court of the 3rd Region denied [negou] the motion for reconsideration.²⁰⁹ That decision was published on July 25, 1995 and became a final judgment [*trânsito em julgado*] in favor of the plaintiffs on September 27, 1995.²¹⁰

[..]”.Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1130 – Sentencia proferida en la Ação Declaratória No. 136/76, del 27 de octubre de 1978.

¹⁹⁹ Texto original: “[e]xistência de relação jurídica entre os As. [autores] e a R. [ré], consistente na obrigação deste indenizar aqueles pelos danos materiais e morais decorrentes da morte do jornalista Vladimir Herzog”. Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1148 – Sentencia proferida en la Ação Declaratória No. 136/76, del 27 de octubre de 1978.

²⁰⁰ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1149 – Sentencia proferida en la Ação Declaratória No. 136/76, del 27 de octubre de 1978.

²⁰¹ Texto original: “[n]ão só em Vladimir Herzog, como em outros presos políticos nas dependências do DOI/CODI do II Exército”. Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1145 – Sentencia proferida en la Ação Declaratória No. 136/76, del 27 de octubre de 1978.

²⁰² Texto original: “[f]ora do campo da responsabilidade civil da R. (demandada), tem este Juízo a obrigação de informar ao Ministério Público quanto a existência de crimes que lhe cheguem ao conhecimento em razão do ofício”. Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1145 – Sentencia proferida en la Acción Declaratoria No. 136/76, del 27 de octubre de 1978.

²⁰³ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1149 – Sentencia proferida en la Acción Declaratoria No. 136/76, del 27 de octubre de 1978.

²⁰⁴ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 4, fls. 725-743 – Apelación de la Unión Federal contra la Sentencia proferida en la Ação Declaratória No. 136/76, del 17 de noviembre de 1978.

²⁰⁵ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 4, fls. 744-779 – Contrarrrazões ao recurso de apelação en la Ação Declaratória No. 136/76, del 14 de febrero de 1978.

²⁰⁶ Texto original: “[c]onsistente na obrigação desta indenizar aqueles danos decorrentes da morte do jornalista”. Tribunal Regional Federal da 3^a Região, Sentencia de los Embargos infringentes No. 89.03.7264-2, fls. 923, del 18 de mayo de 1994.

²⁰⁷ Texto original: “[t]ais indagações estarão mais adequadas dentro de uma ação ordinária de indenização, se desejada pelos autores”. Tribunal Regional Federal da 3^a Região, Sentencia de los Embargos infringentes No. 89.03.7264-2, fls. 923, del 18 de mayo de 1994.

²⁰⁸ Tribunal Regional Federal da 3^a Região, Sentencia de los Embargos infringentes No. 89.03.7264-2, fls. 932, del 18 de mayo de 1994.

²⁰⁹ Tribunal Regional Federal da 3^a Região, Sentencia de los Embargos infringentes No. 89.03.7264-2, fls 923, del 18 de mayo de 1994.

²¹⁰ Extrato de andamento processual disponível no Portal do Tribunal Regional Federal da 3^a Região. Proceso No. 89.03.7264-2. Disponible en: www.trf3.jus.br

iii. Police Inquiry No. 487/92²¹¹ – State Justice System

116. According to the case on April 27, 1992, Federal Deputy Hélio Pereira Bicudo filed a brief with the São Paulo state Public Prosecutor's Office in which he requested a police inquiry to establish [apurar] the culpability of Pedro Antonio Mira Grancieri, known as "Capitão Ramiro", in the death of Vladimir Herzog during his interrogation at the DOI/CODI/SP.²¹² According to that brief, the facts were documented in the case file for the Declaratory Action that Clarice Herzog and her two sons filed, and in the interview published on March 25, 1992, in an article that appeared in the magazine "Isto é Senhor", under the title "Eu, Capitão Ramiro, interroguei Herzog" [I, Captain Ramiro, interrogated Herzog].²¹³ In that interview, Mira Grancieri stated that he was the person in charge of Vladimir Herzog's interrogation.²¹⁴ Prior to that interview, Mira Grancieri had only given testimony in the 1975 military police investigation, but had not testified in the trial held in the Declaratory Action, as previously noted. (supra párr. 108)

117. According to the statements that Pedro Antonio Mira Grancieri made in the newspaper report, he was "the only officer who interrogated Vladimir Herzog in the DOI/CODI, the only one to speak with him that day. No one is more heavily and immediately involved in Herzog's death than I am."²¹⁵ As to the interrogation methods used, Mira Grancieri stated the following: "[O]ne of the best interrogation methods is sleep deprivation, keeping the person under constant stress because that way his defenses break down (...). All modesty aside, I'm very good at that. I've written notes on interrogation techniques that were distributed among my colleagues. (...) We only used physical aggression with terrorists, because one doesn't get anything from anyone without exerting pressure."²¹⁶

118. On May 4, 1992, the São Paulo State Public Prosecutor's Office asked the São Paulo Civil Police to launch an inquiry to determine Mira Grancieri's culpability in and the circumstances of Vladimir Herzog's death.²¹⁷ According to the case file, during the police inquiry instituted by the São Paulo State Civil Police, statements were taken from Clarice Herzog,²¹⁸ from journalists George Benigno Jatayh Duque Estrada,²¹⁹ Rodolfo Osvaldo Konder,²²⁰ Anthony Jorge Andrade de Christo,²²¹ Luis Fernando Passo Correia de Sá,²²² Luiz Weis,²²³ Antonio Carlos Prado Ribeiro,²²⁴ Paulo Sergio Markun,²²⁵ and witnesses Maria Amélia de

²¹¹ Registrado en la Sala Penal con el No. 704/92. Cf. Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 5, fls. 968.

²¹² Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 5, fls. 974, Representação de Hélio Bicudo, del 27 de abril de 1992; Revista "Isto é Senhor", reportaje "Eu, Capitão Ramiro, interroguei Herzog", edición del 25 de marzo de 1992.

²¹³ Revista "Isto é Senhor", reportaje "Eu, Capitão Ramiro, interroguei Herzog", edición del 25 de marzo de 1992.

²¹⁴ Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 5, fls. 974/982, Representação de Hélio Bicudo, del 27 de abril de 1992; Revista "Isto é Senhor", reportaje "Eu, Capitão Ramiro, interroguei Herzog", edición del 25 de marzo de 1992.

²¹⁵ Texto original: "[o] único policial que interrogou [V]ladimir Herzog no DOI-Codi, o único a conversar com ele naquele dia. Ninguém está mais forte e diretamente envolvido na morte de Herzog do que eu". Revista "Isto é Senhor", reportaje "Eu, Capitão Ramiro, interroguei Herzog", edición del 25 de marzo de 1992.

²¹⁶ Texto original: "[U]m dos melhores métodos de interrogatório é não deixar a pessoa dormir, estressa-la o tempo todo, porque assim ela perde a defesa (...). Modéstia a parte, eu sou muito bom nisso. Já escrevi apostilas sobre técnicas de interrogatório que foram distribuídas entre meus colegas. (...) A gente só partia para os conformes com os terroristas, porque também sem pressão não se tira nada de ninguém". Revista "Isto é Senhor", reportaje "Eu, Capitão Ramiro, interroguei Herzog", edición del 25 de marzo de 1992.

²¹⁷ Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 5, fls. 1150/1153, Requisição do Ministério Público para abertura de Inquérito Policial, del 4 de mayo de 1992.

²¹⁸ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 874/875- Declaração de Clarice Herzog en el Inquérito Policial No 704/92, del 28 de mayo de 1992.

²¹⁹ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 891- Declaração de George Benigno Jatayh Duque Estrada en el Inquérito Policial No 704/92, del 3 de junio de 1992.

²²⁰ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 889 - Declaração de Rodolfo Osvaldo Konder en el Inquérito Policial No 704/92, del 3 de junio de 1992.

²²¹ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 918- Declaração de Anthony Jorge Andrade de Christo en el Inquérito Policial No 704/92, del 3 de junio de 1992.

²²² Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 901- Declaração de Luis Fernando Passo Correia de Sá en el Inquérito Policial No 704/92, del 9 de junio de 1992.

²²³ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 916- Declaração de Luiz Weis en el Inquérito Policial No 704/92, del 3 de junio de 1992.

²²⁴ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 898- Declaração de Antonio Carlos Prado Ribeiro en el Inquérito Policial No 704/92, del 9 de junio de 1992.

²²⁵ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 921, Declaração de Paulo Sergio Markun en el Inquérito Policial No 704/92, del 30 de junio de 1992.

Almeida Teles and Ivan Akselrud de Seixas, who identified Pedro Antonio Mira Grancieri as one of the perpetrators of the torture they suffered while being detained.²²⁶

119. On May 11, 1992, the Public Prosecutor's Office requested that Mira Grancieri report to the Police Unit "to be identified by those witnesses."²²⁷ Nevertheless, on August 24, 1992, Mira Grancieri's attorney advised that he would not report to the Police Unit or testify in Police Inquiry No. 487/92.²²⁸

120. On July 11, 1992, the Judge of the 1st Jury Chamber [1^a Vara do Júri] of São Paulo granted an extension of an additional 60 days to continue the investigations.²²⁹ However, on July 21, 1992, a petition seeking a writ of habeas corpus was filed on behalf of Pedro Antonio Mira Grancieri, the argument being that the facts being examined in that police inquiry had already been examined in the military police investigation, which had been closed. It was also argued that the military courts – not the regular courts- would have jurisdiction over any new investigation into the facts. It was also alleged that Law 6.683/79, known as the Amnesty Law, would preclude any investigation into the facts.²³⁰

121. On October 13, 1992, the 4th Criminal Chamber of the São Paulo State Court [4^a Câmara Criminal do Tribunal de Justiça do Estado de São Paulo] unanimously agreed to grant the writ of habeas corpus and close Police Inquiry No. 487/92, in application of Law 6.683/79, the Amnesty Law.²³¹ The Office of the Attorney General appealed that decision on January 28, 1993.²³² On August 18, 1993, the Fifth Rotation of the Superior Court of Justice [Quinta Turma do Superior Tribunal de Justiça] (STJ) confirmed the decision of the São Paulo State Court that ordered the closed [trancamento] of the police inquiry no. 487-92 initiated by the Civil Police.²³³

iv. **Acknowledgement of responsibility under Law 9.140/1995 (Special Commission on Political Deaths and Disappearances)**

122. Law No. 9.140 was enacted in 1995 and recognized as "deceased those persons who were disappeared because of having participated in or being accused of having participated in political activities during the period from September 2, 1961 to August 15, 1979."²³⁴ Law No. 9.140 created the "Special Commission on Political Deaths and Disappearances" (CEMDP). Its functions included the following: "take steps to acknowledge those persons [...] who, after having participated in or having been accused of participating in political activities in the period between September 2, 1961 and August 15, 1979, have died from unnatural causes on police premises or the like."²³⁵

²²⁶ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 876/879 – Declaração de Maria Amélia de Almeida Teles e Ivan Akselrud de Seixas en el Inquérito Policial No 704/92, del 28 de mayo de 1992.

²²⁷ Texto original: "[s]ubmetido a reconhecimento pessoal por parte das mencionadas testemunhas". Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 865 – Requisição de oitiva de Pedro Mira Grancieri en el Inquérito Policial No 704/92, del 11 de mayo de 1992.

²²⁸ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 6, fls. 1168 – Certidão confirmando que Pedro Mira Grancieri no se presentaría a la policía para rendir declaraciones, del 24 de agosto de 1992.

²²⁹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 968-969, Informaciones presentadas por el Juez Juvenal José Duarte, del 30 de julio de 1992.

²³⁰ Habeas Corpus a favor de Pedro Antonio Mira Grancieri No. 131.798/3-4-SP, del 21 de julio de 1992.

²³¹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 6, fls. 1191/1198, Sentencia en el juicio de habeas corpus No 131.798/3-4-SP, del 13 de octubre de 1992.

²³² Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 6, fls. 1208, Recurso Especial contra la Sentencia en el juicio de habeas corpus, del 28 de enero de 1993

²³³ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 6, fls. 1232/1242, Sentencia del Superior Tribunal de Justicia, en el Recurso Especial No. 33.782-7-SP, del 18 de agosto de 1993.

²³⁴ Texto original: "[c]omo mortas pessoas desaparecidas em razão de participação, ou acusação de participação, em atividades políticas, no período de 2 de setembro de 1961 a 15 de agosto de 1979". Brasil. Presidência da República. Ley No. 9.140 del 4 de diciembre de 1995.

²³⁵ Texto original del artículo 4º, inciso I, alínea b, de la Ley 9.140/95: "I. Proceder ao reconhecimento de pessoas: [...] b) que, por terem participado, ou por terem sido acusadas de participação, em atividades políticas, no período de 2 de setembro de 1961 a 15 de agosto de 1979, tenham falecido, por causas não naturais, em dependências policiais ou assemelhadas." Brasil. Presidência da República. Ley No. 9.140, artículo 4º, I, b, del 4 de diciembre de 1995. Es pertinente mencionar que referida Ley posteriormente fue modificada por la Ley 10.536/2002 y por la Ley 10.875/2004.

123. Under that law, on February 28, 1996 Clarice Herzog filed a request with the CEMDP to obtain an acknowledgement of the fact that Vladimir Herzog had been tortured to death on Army premises; she also sought compensation pursuant to Article 11 of that Law.²³⁶ Her request was unanimously approved in April 1996.²³⁷ On July 17, 1997, the President of the Republic confirmed the decision and Clarice Herzog was paid damages of R\$ 100,000.00 *reais*.²³⁸

124. In 2007, the Secretariat of Human Rights of the Office of the President of the Republic published the report titled “Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos” [Right to Memory and to the Truth: Special Commission on Political Deaths and Disappearances] which contained the CEMDP’s findings.²³⁹ The report states that “on October 25, 1975, journalist Vladimir Herzog was tortured to death at the DOI-CODI of São Paul[o].”²⁴⁰

v. Actions of the Office of the Federal Public Prosecutor (Case No. 2008.61.81.013434-2)²⁴¹

125. Given the facts set forth and conclusions reached in the report of the “Special Commission on Political Deaths and Disappearances” (CEMDP), on November 19, 2007, attorney and constitutional lawyer Fábio Konder Comparato filed a request [“*Representação*”²⁴²] with the Federal Public Prosecutor’s Office²⁴³ asking that the necessary measures be taken to investigate “[t]he abuses and criminal acts against the regime’s political opponents”²⁴⁴ committed by “public agents from the various units of the federation.”²⁴⁵ Members in the Federal Public Prosecutor’s Office examined the request and, because they did not have authority to act in criminal matters, requested in March 2008 that the investigation be referred to one of the Members of the Federal Public Prosecutor’s Office with authority in criminal matters, so that it might determine what the necessary measures would be.²⁴⁶ The foregoing notwithstanding, they sent a memorandum to the Attorney General to the following effect:

[...] the crimes of homicide, battery (torture) and kidnapping (forced disappearance) that the repressive organs committed against political dissidents in the 1964-1985 period under Brazil’s military dictatorship may be classified as crimes against humanity, based on the parameters established by the United Nations, the International Court of Justice and the Inter-American Court of Human Rights..

Such crimes still need to be investigated and prosecuted by authorities with the Brazilian Public Prosecutor’s Office and presented to the Judicial Branch, since they are no longer subject to the statute of limitations and do not qualify for amnesty.

Application of the Amnesty Law in the case of the State’s agents of repression and the failure to investigate and prosecute the authors of these crimes is a violation of the obligations Brazil undertook vis-à-vis the international

²³⁶ Texto original: “[p]ara fins de pagamento de indenização prevista no art. 11 da mesma Lei No. 9.140/95”. Solicitud de Clarice Herzog ante la Comisión Especial sobre Mortos e Desaparecidos Políticos, fls. 6, del 28 de febrero de 1996.

²³⁷ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, fls. 408, 2007.

²³⁸ Comunicación del Estado brasileño de agosto de 2015, párr. 10.

²³⁹ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007.

²⁴⁰ Texto original: “Em 25 de outubro de 1975, o jornalista Vladimir Herzog foi assassinado sob torturas no DOI-CODI de São Paul[o]”. Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, fls. 27, 2007.

²⁴¹ El procedimiento fue inicialmente autuado en el Ministerio Público Federal como “Peças de Informação” No. 1.34.001.001574/2008-17.

²⁴² Representação: significa dirigir-se, por escrito, al Ministério Público (Procurador de Justicia, en los estados; Procurador de la Republica, en el ámbito del Ministerio Público Federal), con el objeto de denunciar hechos relacionados con el alcance de las actividades del Ministerio Publico, y solicitar el inicio de una investigación.

²⁴³ Representação de Fabio Konder Comparato a la Procuraduría de la Republica en *São Paulo*, de fecha 19 de noviembre de 2007.

²⁴⁴ Texto original: “[a]busos e atos criminosos contra opositores políticos ao regim[e]”. Proceso No. 2008.61.81.013434-2 Justiça

²⁴⁵ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1279, Oficio No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008. Federal - São Paulo, Volume 7, fls. 1279, Oficio No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008.

²⁴⁶ Es pertinente mencionar que dicha solicitud fue basada en extenso dictamen jurídico de fecha 3 de diciembre de 2007, del Procurador Regional de la Republica Marlon Alberto Weichert.

community and will expose the country to a likely finding by the Inter-American Court of Human Rights of responsibility on Brazil's part.²⁴⁷

126. They also stated that the “murder of VLADIMIR HERZOG is a case that demands immediate criminal prosecution.”²⁴⁸ They maintained that the previous decisions taken in the present case “must be regarded as null and void” given the “absolute lack of jurisdiction of the São Paulo state courts” inasmuch as the journalist’s death occurred on the premises of the DOI/CODI/SP, an organ that is part of the structure of the Brazilian Army.²⁴⁹ The Prosecutors from the Federal Public Prosecutor’s Office argued that the federal courts –not the state courts- would have jurisdiction to prosecute the respective criminal case.²⁵⁰ They also reasoned that there would be “evidence that the unlawful detention, torture and murder were committed by PEDRO ANTONIO MIRA GRANCIERI (Capitão Ramiro), under orders from Lieutenant Colonel AUDIR SANTOS MACIEL, who commanded the DOI/CODI at that time.”²⁵¹ Given the foregoing, they requested that a determination be made as to the measures necessary “to criminally prosecute those responsible for the crimes committed against Vladimir Herzog.”²⁵²

127. On September 12, 2008, the prosecutor of Public Prosecutor’s Office with criminal authority, Fabio Elizeu Gaspar, filed a “motion to close the record” [“promoção de arquivamento”] with the 1st Federal Criminal Court.²⁵³ He acknowledged that “[i]s possible to conclude that Vladimir Herzog’s murder has all the markings of a so-called crime against humanity.”²⁵⁴ He observed, however, that “the amnesty already recognized by the São Paulo state courts produces res judicata and cannot be altered.”²⁵⁵ He argued that regardless of the absolute lack of jurisdiction of the court that issued the ruling, “the decision by the São Paulo state court that granted amnesty with respect to the crime committed against Vladimir Herzog became final and cannot now be modified; hence the request that these informative pieces be filed.”²⁵⁶ He also

²⁴⁷ Texto original: “[...] crimes de homicídio, lesão corporal (torturas) e sequestro (desaparecimento forçado) perpetrados pelos órgãos de repressão a dissidência política durante o regime de ditadura militar no Brasil, no período de 1964 a 1985, podem ser reputados crimes contra a humanidade, conforme parâmetros da Organização das Nações Unidas, da Corte Internacional de Justiça e da Corte Interamericana de Direitos Humanos.

Esses crimes ainda devem ser objeto de investigação e persecução penal pelas autoridades do Ministério Público brasileiro, e submetidos ao Poder Judiciário, pois não são passíveis de serem considerados prescritos ou anistiados.

A aplicação da Lei de Anistia aos agentes estatais da repressão e a omissão em investigar e processar os autores desses crimes viola as obrigações que o Brasil assumiu perante a comunidade internacional, e submeterá o País a uma provável responsabilização da Corte Interamericana de Direitos Humanos.

Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1280, Ofício No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008.

²⁴⁸ Texto original: “O assassinato de VLADIMIR HERZOG é um dos casos para os quais se impõe a imediata persecução penal”. Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1280, Ofício No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008.

²⁴⁹ Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1280, Ofício No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008.

²⁵⁰ Proceso No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 7, fls. 1280, Ofício No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008.

²⁵¹ Texto original: “[i]ndícios de autoria de prisão ilícita, torturas e homicídio por parte de PEDRO ANTONIO MIRA GRANCIERI (vulgo Capitão Ramiro), sob comando do então Tenente-Coronel AUDIR SANTOS MACIEL, que chefiava o DOI/CODI a época”. Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1280, Ofício No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008.

²⁵² Texto original: “[p]ara a persecução penal dos responsáveis pelos crimes praticados contra Vladimir Herzog”. Proceso No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1281, Ofício No GABPR12-EAGF/SP-000109/2008, del 5 de marzo de 2008.

²⁵³ Texto original: “[n]ão teve sua punibilidade extinta pela anistia”. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 26, Solicitud de promoción de archivamiento del Procurador de la Republica Fabio Elizeu Gaspar, del 12 de septiembre de 2008.

²⁵⁴ Texto original: “[s]em maiores dificuldades, é possível concluir que o homicídio de Vladimir Herzog preenche todos as características dos chamados crimes contra a humanidade, como tal podendo perfeitamente ser caracterizado”. Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 28, Solicitud de promoción de archivamiento del Procurador de la Republica Fabio Elizeu Gaspar, del 12 de septiembre de 2008.

²⁵⁵ Texto original: “[o] reconhecimento anterior da anistia pela Justiça do Estado de São Paulo produziu coisa julgada material e não mais pode ser modificado”. Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 26, Solicitud de promoción de archivamiento del Procurador de la Republica Fabio Elizeu Gaspar, del 12 de septiembre de 2008.

²⁵⁶ Texto original: “[a] decisão do Tribunal de Justiça do Estado de São Paulo que reconheceu a anistia em relação ao delito praticado contra Vladimir Herzog transitou em julgado e não mais pode ser modificada, o que justifica o pedido de arquivamento destas peças informativas”. Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 23, Solicitud de promoción de archivamiento del Procurador de la Republica Fabio Elizeu Gaspar, del 12 de septiembre de 2008.

maintained that the action had prescribed, because in 1975, when Vladimir Herzog was tortured and murdered, Brazilian law did not recognize the criminal imprescriptibly. He also argued that “in Brazil custom is not a source of criminal law drawn upon to create rules against the individual being investigated or accused.”²⁵⁷ He therefore reasoned that “the author of Vladimir Herzog’s murder cannot be punished pursuant to a criminal case conducted by Brazil’s domestic courts”²⁵⁸ and requested that the submissions be shelved.²⁵⁹

128. In its decision of January 9, 2009, the substitute Federal Judge, Paula Mantovani Avelino of the 1st Federal Criminal Court²⁶⁰ ordered that the case be closed, accepting the arguments of the Prosecutor with criminal authority²⁶¹. The case was closed on January 12, 2009.²⁶²

vi. Public Civil Suit brought by the Federal Public Prosecutor’s Office (MPF)

129. According to the case file, on May 14, 2008 the Federal Public Prosecutor’s Office (MPF) filed a Public Civil Suit against the Federal Union and against the former commanders of the Second Army’s DOI/CODI in São Paulo, Audir Santos Maciel and Carlos Alberto Brilhante Ustra.²⁶³ The suit states that the Second Army’s DOI/CODI/SP “[w]as among the most notorious locations in the country’s history for torture, murder and forced disappearances perpetrated by agents of the State.”²⁶⁴

130. The Public Civil Suit requested, *inter alia*, to determine the responsibility of former commanders Carlos Alberto Brilhante Ustra and Audir Santos Maciel the “payment of the damages” “paid out of the National Treasury pursuant to Law 9.140/9[5]”²⁶⁵ and for reparations for the collective moral damages caused.²⁶⁶

131. On May 5, 2010, the Judge of the 8th Chamber of the *São Paulo Federal Court* [“8^a Vara da Justiça Federal em São Paulo”] delivered a judgment in which he declared the suit brought against former commanders Carlos Alberto Brilhante Ustra and Audir Santos Maciel to be inadmissible based on the inadequacy of the appeal and the application of Law 6.683/79, known as the Amnesty Law.²⁶⁷ The Federal Public Prosecutor’s Office appealed that decision. The ruling on the appeal is still pending as of the date of the present report.²⁶⁸

²⁵⁷ Texto original: “[c]ostume não pode ser fonte de Direito Penal no Brasil para criar regras contra o investigado ou réu”. Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 45, Solicitud de promoción de archivamiento del Procurador de la Republica Fabio Elizeu Gaspar, del 12 de septiembre de 2008.

²⁵⁸ Texto original: “[i]mpossibilidade de punição do autor de homicídio contra Vladimir Herzog no âmbito de uma persecução penal a ser conduzida por órgãos internos brasileiros”. Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 49/50, Solicitud de promoción de archivamiento del Procurador de la Republica Fabio Elizeu Gaspar, del 12 de septiembre de 2008.

²⁵⁹ Texto original: “[p]ela ocorrência de coisa julgada material ou, não adotado esse entendimento, pela consumação da prescrição da pretensão punitiva”. Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 1, fls. 50, Solicitud de promoción de archivamiento del Procurador de la Republica Fabio Elizeu Gaspar, del 12 de septiembre de 2008.

²⁶⁰ Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1381 y 1385, Decisión de la Juez Federal sustituta Paula Mantovani Avelino, del 9 de enero de 2009.

²⁶¹ Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1381 y 1385, Decisión de la Juez Federal sustituta Paula Mantovani Avelino, del 9 de enero de 2009.

²⁶² Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1394, Decisión de la Juez Federal sustituta Paula Mantovani Avelino, del 9 de enero de 2009.

²⁶³ Petición Inicial de la Ação Civil Pública No. 2008.61.00.011414-5, del 14 de mayo de 2008.

²⁶⁴ Texto original: “[s]e caracterizou por ter sido um dos principais locais de prática de tortura e perpetração de homicídios e desaparecimentos forçados por agentes estatais na historia do país”. Petición Inicial de la Acción Civil Pública No. 2008.61.00.011414-5, fls. 5, del 14 de mayo de 2008

²⁶⁵ Texto original: “[s]uportadas pelo Tesouro Nacional na forma da Lei No. 9.140/9[5]”. Petición Inicial de la Ação Civil Pública No. 2008.61.00.011414-5, fls. 73, del 14 de mayo de 2008.

²⁶⁶ Petición Inicial de la Acción Civil Pública No. 2008.61.00.011414-5, fls. 73, del 14 de mayo de 2008.

²⁶⁷ Proceso No. 2008.61.00.011414-5. 8^a Vara da Justiça Federal em São Paulo. Sentencia del 5 de mayo de 2010, fls. 18 y 20.

²⁶⁸ Recurso de apelación No. 0011414-28.2008.4.03.6100 del 17 de enero de 2011. Disponible para consulta en: www.trf3.jus.br

vii. Actions of the National Truth Commission (CNV) by Law No. 12.528/2011

132. Law No. 12.528/2011 was enacted on November 18, 2011, and created the National Truth Commission (hereinafter the “CNV”).²⁶⁹ Under Article 1 of that law, the purpose of the CNV was to “examine and shed light on the serious human rights”²⁷⁰ committed during the military dictatorship, “in order to respect and fulfill the right to memory and to the historic truth and promote national reconciliation.”²⁷¹ It functioned from May 2012 to December 10, 2014, the date on which its final report was published with its conclusions and recommendations.²⁷²

133. To enable the CNV to accomplish its objectives, Law No. 12.528 gave it the authority to conduct public hearings; request information, data and documents from government organs and entities, including classified information, regardless of the degree of secrecy; to order that tests and measures be taken to compile or recover information, documents and data; and to request the assistance of government entities and organs in order to achieve its goals, and other activities.²⁷³

134. Acting within the scope of its authority, on August 30, 2012 the National Truth Commission asked the Judge of the 2nd Chamber of Public Records for the São Paulo District [2^a *Vara de Registros Públicos da Comarca de São Paulo*] to correct the cause of death shown on Vladimir Herzog’s death certificate [*assento de óbito*].²⁷⁴ On September 24, 2012, the Judge issued a ruling in which he ordered that the deceased’s death certificated be corrected to show that Vladimir Herzog died from “injuries and mistreatment suffered in the Second Army - SP (DOI-CODI).”²⁷⁵

135. Also, in September 2014, a team of CNV experts issued an “indirect expert report” [*laudo pericial indireto*] on Herzog’s death. The experts identified the presence of two injuries on his neck, both caused to the victim while he was still alive.²⁷⁶ The expert report concluded that the journalist “was first strangled, probably with the belt mentioned by the criminal expert, whereupon a gallows system was devised where one end [of the belt] was attached to the metal protective grillwork on the window and other end tied around Vladimir Herzog’s neck [...]. The body was then placed in partial suspension to simulate an actual hanging.”²⁷⁷

²⁶⁹ Brasil. Presidência da República. Ley No. 12.528, del 18 de noviembre de 2011.

²⁷⁰ De acuerdo con el artículo 3 de la Ley No. 12.528/2011, los objetivos de su trabajo fueron: i) aclarar los hechos y las circunstancias de graves violaciones de derechos humanos en el periodo delimitado por su artículo 1; ii) promover el esclarecimiento circunstanciado de los casos de torturas, muertes, desapariciones forzadas, ocultación de cadáveres y su autoría, aunque ocurridos en el exterior; iii) identificar y hacer público las estructuras, lugares, instituciones y circunstancias relacionadas con la práctica de violaciones de derechos humanos mencionados en el *caput* del art. 1 y sus posibles ramificaciones en los diversos aparatos estatales y en la sociedad; iv) transmitir a las autoridades públicas toda y cualquier información obtenida que pueda auxiliar en la localización e identificación de cadáveres y restos de los desaparecidos de conformidad con el artículo 1 de la Ley No. 9.140/95; v) colaborar con todas las instancias del poder público para la investigación de violación de derechos humanos; vi) recomendar la adopción de medidas y políticas públicas para prevenir la violación de derechos humanos, garantizar su no repetición y promover la efectiva reconciliación nacional; y vii) promover, basado en los informes obtenidos, la reconstrucción de la historia de los casos de graves violaciones de derechos humanos, así como contribuir para que sea prestada asistencia a las víctimas de dichas violaciones.

²⁷¹ Texto original: “[a] fim de efetivar o direito à memória e à verdade histórica e promover a reconciliação nacional”. Brasil. Presidência da República. Ley No. 12.528, artículo 1^o, del 18 de noviembre de 2011; Relatório da Comissão Nacional da Verdade. Volume I. Parte I, “A Comissão Nacional da Verdade”, Capítulo 1 – A criação da Comissão Nacional da Verdade, *fls* 22, párr. 8, del 10 de diciembre de 2014.

²⁷² Relatório da Comissão Nacional da Verdade. Volume I. Parte I, “A Comissão Nacional da Verdade”, Capítulo 1 – A criação da Comissão Nacional da Verdade, *fls* 21, párr. 4, del 10 de diciembre de 2014.

²⁷³ Brasil. Presidência da República. Ley No. 12.528, artículo 4, del 18 de noviembre de 2011.

²⁷⁴ Processo No. 0046690-64.2012.8.26.0100. 2^a Vara de Registros Públicos da Comarca de São Paulo.

²⁷⁵ Processo No. 0046690-64.2012.8.26.0100. 2^a Vara de Registros Públicos da Comarca de São Paulo. Sentencia del 24 de septiembre de 2012, *fls*. 4.

²⁷⁶ Texto original: “[i]dentificaram a existência de dois sulcos, ambos com reações vitais, no pescoço do jornalista”. Relatório da Comissão Nacional da Verdade. Volume III “Mortos e desaparecidos políticos”, Maio de 1974 – outubro de 1985, Parte I, *fls* 1796, del 10 de diciembre de 2014.

²⁷⁷ Texto original: “foi inicialmente estrangulado, provavelmente com a cinta citada pelo perito criminal, e, em ato contínuo, foi montado um sistema de força, onde uma das extremidades [da cinta] foi fixada a grade metálica de proteção da janela e, a outra, envolvida ao redor do pescoço de Vladimir Herzog, [...]. Após, o corpo foi colocado em suspensão incompleta de forma a simular um enforcamento”. Relatório da Comissão Nacional da Verdade. Volume III “Mortos e desaparecidos políticos”, Maio de 1974 – outubro de 1985, Parte I, *fls* 1796, del 10 de diciembre de 2014.

136. In its final report, the CNV stated that “there is no longer any doubt surrounding the circumstances of Vladimir Herzog’s death, who was illegally detained, tortured and murdered by agents of the State on the premises of the Second Army’s DOI-CODI in São Paulo in October 1975.”²⁷⁸ The CNV’s conclusion was as follows:

The investigations conducted found that Vladimir Herzog died at the hands of agents of the Brazilian State, in a context of systematic human rights violations encouraged by the military dictatorship that took power in the country in April 1964, [disproving] the suicide story made public at the time of the events. The CNV’s efforts, both to get the family a corrected death certificate and in the findings reached from the experts’ analysis, which exposes the fact that Vladimir Herzog was murdered, were tangible steps in the struggle to solve the serious human rights violations that occurred under the military dictatorship.

The CNV is recommending that the investigations into the circumstances of the case be continued with a view to identifying and bringing to justice the other agents involved.²⁷⁹

137. Likewise, the following is one of the recommendations made in the CNV’s Final Report:²⁸⁰

The competent organs must establish the legal culpability –criminal, civil and administrative- of the government agents that caused the serious human rights violations that occurred during the period investigated by the CNV, and, in the case of these agents, must reverse the application of the amnesty provisions set forth in Law No. 6683 of August 28, 1979, and other provisions of the Constitution and the law.²⁸¹

VI. VII. ANALYSIS OF THE MERITS

A. Analysis of the violation of Article I (Right to life, liberty and personal security), and Article XXV (Right of protection from arbitrary arrest) of the American Declaration

138. Article I of the American Declaration states that “[e]very human being has the right to life, liberty and the security of his person.”

139. Article XXV of said instrument states that:

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing laws.

[...]Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

²⁷⁸ Texto original: “não existir mais qualquer dúvida acerca das circunstâncias da morte de Vladimir Herzog, detido ilegalmente, torturado e assassinado por agentes do Estado nas dependências do DOI-CODI do II Exército, em São Paulo, em outubro de 1975”. Relatório da Comissão Nacional da Verdade. Volume III “Mortos e desaparecidos políticos”, Maio de 1974 – outubro de 1985, Parte I, *fls* 1796, del 10 de diciembre de 2014.

²⁷⁹ Texto original: “Diante das investigações realizadas, conclui-se que Vladimir Herzog morreu em decorrência de ação perpetrada por agentes do Estado brasileiro, em contexto de sistemáticas violações de direitos humanos promovidas pela ditadura militar implantada no país a partir de abril de 1964, restando desconstruída a versão de suicídio divulgada à época dos fatos. As iniciativas da CNV, tanto em entregar à família a certidão de óbito retificada, quanto em concluir análise pericial que evidencia o homicídio de Vladimir Herzog, foram passos concretos na luta pela elucidação [das] graves [violações] de direitos humanos ocorridas durante a ditadura militar. Recomenda-se a continuidade das investigações sobre as circunstâncias do caso para a identificação e responsabilização dos demais agentes envolvidos”. Relatório da Comissão Nacional da Verdade. Volume III “Mortos e desaparecidos políticos”, Maio de 1974 – outubro de 1985, Parte I, *fls* 1799, del 10 de diciembre de 2014.

²⁸⁰ Relatório da Comissão Nacional da Verdade. Volume I, Parte V, “Conclusões e recomendações”, Capítulo 18 – Conclusões e recomendações, II RECOMENDAÇÕES – (A) Medidas Institucionais. *fls* 964-975, del 10 de diciembre de 2014.

²⁸¹ Relatório da Comissão Nacional da Verdade. Volume I, Parte V, “Conclusões e recomendações”, Capítulo 18 – Conclusões e recomendações, II RECOMENDAÇÕES – (A) Medidas Institucionais. *fls* 965, del 10 de diciembre de 2014.

140. The petitioners in this case alleged that the arbitrary detention, torture and execution of journalist Vladimir Herzog constituted a serious human rights violation, within a framework of systematic patterns, resulting in the violation of articles I and XXV of the American Declaration, to the detriment of the journalist.

141. As was ascertained, these events occurred on October 25, 1975, before Brazil had ratified the American Convention and the Inter-American Convention to Prevent and Punish Torture. Therefore, the source of law applicable to these events is the American Declaration. The analysis of the events that took place as of July 20, 1989 and September 25, 1992, or those events that could be considered a situation involving an ongoing violation of rights that would continue to exist after the ratification dates previously mentioned, will take place under the American Convention and the Inter-American Convention to Prevent and Punish Torture.²⁸² (*infra* párr. 83)

142. With regard to the American Declaration, it should be noted that the inter-American system has argued that this instrument is a source of international obligations for all Member States of the OAS, including those that have ratified the American Convention.²⁸³ The American Declaration is part of the human rights framework set forth by the Member States of the OAS, which refers to the obligations and responsibilities of the States, and requires them to abstain from supporting, tolerating or participating in actions or omissions that undermine their human rights commitments. Traditionally, the Commission has interpreted the scope of the obligations under the American Declaration in the broader context of the international and inter-American human rights systems, taking into account the evolution of the field of international human rights law since the instrument was approved, and with due respect to the other rules of international law applicable in the Member States.²⁸⁴

143. In the instant case, the State recognized “the arbitrary detention, torture and murder of Vladimir Herzog” by State agents while the victim was under custody at an Army facility. The State invoked the sentence of the federal judge in charge of declaratory action No. 136-76, which finds that there is “no mention of the existence of an investigation in which Vladimir Herzog has been charged with a crime, or arrest warrant, or competent authority that issued it, including the communication of the detention to the competent judge” (*supra* párr. 112)

144. Indeed, as has been ascertained, the arrest of journalist Vladimir Herzog on October 25, 1975 was not preceded by an arrest warrant issued within a criminal investigation by a competent judge. Neither did the journalist know the motives and reasons for his arrest when it took place, nor was he immediately brought before the competent court, for the necessary steps for judicial review of the detention to be practiced, as required by articles I and XXV of the American Declaration.

145. On the contrary, at the request of Lieutenant Colonel Audir Santos Maciel, Vladimir Herzog showed up on October 25 at 8:00 am at the DOI/CODI/SP to provide statement. In the military unit, he was deprived of his liberty, incommunicado and forced to wear a military uniform with a black cloth hood over his head. That same day, Herzog was taken to an interrogation room where he was tortured to recognize his participation in one of the journalist cells of the Communist Party of Brazil. In the afternoon, 38-year-old Vladimir Herzog was killed by strangulation. (*supra* párr. 79-83)

146. The detention, torture and murder of the victim took place in the context of serious human rights violations that occurred during the dictatorship, and in particular, within a recognized systematic

²⁸² IACHR. Report No. 80/12. Petition P-859-09. Vladimir Herzog et al. Admissibility. Brazil. November 8, 2012. Para. 25.

²⁸³ I/A Court H.R., Advisory Opinion OC-10/89 “Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights”, July 14, 1989, Ser. A N° 10 (1989), para. 45 (The Court held that, “for the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter”).

²⁸⁴ IACHR. Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales) et al. United States. July 21, 2011. Para. 118.

pattern of "repressive actions against the Communist Party of Brazil (PCB)", by which dozens of activists and at least 12 journalists were arrested and tortured for their activism or suspicion of activism in the PCB, which led to "the physical elimination of almost all" of the central committee of the PCB. (supra párr. 67 and 68)

147. The incompatibility of these actions with the international human rights obligations set forth in the American Declaration are evident.

148. First, under Articles I and XXVI of the American Declaration, the protection of individuals against unlawful or arbitrary interference with their freedom by the State requires that "any deprivation of liberty be carried out in accordance with pre-established law, that a detainee be informed of the reasons for the detention and promptly notified of any charges against them, that any person deprived of liberty is entitled to juridical recourse, to obtain, without delay, a determination of the legality of the detention, and that the person be tried within a reasonable time or released pending the continuation of proceedings".²⁸⁵ These obligations also include the right not to be subjected to detention or imprisonment for causes or methods that - although qualified as legal - may be considered incompatible with respect for the fundamental rights of the individual because they are, among other things, unreasonable, unforeseeable or out of proportion.²⁸⁶ For a detention not to be arbitrary, the purpose of the measures that deprive or restrict liberty must be compatible with international human rights law and be suitable to fulfill the aim pursued.²⁸⁷

149. In the instant case, it is not only clearly impossible to invoke any legal basis justifying the detention of Vladimir Herzog. The measure aimed to punish the journalist's alleged activism and political views. In other words, it was based on the exercise of his rights to freedom of thought and expression and freedom of association, which is not a legitimate purpose, in virtue of democratic principles, justifying the deprivation of liberty of a person, and results in an arbitrary detention, thus violating Article XXV of the American Declaration.

150. Secondly, the right of persons deprived of their liberty to humane treatment in the custody of the State is a universally accepted norm in international law. The American Declaration contains a number of provisions in this regard. The Commission has interpreted that Article I of the Declaration (Right to life, liberty and personal security) contains a prohibition of the use of torture or other cruel, inhuman or degrading treatment against individuals under any circumstances, similar to that of Article 5 of the American Convention.²⁸⁸ Additionally, Articles XXV and XXVI of the Declaration concern the right to humane treatment in the context of the rights to protection against arbitrary detention and due process.

151. Both the Court,²⁸⁹ and the Commission have consistently stated that an international legal regime has been formed prohibiting all forms of torture, a prohibition that nowadays belongs to the domain of international *jus cogens*.²⁹⁰ The Court has also understood that there is a constitutive act of torture when the mistreatment is: a) intentional; b) causes severe physical or mental suffering, and c) is committed with any purpose or objective,²⁹¹ including the investigation of crimes.

152. It was determined in the domestic realm that torture was used repeatedly against Vladimir Herzog during his detention in the DOI/CODI/SP. Although all of the methods of abuse that were used are

²⁸⁵ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 120.

²⁸⁶ I/A Court H.R. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Serie C No. 170.

²⁸⁷ I/A Court H.R. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Serie C No. 170.

²⁸⁸ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 184.

²⁸⁹ I/A Court H.R. Case of Maritza Urrutia v. Guatemala. Merits, Reparations, and Costs. Judgment of November 27, 2003. Serie C No. 103, para. 92; I/A Court H.R. Case of Miguel Castro Castro Prison v. Peru. Judgment of November 25, 2006. Serie C No. 160, para. 271; and, Case of Bueno Alves v. Argentina. Merits, Reparations, and Costs. Judgment of May 11, 2007. Serie C No.164, para. 76.

²⁹⁰ IACHR. Report on the Human Rights of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II. Doc.64. December 31, 201. Para. 335.

²⁹¹ I/A Court H.R. Case of Bueno Alves v. Argentina, Merits, Reparations, and Costs. Judgment of May 11, 2007. Serie C No.164. Para. 79.

unknown, on the basis of witness statements and technical work made by the CNV it has been determined that Herzog was hooded, subjected to electric shocks, deafening noises and techniques of drowning and suffocation (supra párr. 81-83 and 135). In the instant case, the abuse applied against Vladimir Herzog by State agents was the result of deliberate action taken in order to extract a confession incriminating him about his involvement in a cell of PCB journalists and to punish him for his political views. The severity of the injuries confirmed in this case is obvious. Vladimir Herzog was subjected to physical abuse that not only caused him harsh suffering; he was also executed under intense torture.

153. Eyewitnesses could hear the journalist's screams and those of his interrogator, police agent Mira Granciere; "[t]he requirement was that Vladimir Herzog acknowledge his involvement in one of the cells of the Brazilian Communist Party." They said that "Herzog's screams while he was being tortured were mixed with [the] sound" of a radio. They also noted that, "at a certain moment, the sound of Vladimir's voice changed, as if they had put something in his mouth; his voice was muffled, as if they had put a gag." (supra párr. 81 and 82)

154. In his statement on these events Osvaldo Rodolfo Konder, the last witness that saw Herzog alive, said that the victim was in the interrogation room; and when he went in a second time to see him "he was sitting in the same chair [for electric shocks], with the hood over his head, but now he seemed especially nervous, his hands trembled and his voice was very weak. Then the interrogator asked Vladimir [to] speak [to Konder]" about the interrogation. (supra párr. 83)

155. Almost 40 years after the journalist was murdered, the CNV ordered medical inquiries to determine the circumstances of his death. As stated in the proven events, these experts identified the existence of two neck injuries, both caused while the victim was alive. The inquiry found that the journalist was "strangled, probably with [a] belt." (supra párr. 135)

156. The CIDH considers that all of the above constitute a violation of the right to personal integrity and humane treatment enshrined in Articles I and XXV of the American Convention, to the detriment of Vladimir Herzog. Also, the State's actions constitute a violation of the journalist's right to life, pursuant to Article I of the Convention. Given the nature of the rights that were infringed and the context in which the events took place, this crime constitutes a serious human rights violation and demonstrates a gross abandonment of the essential principles on which the inter-American human rights system was based at the time of the events.

157. Based on the foregoing, the Commission considers that the State is responsible for the violation of the rights to life, liberty, and personal integrity and the right to protection against arbitrary detention, recognized in Articles I and XXV of the American Declaration, to the detriment of journalist Vladimir Herzog.

B. Analysis of the violation of Article IV (Right to freedom of investigation, opinion, expression and dissemination) and Article XXII (Right of association) of the American Declaration

158. In the merits phase, the petitioners alleged that the arbitrary detention, torture and death of journalist Vladimir Herzog also constituted a violation of his rights to freedom of expression, freedom of assembly and freedom of association for political purposes.

159. The American Declaration contains provisions that protect the right of every person to freedom of expression, peaceful assembly and association, similar to those contained in Articles 13 and 16 of the American Convention. Article IV of the Declaration provides that "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." Furthermore, Article XXII sets forth that "[e]very person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature."

160. The organs of the inter-American system of human rights protection have set forth, in extensive case law and doctrine, that the right to freedom of expression, particularly in matters of public interest, ensure the dissemination of information and ideas, including those resulting unpleasant for the State or any sector of the population.²⁹² Also, they have recognized that the right to freedom of association guarantees freedom of association for political purposes.²⁹³ In this regard, it has been stated that a violation of the right to life or personal integrity attributable to the State may cause, in turn, a violation of the rights to freedom of expression and association, when that violation was due to the legitimate exercise of such rights.²⁹⁴

161. Particularly, the IACHR has stated that the murder of journalists and members of the media due to their professional duties is the most extreme form of censorship. As the Inter-American Court has observed, "journalism can only be exercised freely when those who carry out this work are not victims of threats or physical, mental or moral attacks or other acts of harassment." Such actions not only violate in a particularly drastic way the freedom of thought and expression of the person concerned, but also affect the collective dimension of this right. Acts of violence committed against journalists violate their right to express and impart ideas, opinions and information, and also violate the rights of citizens and society in general to seek and receive information and ideas of any kind.²⁹⁵ In that sense, they are "an attack against the principles of transparency and accountability, as well as the right to hold opinions and to participate in public debates, which are essential for democracy."

162. Similarly, the Inter-American Court has stressed that "opposition voices are essential in a democratic society; without them it is not possible to reach agreements that satisfy the different visions that prevail in society."²⁹⁶ In this sense, it states that the "extrajudicial execution of an opponent for political reasons not only entails the violation of several human rights, but also breaches the principles upon which the rule of law is based, and directly violates the democratic system, inasmuch as it results from a failure to ensure that the different authorities abide by their obligation to protect nationally and internationally recognized human rights, and submit to the domestic organs that guarantee the observance of those rights."²⁹⁷

163. The body of evidence has shown that the arbitrary detention, torture and murder of journalist Vladimir Herzog were motivated by his alleged activism in a cell of PCB journalists, and his work as editor-in-chief at the public television station *TV Cultura*, a medium accused of spreading communist propaganda. (supra párr. 74 and 75) As such, the actions of the State sought precisely to prevent his political activism and journalism, and were expressed in illegitimate restrictions of his rights to freedom of expression and freedom of association for political purposes. In the words of the Inter-American Court, these actions directly undermine the rule of law and openly contradict fundamental principles of the democratic system.

164. The Commission has referred to the chilling effect that crimes against journalists have on other media professionals and citizens in general seeking to expose abuses of power and illicit acts of any

²⁹² IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom Of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 179; I/A Court H.R. Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Serie C No. 194;

²⁹³ I/A Court H.R. Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 26, 2010. Serie C No. 213.

²⁹⁴ I/A Court H.R. Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Serie C No. 167, para. 147; I/A Court H.R. Case of Vélez Restrepo and Family v. Colombia. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 3, 2012 Serie C No. 248. Paras. 142-149; I/A Court H.R. Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 26, 2010. Serie C No. 213.

²⁹⁵ IACHR. Annual Report 2013. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Violence Against Journalists and Media Workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 1.

²⁹⁶ I/A Court H.R. Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 26, 2010. Serie C No. 213.

²⁹⁷ I/A Court H.R. Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 26, 2010. Serie C No. 213.

nature. This chilling effect can only be avoided, according to the Commission, “by swift action on the part of the State to punish all perpetrators, as is its duty under international and domestic law”.

165. It has been ascertained that Vladimir Herzog was a journalist with a renowned domestic and international experience, and a leading professional of prestige among his colleagues. He was the editor-in-chief of a public television channel with an important background of investigative journalism. Undoubtedly, the viciousness of the torture he suffered and his murder were a message to discourage any critical and dissenting voices in journalism and political activism at that time in Brazil.

166. To this extent, the IACHR believes that the serious violations of the rights of journalist Vladimir Herzog had an intimidating and chilling effect on other journalists critical of the military regime and coworkers of *TV Cultura*, and on the community of people who were active in the Brazilian Communist Party or sympathetic to its ideas.

167. Based on these considerations, the Commission concludes that the State is responsible for the violation of the right to freedom of expression, freedom of assembly and freedom of association for political purposes of journalist Vladimir Herzog, recognized in Articles IV and XXII of the American Declaration. The Commission has no information enabling it to determine the need for a separate decision on Article XXI of the American Declaration.²⁹⁸

C. Analysis of the violation of Article XVIII (Right to a fair trial) of the American Declaration, Article 8 (Fair Trial) and Article 25 (Judicial Protection) of the Convention, in relation to Article 1.1 (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of said instrument, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture

168. In this chapter, the IACHR will analyze the international responsibility of the State for actions relating to the investigation of the torture and execution of journalist Vladimir Herzog and the access of his family to justice. As mentioned, this study refers to events that happened before Brazil ratified the American Convention and the Inter-American Convention to Prevent and Punish Torture. Therefore, the source of law applicable to any of these events is the American Declaration. As of July 20, 1989 and September 25, 1992, and as appropriate, the analysis will be carried out under the American Convention and the Inter-American Convention to Prevent and Punish Torture.

169. In this regard, the Commission will examine the alleged human rights violations related to the following actions at the domestic level: i) the Military Police investigation into the death of Vladimir Herzog; ii) the procedure for the declaration of a civil action before the Federal Court of São Paulo; and iii) the criminal investigation in the ordinary court for the arbitrary detention, torture and death of the journalist.

i. Military Police Investigation into the death of Vladimir Herzog

170. The IACHR has noted that the State is not only responsible for respecting and guaranteeing the exercise of the rights of a person deprived of liberty. In its capacity as guarantor, it is also required to provide accurate information, and all evidence related to what happens to the detainee while in custody. This duty stems from the general obligation, of the States themselves, to guarantee the free and full exercise of the rights recognized in the American Declaration, as well as the right of victims of human rights violations or their relatives to have substantial possibilities of being heard and to act in the respective proceedings, both in order to clarify the facts and punish those responsible, and to have access to effective judicial remedies to this end, substantiated in accordance with the rules of due process.

²⁹⁸ In the merits stage the petitioners also alleged that the arbitrary detention, torture and execution of Vladimir Herzog was a violation of the right to peaceful assembly, recognized in Article XXI of the American Declaration, which states that “[e]very person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.”

171. The fulfillment of this obligation is particularly strict when there is evidence of torture²⁹⁹ and in any case where the death of the detainee occurs.³⁰⁰ Indeed, the State, as guarantor of the right to life and personal integrity of detainees, has the duty to prevent all situations that might lead, either by action or omission, to the suppression of these rights. In this sense, if a person was detained in good health and later died, it lies with the State to provide a satisfactory and convincing explanation of what happened and to disprove accusations regarding its responsibility, through valid evidence, considering that there is a presumption of State responsibility for what happens to a person while in custody of the State.³⁰¹

172. In these cases, the State must initiate *ex officio* and with due diligence an investigation in order to determine the nature and causes of the injuries, and ensure the identification and prosecution of those responsible, if applicable. Conducting an effective investigation is a key and conditioning element for the protection of the substantive rights that are affected or annulled by these situations.³⁰²

173. To be effective, the investigation must be carried out by independent authorities, who should have no hierarchical or institutional connection with those implicated.³⁰³ The IACHR has stated that when it comes to a violent death in which the involvement of State officials is under investigation, States must ensure that the responsibility to investigate and prosecute human rights violations is assigned to the authorities who are in the best position to effectively carry it out with autonomy and independence. In this regard, States should establish safeguards for the competent authorities to be able to operate without being subjected to the sphere of influence of public officials allegedly involved in the crime, and also, to ensure that witnesses and relatives of victims take part in the proceedings without fear of reprisals.³⁰⁴

174. In this regard, the IACHR reiterates that, in accordance with the doctrine and constant jurisprudence of the inter-American system of human rights protection, in addition to posing serious problems for an impartial and independent administration of justice³⁰⁵, military criminal courts are not the competent jurisdiction to investigate and, where appropriate, prosecute and punish the perpetrators of human rights violations.³⁰⁶ Indeed, the IACHR has stressed that military jurisdiction should be applied only when military criminal legal rights are affected, during the particular functions of State defense and security, and never to investigate human rights violations.³⁰⁷

175. In its judgment in the case *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil*, the Inter-American Court ordered the State to ensure that criminal proceedings initiated by the events of that case -

²⁹⁹ I/A Court H.R. Case of Miguel Castro Castro Prison v. Peru. Judgment of November 25, 2006. Serie C No. 160, para. 344; and, Case of Bueno Alves v. Argentina. Merits, Reparations, and Costs. Judgment of May 11, 2007. Serie C No.164, para. 88.

³⁰⁰ I/A Court H.R. Case of Bulacio v. Argentina. Judgment of September 18, 2003. Serie C No. 100; I/A Court H.R. Case of Ximenes Lopes v. Brazil. Merits, Reparations, and Costs. Judgment of July 4, 2006. Serie C No. 149, para. 147ñ I/A Court H.R. Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013 Serie C No. 260. Para. 218; European Court. *Salman v. Turkey*, cited above, at § 99; *Keenan v. the United Kingdom*, no. 27229/95, § 91, ECHR 2001-III.

³⁰¹ IACHR. Report on the Human Rights of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II. Doc.64. December 31, 2011. Para. 270.

³⁰² I/A Court H.R. Case of Miguel Castro Castro Prison. Judgment of November 25, 2006. Serie C No. 160, para. 253. See also, I/A Court H.R. Case of Servellón García et al. Judgment of September 21, 2006. Serie C No. 152, para. 119; Case of Ximenes Lopes. Judgment of July 4, 2006. Serie C No. 149, para. 147; Case of the Ituango Massacres. Judgment of July 1, 2006 Serie C No. 148, para. 297; and Case of Cantoral Huamaní and García Santa Cruz. Judgment of July 10, 2007. Serie C No. 167, para. 100.

³⁰³ *Ramsahai et al. v. The Netherlands* [GC], no. 52391/99, § 325, CEDH 2007 -..., *Güleç v. Turkey*, Judgment of July 27, 1998, Reports 1998-IV, p. 1733, §§ 81- 82, and *Ogur v. Turkey* [GC], no. 21954/93, §§ 91 to 92, CEDH 1999-III).

³⁰⁴ IACHR. Annual Report 2013. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Violence Against Journalists and Media Workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 1.

³⁰⁵ IACHR. The Right to Truth in the Americas. OEA/Ser.L/V/II.152. Doc. 2. August 13, 2014. Para. 106

³⁰⁶ I/A Court H.R. Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Serie C No. 209. Paras. 272-278; IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 230; IACHR. Report on Citizen Security and Human Rights. OEA/Ser.L/V/II. Doc. 57. December 31, 2009. Para. 162.

³⁰⁷ IACHR. The Right to Truth in the Americas. OEA/Ser.L/V/II.152. Doc. 2. August 13, 2014. Para. 103.

which occurred during the military regime, just like the instant case- against suspects who are or have been military officers, must be conducted before the ordinary courts and not in military courts.³⁰⁸

176. In that sense, the Commission has constantly stated that: “[t]he military criminal justice system has certain peculiar characteristics that impede access to an effective and impartial remedy in this jurisdiction. One of these is that the military jurisdiction cannot be considered a real judicial system, as it is not part of the judicial branch, but is organized instead under the Executive. Another aspect is that the judges in the military judicial system are generally active-duty members of the Army, which means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context”.³⁰⁹

177. This investigation must be carried out through all legal means available to determine the truth and the investigation, prosecution and punishment of all those responsible for the events. While it is an obligation of means, and not of results, the duty to investigate must be borne by the State as its own legal duty.³¹⁰ In this regard, the State must ensure the collection of evidence, including, among others, witness statements, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective medical analysis of the findings, including the cause of death.³¹¹

178. The State must also ensure the independence of medical and health staff in charge so they can freely practice the necessary medical evaluations, respecting the standards in the practice of their profession.³¹² In this regard, the Commission notes that encouraging investigation effectiveness also depends on the provision of adequate protection for witnesses against threats, pressure or reprisals³¹³ – particularly if these individuals are also detained. Finally, this type of investigation and its results must be subjected to public scrutiny.³¹⁴

179. In the instant case, the IACHR notes that State authorities did not act in accordance with these provisions. Instead, as was proven, the military regime forged a fake version of the death of Vladimir Herzog and initiated a preliminary investigation by a military criminal court, whose final sentence decided to

³⁰⁸ I/A Court H.R. Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para. 257.

³⁰⁹ IACHR, Report No. 2/06, Case 12.130, Miguel Orlando Muñoz Guzmán, Mexico, February 28, 2006, para. 83, 84, in IACHR. The Right to Truth in the Americas. OEA/Ser.L/V/II.152. Doc. 2. August 13, 2014. Para. 103.

³¹⁰ I/A Court H.R. Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013 Serie C No. 260. Para. 218.

³¹¹ The inter-American system has referred to the Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, adopted by the United Nations Economic and Social Council in its resolution 1989/65, as guidelines that should be observed in the investigation into a violent death. These principles require that in such cases the investigation of the suspicious death shall have the following objectives: to identify the victim; to recover and analyze all physical and documentary evidence; to identify possible witnesses and collect their testimony; to determine the cause, manner and time of death, as well as the procedure, practice or instruments that may have caused the death; to distinguish between natural death, accidental death, suicide and homicide; and to identify and arrest the person or persons who may have been involved in the execution. United Nations, Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, adopted by the Economic and Social Council in its resolution 1989/65. The regional system has also referred to the guidelines set forth in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, noting that one of the most important aspects of a “thorough and impartial” investigation into an extrajudicial, arbitrary or summary execution is the collection and analysis of evidence in a suspicious death.³¹¹ Therefore, the Manual sets forth that, in relation to the crime scene, investigators must at least photograph the scene, any other physical evidence and the body as was found and once moved; collect and preserve all samples of blood, hair, fibers, threads and other clues; examine the area for traces of shoes or other evidence; and prepare a report detailing every observation of the scene, the actions of the investigators and the fate of all the evidence collected. In addition, it is necessary to thoroughly investigate the scene of the crime, and an autopsy should be performed, as well as a rigorous analysis of human remains by competent professionals. United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. Doc. E/ST/CSDHA/12 (1991).

³¹² In this regard, see United Nations. Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, August 9, 1999, para. 56, 60, 65 and 66.

³¹³ IACHR. Annual Report 2013. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Violence Against Journalists and Media Workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 1.

³¹⁴ See Güleç, op. cit., p 1733, § 82.; Ogur, op. cit., § 92; Gül, op. cit., § 93;.. and the trials of Northern Ireland, e.g., McKerr v. United Kingdom, no 28883/95, § 148, CEDH 2001-III)

close the investigation, after reproducing the version of the victim's suicide sustained by the Second Army DOI/CODI/SP authorities, ensuring impunity for what happened.

180. Indeed, on the same day of his murder, the Second Army issued an official note stating that "around 16:00 hs, looking for [Vladimir Herzog] in the room where he was left, unattended, he was found dead, hanged, for which he had used a strip of cloth." Also, according to the official note, in proceedings undertaken in the Second Army which revealed "[t]he structure and activities of the 'State Committee of the Communist Party,'" Vladimir Herzog was listed by "his peers" as an "[a]ctivist and member of a journalist cell of said 'Party'". Because of this, he was "invited to provide explanatory statements," for which he appeared accompanied by a "[c]olleague by profession, at 8:00 hs the 25th of this month." The note indicated that, despite having "resisted" ["*relutado*"] initially to admit "[h]is criminal links and activities," Vladimir Herzog admitted his participation in the PCB." The note also states that he was allowed to write "[h]is statement with his own hand" and that the paper was later found "in pieces" next to his body. Finally, the note stated that "the necessary technical/inquiry was requested to the Secretariat of Security, having Messrs. Experts confirmed the occurrence of the suicide." (supra párr. 85 and 86)

181. On October 25 a forensic report was prepared by officer Motoho Chiota, which stated that "the scenario in which the body was found was a typical case of suicide by hanging." Also, an autopsy certificate was signed by Arildo Viana and Harry Shibata, supporting the suicide version. The latter expert later declared he had never examined the victim's body. A famous and controversial photo in which Vladimir Herzog appears "hanging by a piece of cloth to the window of the cell he was in and with his legs bent", was also annexed to the forensic exam as evidence of suicide. (supra párr. 86 and 105)

182. Furthermore, as is clear from the file of the military police investigation, procedures were carried out "in order to preclude any criticism of the hoax". In particular, an additional forensic examination was ordered, which found "[n]o evidence of the presence of fatal injuries of any kind that would enable to consider the death as violent or naturally pathological", and witnesses were coerced to provide false statement or their statements were manipulated. (supra párr. 94 and 96)

183. As stated in the proven events, several journalists confirmed that during the Military Police investigation their testimony was provided under strong pressures and their statements were manipulated. Also, Clarice Herzog stated, among other things, that she knew Herzog was tortured, but refused "to say the names of the people who reported these events to her, fearing those people could lose their lives." Meanwhile, Zora Herzog, the journalist's mother, said that her statements in the investigation had been manipulated. (supra párr. 96)

184. In view of the above, it is clear to the IACHR that the State is in breach of its duty to investigate with due diligence the events that caused the violation of Vladimir Herzog's human rights. The investigation into the death of Vladimir Herzog carried out by military courts in 1975 prevented the clarification of the facts and infringed the right of the victim's family to get to know the truth of what had happened. In the instant case, it was imperative that the State provided reliable information about what happened to the journalist and lead an investigation that would have allowed for the prosecution and punishment of State agents responsible for the events, and due reparation. On the contrary, the investigation was initiated with purposes of institutional cover-up and in order to conceal the serious actions taken at that time by the army against Vladimir Herzog and other PCB activists or sympathizers.

185. Concealment of the truth through the simulation of suicides and accidents was a systematic practice under President Geisel [1974-1979], so as not to leave evidence of the contradiction between the discourse of openness and the serious human rights violations that were being committed. As a result, according to what was found by the CEMDP as of 1974, "officially there were no deaths in prisons", the dead

political prisoners disappeared or committed suicide, and the "regime did not assume the murder of opponents", ensuring impunity of the crimes committed³¹⁵.

186. It should be reiterated that impunity for these types of crimes encourages self-censorship and thereby weakens democratic debate.³¹⁶ In this regard, the Inter-American Court in its judgment in the *Vélez Restrepo v. Colombia* case stated that impunity in these cases causes "reasonable fear that this type of human rights violation might be repeated, and this could lead to self-censorship of their work; for example, as regards the type of news covered, the way the information is obtained, and the decision to disseminate it".³¹⁷

187. Based on the foregoing, the Inter-American Commission concludes that the State failed to comply with State obligations to guarantee the rights of journalist Vladimir Herzog through an effective and independent investigation in an ordinary jurisdiction, and infringed the rights to justice and truth of Zora, Clarice, André and Ivo Herzog, enshrined in Article XVIII of the American Declaration.

ii. Civil declaratory action before the Federal Court of São Paulo

188. As is apparent from the file, on April 19, 1976, Clarice Herzog and her two younger sons, Ivo and André Herzog, filed a declaratory civil action before the Federal Court of São Paulo, to declare the responsibility of the Federal Union over the arbitrary detention of Vladimir Herzog, the torture he was subjected to and his death. While the declaratory action was decided in first instance in favor of the plaintiffs by judgment of October 27, 1978, the analysis of the appeal filed by the Union extended the process for another 16 years.

189. Indeed, the appeal filed by the Federal Union on November 17, 1978 was settled five years later, in 1983, by the Federal Court of Appeal, which upheld the first instance ruling. Likewise, the appeal for a court review [*Embargos Infringentes*] filed by the Federal Union in 1984 was rejected by the Federal Regional Court of the 3rd Region, with a final judgment [*trânsito em julgado*] on May 18, 1994.³¹⁸

190. The petitioners alleged that the 17-year duration of the declaratory action proceedings constituted a violation of the right of access of the family of Vladimir Herzog to an effective judicial remedy, based on the rules of due legal process, according to Article XVIII of the American Declaration, and Article 8.1 of the American Convention, once entered into force for the State in September 1992.

191. Article XVIII of the American Declaration states that every person has the right of access to legal remedies when they have been victims of human rights violations³¹⁹, "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

192. The IACHR has indicated that this right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention,³²⁰ which includes the right of every

³¹⁵ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. *Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos*. Brasília, Secretaria Especial dos Direitos Humanos, 2007, fls. 27 y 49. Anexo a la comunicación de los peticionarios de 11 de diciembre de 2014.

³¹⁵ Corte IDH. La Colegiación Obligatoria de Periodistas

³¹⁶ I/A Court H.R. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Serie A No. 5. Para. 70; IACHR. [Annual Report 2013. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Violence Against Journalists and Media Workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 2.

³¹⁷ CITA

³¹⁸ Extrato de andamento processual disponível no Portal do Tribunal Regional Federal da 3ª Região. Processo No. 89.03.7264-2. Available at: www.trf3.jus.br

³¹⁹ IACHR, Report No. 54/01, Case 12.051, Maria Da Penha Fernandes (Brazil), April 16, para. 37.

³²⁰ Article 25.1 of the American Convention states:

person to appear before a court when one of his rights has been violated, to obtain an investigation conducted by a competent, independent and impartial tribunal that will determine whether there has been such a violation, and the corresponding right to reparation for the damage suffered.³²¹

193. Also, Article 8.1 of the Convention sets forth that:

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

194. In this regard, the Commission reiterates that the formal existence of domestic remedies is not enough to consider that the State has complied with the obligation to guarantee the full exercise of rights under the Convention, and that they must be effective.³²² In addition, the Commission notes, as the Court has done, that such resources should ensure a decision within a reasonable time period.³²³ Likewise, the State must explain and prove the reasons for the delay in issuing final judgment in a particular case.³²⁴

195. The Inter-American Court has stated on several occasions that:

[t]he right to justice shall also ensure, within a reasonable time, the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.³²⁵ The lack of reasonableness in the duration of judicial proceedings constitutes in principle, in itself, a violation of judicial guarantees.³²⁶ In this regard, the Court has taken into account four elements to determine whether the time is reasonable: a) the complexity of the matter; b) the procedural activity of the interested party; c) the conduct of the judicial authorities;³²⁷ and d) the adverse effect on the judicial situation of the person involved in the proceedings.³²⁸

196. In the case under review, the Commission notes that the delay in the proceedings and final judgment cannot be justified due to the complexity of the case. Indeed, the purpose of the action was to declare the responsibility of the Federal Union for the arbitrary detention of Vladimir Herzog, the torture he was subjected to and his death. The investigation of said Declaratory action was essentially based on testimonial and documentary evidence. All of the witnesses and experts, and documentary evidence, were presented and processed during the proceedings before the first instance federal magistrate, who settled on October 27, 1978 in favor of the petitioners, declaring the State responsible for the death of journalist Vladimir Herzog. It has not been shown that the appeals filed later on were so complex as to justify such a delay in the response in the instant case.

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.

³²¹ IACHR, Report No. 40/04, Case N° 12.053, Maya Indigenous Communities of the Toledo District (Belize), IACHR Annual Report 2004, para. 174; IACHR, Report No. 54/01, CasE 12.051, Maria Da Penha Fernandes (Brazil), April 16, 2001, para. 37.

³²² See I/A Court H.R. Case of Gómez Paquiyauri Brothers, Judgment of July 8, 2004. Serie C No. 110, para. 229; Case of Myrna Mack Chang, Judgment of November 25, 2003. Serie C No. 101, para. 273; Case of Cantoral Benavides, Judgment of December 3, 2001. Serie C No. 88, para. 69, and Case of Juan Humberto Sánchez, Judgment of June 7, 2003. Serie C No. 99, para. 121.

³²³ I/A Court H.R. Case of 19 Merchants, Judgment of July 5, 2004. Serie C No. 109, para. 188; Case of Myrna Mack Chang, Judgment of November 25, 2003. Serie C No. 101, para. 209; Case of Bulacio, Judgment of September 18, 2003. Serie C No. 100, para. 114; and Case of Hilaire, Constantine and Benjamin et al., Judgment of June 21, 2002. Serie C No. 94, paras. 142 to 145.

³²⁴ I/A Court H.R., Case of 19 Merchants, Judgment of July 5, 2004. Serie C No. 109, para. 191.

³²⁵ Cfr. Case of Bulacio v. Argentina. Merits, Reparations, and Costs. Judgment of September 18, 2003. Serie C No. 100, para. 114; Case of Garibaldi, supra note 18, para. 133, and Case of Las Dos Erres Massacre, supra note 186, para. 105.

³²⁶ Cfr. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad Tobago. Merits, Reparations, and Costs. Judgment of June 21, 2002. Serie C No. 94, para. 145; Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Serie C No. 192, para. 154, and Case of Garibaldi v. Brazil, supra note 18, para. 133.

³²⁷ Cfr. Case of Genie Lacayo v. Nicaragua. Merits, Reparations, and Costs. Judgment of January 29, 1997. Serie C No. 30, para. 77; Case of Radilla Pacheco, supra note 24, para. 244, and Case of Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of August 24, 2010. Serie C No. 214, para. 133.

³²⁸ Cfr. Case of Valle Jaramillo et al., supra note 326, para. 155; Case of Radilla Pacheco, supra note 24, para. 244, and Case of Xákmok Kásek Indigenous Community, supra note 327, para. 133.

197. As to the second element under consideration, the procedural activity of the next of kin, it was not ascertained that they filed appeals or other incidents that might have justified the delay, or attempted to obstruct the judicial proceedings or delay any decision related to it. On the contrary, it was established that the petitioners were involved in different stages of the proceedings in order to substantiate their arguments and advance the resolution of the civil action that was filed.³²⁹

198. In this regard, the analysis of the procedural record shows an attempt by the Federal Union to delay the proceedings by filing different resources to prolong a final decision.³³⁰

199. As to the conduct of the authorities in the judicial proceedings, it appears that the process shows long periods of inactivity attributable to the judicial authorities. This delay in the proceedings evidently affected the legal status of the persons involved. The State presented no element whatsoever leading to a different conclusion. In the instant case, the State did not present any arguments to demonstrate the reasonableness of the approximately 17-year period between the filing of a civil action by relatives of Vladimir Herzog in 1976, and the issuance of a final judgment in the process in 1994.

200. For all of the above, the CIDH concludes that the duration of the proceedings of the civil declaratory action was not reasonable, nor was it an effective recourse to ensure the rights of the victim and his family, thereby the State incurred in a violation of Article XVIII of the American Declaration and of articles 8.1 and 25 of the Convention, in relation with Article 1.1 thereof, to the detriment of Clarice, André and Ivo Herzog.

iii. The criminal investigation within the ordinary jurisdiction

201. As has been noted, in cases such as this one, with serious human rights violations, the American Convention requires the adoption of positive measures to ensure the investigation, prosecution and, if applicable, punishment of those responsible, and thus avoid impunity and the harmful effects it causes.

202. The Inter-American Court has indicated that Article 8.1 of the American Convention sets forth that the victims of human rights violations, or their next of kin, should have substantial possibilities of being heard and of acting in the respective proceedings, in order to clarify the facts and punish those responsible, and to search for proper reparation. The Court has also considered that the States have the obligation to provide effective judicial remedies to all those claiming to be victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due legal process (Article 8.1), all within the general obligation, by such States, to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1.1).³³¹

203. In cases such as this, the obligation to investigate is reinforced by the provisions of Articles 1, 6 and 8 of the IACPPT, of which Brazil is a party since July 20, 1989, requiring the State to “take effective measures to prevent and punish torture within [its] jurisdiction”, as well as to “prevent and punish [...] any other cruel, inhuman, or degrading treatment or punishment”. Indeed, according to jurisprudence of the Court and the Inter-American Commission, the obligation to investigate and identify and punish those responsible for serious human rights violations, such as torture, extrajudicial, summary or arbitrary executions and forced disappearances, has an inalienable nature.³³² Furthermore, in accordance with Article 8 of this Convention, State Parties shall ensure: [...] any person making an accusation of having been

³²⁹ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 2, fls.426/427, Petición de los autores en la Ação Declaratória No. 136/76, of May 16, 1978; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 4, fls. 744-779 - Contrarrrozes ao recurso de apelação en la Ação Declaratória No. 136/76, of February 14, 1978.

³³⁰ Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 1, fls. 88/123, Parecer do Ministério do Exército en la Ação Declaratória No. 136/76, of May 26, 1976; Processo No. 2008.61.81.013434-2, Justiça Federal - São Paulo, Volume 3, fls. 472/473, Memorial de la Unión Federal en la Ação Declaratória No. 136/76, of June 15, 1978; Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1003 - Sentencia proferida en la Ação Declaratória No. 136/76, of October 27, 1978.

³³¹ I/A Court H.R., Case of Torres Millacura et al. v. Argentina. Judgment of August 26, 2011. Serie C No. 229, para. 113.

³³² IACHR. The Right to Truth in the Americas. OEA/Ser.L/V/II.152. Doc. 2. August 13, 2014. Para. 90.

subjected to torture within their jurisdiction shall have the right to an impartial examination of his case [, and] [i]f there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction [...] their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

204. Likewise, the Inter-American Court has stated that “the obligation to investigate and the corresponding right of the presumed victims or their next of kin are derived not only from treaty-based provisions under international law, which are binding for States Parties, but also from domestic laws concerning the obligation to investigate *ex officio* certain illegal conducts and the norms that allow the victims or their next of kin to file complaints or lawsuits, evidence, petitions, or any other measure, in order to play a procedural role in the criminal investigation intended to establish the truth of the facts.”³³³

205. The Commission recognizes that, following the restoration of democracy and at the request of Vladimir Herzog's family, the Brazilian State has taken actions that contribute to clarify the historical truth of the illegal detention, torture and killing of the journalist. In this regard, it notes the judgment of October 27, 1978 which declared the State's responsibility in this case;³³⁴ the acknowledgment of responsibility under Law 9.140/95, as well as the establishment of the Special Commission on Political Deaths and Disappearances;³³⁵ and the payment of pecuniary compensation to Clarice Herzog, the victim's widow.³³⁶ In addition, the Commission notes the publication in 2007 of the report "Right to Memory and the Truth", by the Special Secretariat on Human Rights of the Office of the President of the Republic, which records the victim's professional significance as a journalist, and the circumstances of his death.³³⁷ It also recognizes the decision of the 2nd Chamber of Public Records for the São Paulo District [*2ª Vara de Registros Públicos da Comarca de São Paulo*], on September 24, 2012, to correct the death certificate and register the death of Vladimir Herzog as a result "[o]f injuries and mistreatment suffered in units of the Second Army - SP (DOI-CODI)".³³⁸

206. The Commission also recognizes the fundamental importance of the work performed by the National Truth Commission, which after a broad and participatory effort to identify victims and construct the truth, in its final report published in December 2014, *addressed cases such as Vladimir Herzog's*.³³⁹

207. Despite of the importance of the above actions, the Commission has argued that the "historical truth" contained in the reports produced by the truth commissions does not complete nor replace the State's obligation to establish the truth and ensure the judicial determination of individual or State responsibilities through the relevant proceedings, therefore it is the State's obligation to initiate and pursue criminal investigations to determine responsibilities, in accordance with Articles 1.1, 8 and 25 of the Convention.³⁴⁰

208. The CNV of Brazil was established by the democratic Government in order to investigate serious human rights violations that occurred between September 18, 1946 and October 5, 1988. While the Final Report of the CNV identified those who it believed were responsible for the arbitrary detention, torture and murder of Vladimir Herzog, by the nature of its mandate, the Commission was not authorized to impose any punishment. Hence, despite its importance, it can not be regarded as an adequate substitute for judicial proceedings. In fact, the CNV's own Final Report recommends that the State “[c]ontinue investigations on the

³³³ I/A Court H.R. Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013 Serie C No. 260. Para. 217.

³³⁴ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 1004 – Sentencia proferida en la Ação Declaratória No. 136/76, of October 27, 1978.

³³⁵ Brasil. Presidência da República. Ley No. 9.140 of December 4, 1995. It should be mentioned that said Law was subsequently modified by Ley 10.536/2002 and Ley 10.875/2004.

³³⁶ Communication of the Brazilian State, of May 28, 2012, para. 13.

³³⁷ Brasil. Presidência da República. Secretaria Especial dos Direitos Humanos. Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos. Brasília, Secretaria Especial dos Direitos Humanos, 2007.

³³⁸ Processo No. 0046690-64.2012.8.26.0100. 2ª Vara de Registros Públicos da Comarca de São Paulo. Judgment of September 24, 2012, fls. 4.

³³⁹ Relatório da Comissão Nacional da Verdade. Volume III. “Mortos e desaparecidos políticos” – May 1974 – October 1985, fls 1794-1799, of December 10, 2014.

³⁴⁰ I/A Court H.R. Case of Almonacid Arellano, Judgment of September 26, 2006. Serie C No. 154, para. 150. See also, I/A Court H.R. Case of Barrios Altos. Judgment of March 14, 2001. Serie C No. 75, para. 48.

circumstances of the case in order to identify and find other agents responsible involved [in Herzog's homicide]".³⁴¹

209. As is apparent from the record, in June 1992, at the request of the Office of the Attorney General of the state of São Paulo, the authorities of the state ordinary jurisdiction opened a police investigation, under No. 487/92, in order to clarify the facts in this case. The Court of the state of São Paulo decided to close the police investigation on October 13, 1992 due to the implementation of the Amnesty Law (Law No. 6.683/79) regarding the facts under investigation. On August 18, 1993, the Supreme Court of Justice confirmed that decision.

210. It was not until March 2008 that members of the Federal Office of the Attorney General requested the federal courts open a criminal investigation, claiming a lack of jurisdiction of the state courts, and the inapplicability of Law No. 6.683/79 (Amnesty Law). However, the request was rejected by the Federal Court decision of January 9, 2009.³⁴² This decision determined the existence of *res judicata* after the state decided to shelve the case in 1992, based on Law No. 6.683/79 (Amnesty Law) and the statute of limitations of the criminal action.³⁴³

211. Subsequently, on April 29, 2010, the Federal Supreme Court declared inadmissible an Action claiming Non-compliance of a Fundamental Precept [ADPF 153] filed by the Brazilian Bar Association ["*Ordem dos Advogados do Brasil*"] and affirmed the validity of the Amnesty Law (Law No. 6.683/79) and the constitutionality of the interpretation of the first paragraph of its Article 1.³⁴⁴ The Brazilian Bar Association filed a motion for clarification ["*embargos de declaração*"], which is pending at the date of issue of the instant report.

212. In sum, the decisions to close or shelve the investigation that became final validated an interpretation of Law No. 6.683/79 (Amnesty Law), in the sense that it prevents the investigation and prosecution of the arbitrary detention, torture and execution of Vladimir Herzog. Based on these decisions of the state and federal courts, the Brazilian State has not continued a criminal investigation in ordinary jurisdiction regarding the facts of the instant case.

213. The Commission shall examine whether, once the State became internationally bound after ratifying the American Convention, the following concepts of criminal law: (a) the Amnesty Law (Law No. 6.683/79); (b) *res judicata*, and (c) statute of limitation of the criminal action, apply and are compatible in the instant case with its international obligations in this matter.

(a) Amnesty Law (Law No. 6.683/79)

214. The Commission has commented in a number of cases on the application of amnesty laws, stating that such laws violate several provisions of both the American Declaration and the Convention. In these decisions, consistent with the criteria of other international human rights bodies, the Commission has uniformly stated that both the amnesty laws as well as comparable legislative measures that prevent or terminate an investigation and prosecution of State agents who may be responsible for serious violations of the Convention or the American Declaration, violate multiple provisions of these instruments.³⁴⁵

215. In similar terms, the Court has repeatedly held that "[a]ll amnesty provisions [...] are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for

³⁴¹ Relatório da Comissão Nacional da Verdade. Volume III. "Mortos e desaparecidos políticos" – May 1974 – October 1985, fls. 1799, of December 10, 2014.

³⁴² Processo 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1381 and 1385, Judgment of deputy Federal Judge Paula Mantovani Avelino, of January 9, 2009.

³⁴³ Processo 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1387, Judgment of deputy Federal Judge Paula Mantovani Avelino, of January 9, 2009.

³⁴⁴ I/A Court H.R. Case of Gomes Lund et al. ("*Guerrilha do Araguaia*") v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para.136.

³⁴⁵ IACHR. Report No. 44/00, Case 10.820. Peru, of April 13, 2000, para. 68, and IACHR. Report No. 47/00, Case 10.908. Peru, of April 13, 2000, para. 76. In this regard, cfr. IACHR. Report No. 55/99, Cases 10.815; 10.905; 10.981; 10.995; 11.042, and 11.136. Peru, April 13, 1999, para. 140.

serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.³⁴⁶

216. More recently, this Court observed that:

all of the international organs for the protection of human rights and several high courts of the region that have had the opportunity to rule on the scope of amnesty laws regarding serious human rights violations and their compatibility with international obligations of States that issue them, have noted that these amnesty laws impact the international obligation of the State to investigate and punish said violations.³⁴⁷

217. In the case of *Julia Gomes Lund et al. (Guerrilla de Araguaia) v. Brasil*, the Commission had the opportunity to comment on Law No. 6.683/79, adopted in Brazil on August 28, 1979. The Commission considered that this legislation constitutes an amnesty law by declaring the extinction of criminal liability of all individuals that had committed “political crimes or derived crimes to these” within the period of the military dictatorship, between September 2, 1961 and August 15, 1979.³⁴⁸ The Commission added that Brazilian courts have interpreted the amnesty law in the sense that it prevents the criminal investigation, prosecution and punishment of those responsible for serious violations of human rights which constitute crimes against humanity, including torture, extrajudicial executions and forced disappearances.³⁴⁹ In this regard, the Commission considers that Law No. 6.683/79 is contrary to the American Convention, “to the extent that it is interpreted as an impediment to the criminal prosecution of serious human rights violations”³⁵⁰.

218. In its decision on this case, the Court stated if “finds no legal grounds for departing from its settled case-law, according to which ‘amnesty provisions which seek to prevent the investigation and punishment of those responsible for serious human rights violations are inadmissible’”. Adding:

172. The Inter-American Court considers that the manner in which the Amnesty Law has been interpreted and applied by Brazil [...] has affected the international obligation of the State in regard to the investigation and punishment of serious human rights violations because it prevented the next of kin in the present case from being heard before a judge, pursuant to that indicated in Article 8(1) of the American Convention and violated the right to judicial protection enshrined in Article 25 of the Convention given the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, failing to comply with Article 1(1) of the Convention. In addition, in applying the provisions of the Amnesty Law preventing the investigation of the facts and the identification, prosecution, and possible punishment of those responsible of continued and permanent violations such as enforced disappearances, the State failed to comply with its obligation to adapt its domestic law enshrined in Article 2 of the American Convention.

173. The Court deems it necessary to emphasize that, under the general obligations enshrined in Article 1(1) and 2 of the American Convention, the States Parties have the obligation to take measures of all kinds to assure that no one is taken from the judicial protection and from the exercise of their right to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention. In a case such as the present, once the American Convention has been ratified, it corresponds to the State to adopt all the measures to revoke the legal provisions that may contradict said treaty as established in Article 2, such as those that prevent the investigation of serious human rights violations given that it

³⁴⁶ I/A Court H.R. Case of Barrios Altos. Judgment of March 14, 2001. Serie C No. 75, para. 41.

³⁴⁷ I/A Court H.R. Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para. 170.

³⁴⁸ IACHR, Report No. 91/08, Case of 11.552, Fondo, Julia Gomes Lund et al. (Guerrilla de Araguaia), Brazil, October 31, 2008, para. 97.

³⁴⁹ IACHR, Report No. 91/08, Case of 11.552, Fondo, Julia Gomes Lund et al. (Guerrilla de Araguaia), Brazil, October 31, 2008, para. 100.

³⁵⁰ IACHR, Report No. 91/08, Case of 11.552, Fondo, Julia Gomes Lund et al. (Guerrilla de Araguaia), Brazil, October 31, 2008, para. 180.

leads to the defenselessness of victims and the perpetuation of impunity and prevent the next of kin from knowing the truth.³⁵¹

219. On this basis, the Court found that “given its express non-compatibility with the American Convention, the provisions of the Brazilian Amnesty Law that impedes the investigation and punishment of serious human rights violations lack legal effect. As a consequence, they cannot continue to represent an obstacle in the investigation of the facts in the present case, nor for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other cases of serious human rights violations enshrined in the American Convention that occurred in Brazil”.³⁵²

220. The IACHR notes that, in its final report, the National Truth Commission (CNV) of Brazil resumed inter-American jurisprudence and noted that “the characterization of a human rights violation as serious imposes, on the State, a series of obligations”,³⁵³ indicating that “Amnesty and statute of limitations provisions, and the establishment of liability waivers in order to obstruct the investigation and punishment of those responsible for serious violations of human rights are inadmissible”.³⁵⁴

221. Both the Court³⁵⁵ and the IACHR have emphasized that in their capacity as guarantors, the courts of each State are obliged to exercise “control of conventionality”, which means that they must, at all times, arrange or guide their judgments in accordance with treaty-based norms on human rights. In its judgment in the case of *Gomes Lund et al (“Araguaia Guerrillas”) v Brazil*, the Court reaffirmed this obligation and indicated that if a State is party to an international treaty such as the American Convention, the judiciary “is internationally obligated to exercise “control of conventionality” *ex officio* between the domestic norms and the American Convention”.³⁵⁶ The Court recalled that “the obligation of a State to comply with international obligations voluntarily contracted corresponds to a basic principle of law of international responsibility of States, backed by international and national jurisprudence, according to which States must comply with their conventional international obligations in good faith (*pacta sunt servanda*). According to that previously held by this Court and established in Article 27 of the Vienna Convention on the Law of Treaties of 1969, States cannot, due to domestic order reasons, not to assume their already established international obligations. The conventional obligations of States Parties bind all the powers and organs of the State, those of which must guarantee compliance with conventional obligations and its effects (*effet utile*) in the design of its domestic law”.

222. In the proceedings of this case, the State reported that through bills known as PL 573/2011 and PL 7.357/2014, the Legislative Branch was working toward an “authentic interpretation” of the provision contained in Article 1, paragraph 1 of the Amnesty Law, to ensure that the concept of “derived crimes” “[d]oes not include crimes committed by public officials, be they military or civilian, against persons who committed or are suspected of having committed political crimes”. Bill PL 7.357/2014 seeks to exclude from the Amnesty Law “[p]ublic officials, be they military or civilian, who have committed crimes of torture, kidnapping, private detention, summary execution, hiding of corpses or attacks.” It also reported that, on April 9, 2014, its annexation was decided to PL 573/2011. Reference was also made to the bill known as PL 237/2013 which defines the expression “derived crimes” contained in Article 1, paragraph 1 of the Amnesty Law in the manner described above, and establishes that the statutory limitation or other bases for extinction of the

³⁵¹ I/A Court H.R. Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para. 170.

³⁵² I/A Court H.R. Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para. 174.

³⁵³ Relatório da Comissão Nacional da Verdade. Volume I. Parte I “A Comissão Nacional da Verdade”, Chapter 1 – A criação da Comissão Nacional da Verdade, (C) O mandato legal da Comissão Nacional da Verdade, fls. 38, para. 64, of December 10, 2014.

³⁵⁴ Relatório da Comissão Nacional da Verdade. Volume I. Parte I “A Comissão Nacional da Verdade”, Chapter 1 – A criação da Comissão Nacional da Verdade, (C) O mandato legal da Comissão Nacional da Verdade, fls. 38, para. 65, of December 10, 2014.

³⁵⁵ Corte IDH. Caso Almonacid Arellano y otros vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y costas. Sentencia de 26 de septiembre de 2006. Serie C No. 154, párr. 124; Corte IDH. Caso Rosendo Cantú y otra Vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2010. Serie C No. 216. párr. 219, y Corte IDH. *Caso Ibsen Cárdenas e Ibsen Peña Vs. Bolivia*. Fondo, Reparaciones y Costas. Sentencia de 1 de septiembre de 2010 Serie C No. 217. párr. 202.

³⁵⁶ I/A Court H.R. Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para. 176.

ability of the State to enforce punishment, shall not apply to crimes not included in the legally granted amnesty. (supra párr. 33)

223. Also, the State emphasized that there are two cases currently before the Supreme Court (STF) claiming non-compliance with a fundamental precept (ADPF) [*“Arguição de Descumprimento Preceito Fundamental”*] on this matter and that one of them seeks a finding from the STF declaring that the Amnesty Law, “in general, does not apply to crimes involving serious human rights violations committed by public officials, be they military or civilian, against persons who committed or are suspected of having committed political crimes; and, in particular, that the Law does not apply to the authors of continuing or permanent crimes, since the effects of this provision expired on August 15, 1979 (Article 1).” Likewise, the action also requested that the Brazilian State comply “fully” with the twelve operative paragraphs of the Inter-American Court’s judgment in the *Case of Gomes Lund et al.* and other Court judgments. (supra párr. 34 and 36)

224. The Commission appreciates the initiatives mentioned by the State. However, in terms similar to those expressed in the case of *Gomes Lund et al (“Guerrilha do Araguaia”) v Brazil*, the Commission concludes that, in this case, the judges validated the interpretation of Law No. 6.683/79 (Amnesty Law), which has no legal effect for serious human rights violations in the above terms. To that extent, the judicial authorities who have known about the investigation of the arbitrary detention, torture and murder of Vladimir Herzog have prevented the identification, trial and punishment of those responsible, and have not exercised proper control of conventionality to which they were obliged, once the American Convention was ratified, in accordance with the international obligations of Brazil under international law.

(b) Res judicata

225. With regard to the *ne bis in idem* principle, the Court has indicated that:

although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice.³⁵⁷

226. It appears from the Court’s jurisprudence that a judgment rendered in the foregoing circumstances produces an “apparent” or “fraudulent” *res judicata* case.³⁵⁸ The Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.

227. The instant case falls under one of the mentioned assumptions of “apparent” or “fraudulent” *res judicata*. In 2009, the 1st Federal Criminal Court decided to file the investigation into the facts of this case, considering that the closure of the investigation, previously ordered by state courts in 1993 in application of Law No. 6.683/79 (Amnesty Law), had become *res judicata*. (supra párr. 127 - 128).

228. According to the IACHR, given its manifest incompatibility with the American Convention, the interpretation and application of Law No. 6.683/79 (Amnesty Law) in this case was intended to exclude the alleged perpetrators from judicial action, and leave the crime committed against journalist Vladimir Herzog unpunished. Under this assumption, the State cannot resort to the principle of *ne bis in idem*, in order to not comply with its international obligations.

³⁵⁷ I/A Court H.R. Case of Almonacid Arellano, Judgment of September 26, 2006. Serie C No. 154, para. 154.

³⁵⁸ Cfr. Case of Carpio Nicolle et al. Judgment of November 22, 2004. Serie C No. 117, para. 131; I/A Court H.R. Case of Gutiérrez Soler v. Colombia. Judgment of September 12, 2005. Serie C No. 132, para. XXX; I/A Court H.R. Case of Almonacid Arellano, Judgment of September 26, 2006. Serie C No. 154, para. 154.

229. The Commission reiterates that in cases of serious violations of human rights, such as the commission of murder, forced disappearances, rape, torture, inhumane acts intended to cause death or serious harm to physical and mental integrity, States have a *reinforced* duty to investigate and clarify the facts.³⁵⁹

(c) Statutes of limitation for criminal action

230. Both the Court³⁶⁰ and the Commission³⁶¹ have ascertained that the application of the statute of limitations for criminal actions violates the American Convention in cases of serious human rights violations, such as forced disappearances, the extrajudicial killing of persons and torture, which does not necessarily imply they took place in a context of massive and systematic violations.³⁶²

231. In the case of *Ibsen Cárdenas and Ibsen Peña v. Bolivia* this principle was reiterated when it was established that “in certain circumstances, international law considers statutes of limitations to be inadmissible and inapplicable [,] along with amnesty laws and exemptions from liability, so as to maintain the State’s punitive power in effect for actions which, because of their seriousness, must be stopped and also to avoid their repetition”.³⁶³

232. Later on, in the cases of *Gomes Lund et al. (Guerrilha do Araguaia) v. Brasil* and *Gelman v. Uruguay*, involving serious human rights violations committed during military dictatorships, the Court reiterated its jurisprudence in the sense that “statute of limitation provisions [...] that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.”³⁶⁴ This formulation on the prohibition of the statutes of limitations in cases of serious human rights violations has also been upheld by the Court in cases where such violations occurred in the context of domestic armed conflicts.³⁶⁵

233. In the instant case, the 1st Federal Criminal Court that decided the closing of the investigation into the arbitrary detention, torture and murder of Vladimir Herzog, also based its decision on the statutes of limitation of criminal actions. It stated that “murder, genocide, or even torture (...), are crimes not subject to statutes of limitations under the Constitution or other norms in current legislation.”³⁶⁶ It also maintained that, when the facts took place, the Brazilian State had not ratified the Convention on war crimes and crimes against humanity. (supra párr. 127-128).

234. In the case *Almonacid Arellano v. Chile* the Court stated that, “even though the Chilean State has not ratified said Convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity], the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*ius cogens*), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule.”³⁶⁷

³⁵⁹ I/A Court H.R. Case of Gudiel Álvarez (Diario Militar) v. Guatemala. Merits, Reparations, and Costs. Judgment of November 20, 2012 Serie C No. 253, para. 298; IACHR. The Right to Truth in the Americas. OEA/Ser.L/V/II.152. Doc. 2. August 13, 2014. Para. 90

³⁶⁰ Corte I.D.H., Case of Barrios Altos v. Peru. Judgment of March 14, 2001. Serie C No. 75, para. 41.

³⁶¹ Cfr. IACHR, Report No 35/98, Case 12.019, Antonio Ferreira Braga, Brazil, July 19, 2008.

³⁶² I/A Court H.R. Case of Vera Vera et al. v. Ecuador. Preliminary Objection, Merits, Reparations, and Costs. Judgment of May 19, 2011. Serie C no. 226. Para. 117.

³⁶³ I/A Court H.R. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations, and Costs. Judgment of September 1, 2010 Serie C No. 217, para. 207.

³⁶⁴ I/A Court H.R. Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para. 171; and I/A Court H.R. Case of Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011. Serie C No. 221, para. 225.

³⁶⁵ See I/A Court H.R. Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, Reparations, and Costs. Judgment of October 25, 2012 Serie C No. 252. Para. 283.

³⁶⁶ Proceso 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 7, fls. 1394, Decisión de la Juez Federal sustituta Paula Mantovani Avelino, del 9 de enero de 2009. Anexo a la comunicación de los peticionarios de 11 de diciembre de 2014.

³⁶⁷ I/A Court H.R. Case of Almonacid Arellano, Judgment of September 26, 2006. Serie C No. 154, para. 153.

235. In similar terms, the Inter-American Commission held in its report on the case of *Julia Gomes Lund et al. ("Guerrilha do Araguaia")* that although the Brazilian State had not ratified the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, the obligation to investigate and prosecute crimes against humanity is a norm of *ius cogens*, so applying the prescription in these cases is a violation of that mandatory rule by the State.³⁶⁸

236. The Commission finds no reason to depart from this criterion. In this case, which entails serious human rights violations, the application of the statute of limitations has hindered the investigation and punishment of crimes committed against Vladimir Herzog and constituted an obstacle to effective access to justice and truth for the victim's next of kin, in clear non-compliance by the State of a mandatory international obligation.

237. Based on the foregoing, the IACHR concludes that the failure to investigate serious human rights violations committed in this case, in a context of systematic patterns, reveal a non-compliance of international obligations by the State. Because of its interpretation and application of Law No. 6.683/79 (Amnesty Law), Brazil has failed to fulfill the obligation to adapt its domestic law to the Convention, contained in Article 2 thereof, related to articles 8.1, 25 and 1.1 of the same treaty. Likewise, the Commission considers that the failure to investigate the facts, and to prosecute and punish those responsible, derived both from the interpretation and application of Law No. 6.683/79 (Amnesty Law), and the application of the concepts of *res judicata* and statutory limitation of criminal action violate the rights to a fair trial and judicial protection under Articles 8.1 and 25.1 of the American Convention, related to Articles 1.1 and 2 thereof, and provisions 1, 6 and 8 the Inter-American Convention to Prevent and Punish Torture, to the detriment of Clarice (wife), André and Ivo (sons), Zora (mother deceased on November 18, 2006), all surnamed Herzog.

238. On the merits stage, the petitioners alleged that after Brazil ratified the American Convention on July 20, 1989, the failure to investigate the facts and to prosecute and punish those responsible for the arbitrary detention, torture and murder of Vladimir Herzog, have also caused the non-compliance of the obligation to guarantee the rights recognized in Articles 4, 5, 7 and 13 of the American Convention, in relation to Article 1.1 of that treaty.

239. In this regard, the IACHR reiterates that the lack of due diligence in the investigation, prosecution, and punishment of those responsible for the torture and violent death of a person is a component of the establishment of the State's international responsibility.³⁶⁹ Indeed, part of the general obligation to guarantee the rights recognized in the Convention is the specific duty to investigate cases where human rights violations are alleged; that is, that duty is set forth by Article 1.1 of the Convention regarding the right that must be protected or guaranteed. Under the inter-American system, non-compliance of this duty constitutes a breach of the general obligation to guarantee the rights established in Article 1.1 of the American Convention, regarding the rights to life and/or personal integrity, depending on the consequences of the act of violence, and the right of access to justice recognized in Articles 8 and 25 of the treaty.³⁷⁰

240. In this regard, it is sufficient to reiterate that, once the American Convention was ratified, the actions initiated by the State on justice have not been effective to comply with its duty to investigate with due diligence the facts of this case, prosecute and punish those responsible to the detriment of the rights to truth and access to justice of Vladimir Herzog's family, under articles 8.1 and 25 of the American Convention. Thus, for the purpose of this case, the Commission does not consider it necessary to make a separate determination of the alleged "continued" violations of Articles 4, 5, 7 and 13 of the American Convention in this case.

³⁶⁸ Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos contra la República Federativa de Brasil. Case 11,552 - Julia Gomes Lund et al. (Guerrilha do Araguaia), of March 26, 2009, para. 186.

³⁶⁹ Cfr. Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 7, 2003. Serie C No. 99, para. 112; Case of Valle Jaramillo et al. v. Colombia, , para. 97, and Case of Garibaldi v. Brazil, para. 23.

³⁷⁰ Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 7, 2003. Serie C No. 99, para. 112; Case of Valle Jaramillo et al. v. Colombia, para. 97, and Case of Garibaldi v. Brazil, para. 23.

D. Analysis of the right to life, liberty and personal security (Article I) and the right to protection for mothers and children (Article VII) of the American Declaration, and the right to personal integrity (Article 5.1) of the American Convention

241. Article I of the Declaration recognizes the right of every person to personal integrity. Article 5.1 of the American Convention states that “[e]very person has the right to have his physical, mental, and moral integrity respected.” Regarding the next of kin of the victims of certain human rights violations, the Court has indicated that they may be considered, in turn, victims themselves.³⁷¹ Article VII of the same instrument states that “[...] all children have the right to special protection, care and aid.”

242. The Court has repeatedly stated that the next of kin of the victims of certain human rights violations can be, in turn, victims themselves.³⁷² Specifically, the Court has considered that the mental and moral integrity of the next of kin of victims can be affected as a result of the particular circumstances of the violations perpetrated against their loved ones and owing to the subsequent acts or omissions of the domestic authorities in relation to these facts.³⁷³ Also, the Court has stated that “[t]he obligation to investigate human rights violations is among the positive measures that the State must adopt to guarantee the rights established in the Convention. Additionally, the State must, if possible, try to reestablish a right that has been violated and, if applicable, repair the damage produced by human rights violations”.³⁷⁴ In this regard, the Court has stated that a lack of effective remedies is a source of additional suffering and anguish for the relatives of the victims.

243. The consequences of violence and impunity may have a particularly detrimental effect on the relatives of the victims who are minors. In this regard, the Court observed in the case of the *Las Dos Erres Massacre* that the children relatives of the victims, “[h]ave suffered infringements to their physical and psychological health, particularly from the prolonged lack of justice and impunity in the instant case, and that said experiences have affected their social [...] relations, altered their family dynamics”.³⁷⁵

244. Also, the Court has determined that it can presume a harm to the right to mental and moral integrity of direct family members of victims of certain violations of human rights by applying a presumption *iuris tantum* regarding mothers and fathers, daughters and sons, husbands and wives, and permanent companions, when and if they correspond to the specific circumstances of the case. In the case of said direct family members, it corresponds to the State to disprove said presumption.³⁷⁶

245. The Commission notes that, as has been discussed, the State is responsible for the arbitrary detention, torture and murder of the journalist, for the dissemination of false information about the circumstances of his death and for failing to investigate with due diligence this crime, set in systematic patterns of human rights violations. These facts have seriously affected the mental and moral integrity of the relatives identified of the instant case.

³⁷¹ Corte I.D.H., Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Serie C No. 167. para. 112; and Case of Bueno Alves v. Argentina. Merits, Reparations, and Costs. Judgment of May 11, 2007. Serie C. No. 164. para. 102.

³⁷² I/A Court H.R. Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Serie C No. 167. Para. 112; I/A Court H.R. Case of Bueno Alves v. Argentina. Judgment of May 11, 2007. Serie C. No. 164. Para. 102.

³⁷³ I/A Court H.R. Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Serie C No. 167. Para. 112; I/A Court H.R. Case of Vargas Areco v. Paraguay. Judgment of September 26, 2006. Serie C No. 155. Para. 96.

³⁷⁴ I/A Court H.R. Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Serie C No. 192. Para. 98; I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Judgment of July 29, 1988, Serie C No. 4. Para. 166; I/A Court H.R. Case of Heliodoro Portugal v. Panamá. Judgment of August 12, 2008. Serie C No. 186. Para. 142; I/A Court H.R. Case of García Prieto et al. v. El Salvador. Judgment of November 20, 2007, Serie C No. 168. Para. 99.

³⁷⁵ I/A Court H.R., Case of Las Dos Erres Massacre v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2009. Serie C No. 211, par. 215.

³⁷⁶ I/A Court H.R. Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Serie C No. 219, para. 235.

246. Indeed, in accordance with the allegations of the petitioners, and not contested by the State, Clarice Herzog "experienced severe feelings of anguish, fear and apprehension", from the time her husband, Vladimir Herzog, was informed that he would be arrested to this date. According to Clarice Herzog's statement in the Military Police investigation of 1975, when she received the news of his death, "in a nervous breakdown, and shouting" she said "her husband had been murdered."³⁷⁷ Also, Clarice declared that:

[Of] course all that happened was a nightmare, as the death of [Vladimir] reflected in all aspects of life, especially the emotional and family, because at the time (...) their children were only nine and seven, apart from the financial aspect; from one moment to the other the respondent and her children were deprived of the economic protection [Vladimir] provided.³⁷⁸

247. Particularly serious is the impact on the mental and moral integrity of the journalist's relatives, following the dissemination of the false account of his death and the pressure and surveillance by the military authorities during the burial rituals. Serious impairment of this right is evident in the cases of Ivo and André Herzog, the journalist's sons, who at the material time were 9 and 7 years old, respectively. Also, the relatives of Vladimir Herzog played a significant role in the search for justice and truth, so it is evident that the continuing impunity 40 years after the events occurred causes them profound suffering and anguish.

248. Consequently, while it appreciates the initiatives undertaken by the State to compensate Vladimir Herzog's next of kin and to clarify the truth about what happened, the Court concludes that the State violated the right to mental and moral integrity enshrined in Article I of the American Declaration and Article 5.1 of the American Convention in relation to the obligations under Article 1.1 of the same, to the detriment of Zora Herzog (who died on November 18, 2006); Clarice, André and Ivo Herzog; and Article VII of the American Declaration, to the detriment of Ivo and André Herzog.

VII. CONCLUSIONS

249. Based on the considerations of fact and law contained in this report, the Commission concludes that the Brazilian State is responsible for the violation of the rights enshrined in Articles I, IV, VII, XVIII, XXII and XXV of the American Declaration and the rights enshrined in Articles 5.1, 8.1 and 25.1 of the American Convention, together with Articles 1.1 and 2 thereof. It also concludes that the State is responsible for violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

VIII. RECOMMENDATIONS

250. Based on foregoing conclusions of this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE STATE OF BRAZIL,

1. To 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 punish them criminally; and to publish the results of that investigation. Pursuant to this recommendation, the State shall take into account that these crimes against humanity are not subject to amnesties or statutes of limitations.

2. Take all necessary measures to ensure that Law No. 6.683/79 (Amnesty Law), as well as other criminal law arrangements, such as statutes of limitations, *res judicata*, the principles of non-

³⁷⁷ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 3, fls. 578 – Statement of Clarice Herzog, Inquérito Policial Militar, of November 27, 1975.

³⁷⁸ Processo No. 2008.61.81.013434-2 Justiça Federal - São Paulo, Volume 5, fls. 875 – Statement of Clarice Herzog, Inquérito Policial No 704/92, of May 28, 1992.

retroactivity and *ne bis in idem*, do not continue to represent an obstacle for the criminal prosecution of serious human rights violations, as such of the instant case.

3. Grant reparation to the next of kin of Vladimir Herzog, including physical and psychological treatment, as well as holding events of symbolic importance that guarantee the non-repetition of the crimes committed in the instant case and the recognition of State responsibility for the arbitrary detention, torture and murder of Vladimir Herzog and the suffering of his relatives.

4. Grant adequate reparation for human rights violations stated in this report, both materially and morally.