INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MÉMOLI *v.* ARGENTINA

JUDGMENT OF AUGUST 22, 2013

(Preliminary objections, merits, reparations and costs)

In the case of *Mémoli,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court" or "this Court"), composed of the following judges:

Diego García-Sayán, President
Manuel E. Ventura Robles, Vice President
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, Judge
Roberto F. Caldas, Judge
Humberto Antonio Sierra Porto, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

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

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

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On December 3, 2011, under the provisions of Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of *Carlos and Pablo Carlos Mémoli v. the Argentine Republic* (hereinafter "the State" or "Argentina"). The case refers to the alleged violation of the right to freedom of expression of Carlos and Pablo Carlos Mémoli, owing to the criminal conviction imposed on the [presumed] victims because they had publicly denounced the supposedly irregular sale of burial niches in the local cemetery by the executive officers of a mutual association of the town of San Andrés de Giles." In addition, according to the Commission, the case involves "the violation of the [presumed] victims' right to the guarantee of a reasonable time in the civil suit filed against them during which, for more than 15 years, attempts have been made to collect compensation established in the criminal proceeding. In [the said] proceeding, an embargo of the [presumed] victims' property was ordered more than 14 years ago and, in practical terms, this has [presumably] had the effect of a punishment and an inhibition of freedom of expression, with consequences on the life project of Messrs. Mémoli."

2. *Proceedings before the Commission.* The proceedings before the Commission were as follows:

a) *Petition.* On February 12, 1998, the presumed victims, representing themselves, presented the initial petition.

b) *Admissibility Report.* On July 23, 2008, the Commission approved Admissibility Report No. 39/08,[1] in which it concluded that it was competent to examine the complaints lodged by the petitioners concerning the presumed violations of "Articles 8 and 13 of the American Convention, in relation to the general obligations embodied in Articles 1(1) and 2" of this instrument. It also indicated that the petition was admissible because it met the requirements established in Articles 46 and 47 of the Convention.

c) *Merits Report.* Pursuant to Article 50 of the Convention, on July 20, 2011, the Commission issued Merits Report No. 74/11 (hereinafter "the Merits Report")[2] in which it reached a series of conclusions and made several recommendations to the State:

Conclusions. The Commission concluded that the State was responsible for the violation of Articles 8(1) and 13, in relation to Articles 1(1) and 2 of the American Convention, to the detriment of Carlos and Pablo Mémoli.

Recommendations. Consequently, the Commission made a series of recommendations to the State:

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[1] *Cf.* Admissibility Report No. 39/08, Petition 56-98, Carlos and Pablo Mémoli *v.* Argentina, July 23, 2008 (file of proceedings before the Commission, tome III, folios 778 to 790).

[2] *Cf.* Merits Report No. 74/11, Case 12,653, Carlos and Pablo Carlos Mémoli *v*. Argentina, July 20, 2011 (merits file, tome I, folios 6 to 28).

- To annul the criminal convictions imposed on Carlos Mémoli and Pablo Carlos Mémoli and all the consequences arising from them;

- To lift immediately the general injunction on the property of Carlos and Pablo Carlos Mémoli;

- To adopt all the measures required to decide the civil case against Carlos and Pablo Carlos Mémoli promptly and impartially, safeguarding the rights recognized in the American Convention;

- To provide compensation to Carlos and Pablo Carlos Mémoli for the pecuniary and non-pecuniary damage caused, and

- To adopt the measures necessary to prevent the repetition of similar situations as regards the disproportionate duration of civil proceeding and precautionary measures in the above-mentioned conditions.

d) *Notification to the State.* The Merits Report was notified to the State on August 3, 2011, granting it two months to provide information on compliance with the recommendations. In view of requests made by Argentina and its express waiver of filing preliminary objections in relation to the time frame established in Article 51(1) of the American Convention, the Commission granted the State an extension to adopt the corresponding measures. Once the initial time frame and the extension had expired, the State presented a report on the measures adopted to comply with the recommendations made in the Merits Report on November 28, 2011.[3]

e) *Submission to the Court.* The Commission decided that it would submit this case to the Inter-American Court "owing to the need to obtain justice for the [presumed] victims." The Commission appointed the Executive Secretary at the time, Santiago A. Canton, and the Special Rapporteur for Freedom of Expression, Catalina Botero, as delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, María Claudia Pulido and Michael Camilleri, lawyers of the Executive Secretariat, as legal advisers.

3. *Request of the Inter-American Commission.* Based on the foregoing, the Inter-American Commission asked the Court to declare the international responsibility of the Argentine State for the violation of the rights recognized in Articles 8(1) and 13 of the American Convention, in relation to the general obligations established in Articles 1(1) and 2 of this treaty, to the detriment of Carlos and Pablo Carlos Mémoli. In addition, the Commission asked the Court to order the State to provide certain measures of reparation that will be described and examined in Chapter X of this Judgment.

II
PROCEEDINGS BEFORE THE COURT

[3] The State indicated, regarding the recommendation to annul the criminal conviction, that "Argentina has amended the regime for honor crimes, of which Messrs. Mémoli were convicted, [so that] it should be noted that the complainants have a procedural mechanism within the regular domestic legal system to achieve effective compliance with the recommendation." In this regard, it indicated that "an appeal for review [was] appropriate" and noted that a special appeal filed by Messrs. Mémoli was pending. Regarding "the recommendation concerning the status of the civil action and the alleged 'disproportionate duration' of [the] civil proceeding and precautionary measure," the State indicated that "both the provincial authorities and the national Human Rights Secretariat [had] stressed the importance of expediting the issue of a reminder to the judges that they should adjudicate the pertinent conducts in order to respond to the situation." Lastly, regarding the recommendation to lift the general injunction on the property, the State indicated that "the issue of this order [...] depends on the activity of the complainants." *Cf.* The State's brief of November 28, 2011 (file of annexes to the final written arguments of the representatives, folios 3526 to 3529).

4. *Notification to the State and to the representatives.* The State and the representatives of the presumed victims[4] were notified of the submission of the case on February 13, 2012.

5. *Brief with pleadings, arguments and evidence.* On April 5, 2012, Carlos and Pablo Carlos Mémoli, together with Leopoldo Gold (hereinafter "the representatives"), presented their brief with pleadings, arguments and evidence (hereinafter "pleadings and motions brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. The representatives agreed, substantially, with the violations alleged by the Inter-American Commission and asked the Court to declare the international responsibility of the State for the alleged violation of the same articles of the American Convention indicated by the Commission. In addition, they asserted that the State had also violated Articles 9 (Freedom from *Ex Post Facto* Laws), 21 (Right to Property), 23 (Right to Participate in Government), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the American Convention, to the detriment of Carlos and Pablo Carlos Mémoli. Consequently, they asked the Court to order diverse measures of reparation, as well as the payment of costs and expenses.

6. *Answering brief*. On June 22, 2012, Argentina submitted to the Court its brief answering the Commission's submission of the case by and with observations on the pleadings and motions brief (hereinafter "the answering brief"). In this brief, the State filed two preliminary objections and included "preliminary comments [on] the effects on inter-American public order in the area of human rights" (*infra* paras. 12 and 19). The State appointed Alberto Javier Salgado, Director of the Human Rights International Litigation Unit of the Ministry of Foreign Affairs, International Trade and Worship, as its Agent for this case, and Julio César Ayala, Chargé d'affaires of the Argentine Embassy in Costa Rica, and Andrea G. Gualde, National Director of Legal Affairs in the area of Human Rights, of the national Human Rights Secretariat as Deputy Agents.

7. *Observations on the preliminary objections*. On September 15 and 19, 2012, the Inter-American Commission and the representatives, respectively, presented their observations on the preliminary objections filed by the State. On that occasion, the Commission also presented its observations on the State's preliminary comments on the effects on inter-American public order (*supra* para. 6). The representatives also submitted documentation that it referred to as "new evidence originating in the […] months [following the presentation of their pleadings and motions brief]."

8. *Public hearing.* On December 19, 2012, the President of the Court issued an Order,[5] convening the Inter-American Commission, the representatives, and the State to a public hearing to receive the final oral arguments of the representatives and of the State, and the final oral observations of the Commission, on the preliminary objections and eventual merits, reparations and costs. The public hearing took place on February 8, 2013, during the Court's ninety-eighth regular session, held at its seat.[6] During this hearing, the judges of the Court

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[4] In the brief submitting the case (*supra* para. 1), the Inter-American Commission stated that "Carlos and Pablo Carlos Mémoli acted directly as petitioners in the processing of the case." In their pleadings and motions brief, Carlos and Pablo Carlos Mémoli confirmed that Pablo Carlos Mémoli would represent himself and his father, "with the assistance of the lawyer, Leopoldo Ariel Gold."

[5] *Cf. Case of Mémoli v. Argentina*. Order of the President of the Court of December 19, 2012, which can be consulted on the Court's website at: http://www.corteidh.or.cr/docs/asuntos/memoli_19_12_12.pdf.

[6] At this hearing, there appeared: (a) for the Inter-American Commission: Catalina Botero, Special Rapporteur for Freedom of Expression and Silvia Serrano Guzmán, Adviser; (b) for the representatives: Pablo Carlos Mémoli and Leopoldo Gold, and (c) for the State: Alberto Javier Salgado, Director of the Human Rights International Litigation Unit of the Ministry of Foreign Affairs, International Trade and Worship; María Eugenia Carbone, Coordinator of International Legal Affairs of the Human Rights Secretariat of the Ministry of Justice of the Nation; Gonzalo Bueno, Legal Adviser of the Human Rights International Litigation Unit of the Ministry of Foreign Affairs, International Trade and Worship, and Patricia Cao, Legal Adviser for International Legal Affairs of the Human Rights Secretariat of the Ministry of Justice of the Nation.

requested certain information, explanations and helpful evidence from the parties and the Commission.[7]

9. *Helpful evidence*. On February 26, 2013, the Secretariat of the Court, on the instructions of the President, requested the State and the representatives to submit certain documents and explanations as helpful evidence.[8]

10. *Final written arguments and observations.* On March 10 and 11, 2013, the representatives, the State and the Commission, respectively, presented their final written arguments and observations. On that occasion, the State and the representatives presented some of the helpful documentation and explanations requested by the Court and its President (*supra* para. 8 and 9). On April 10 and 12, 2013, the representatives and the State, respectively, presented their observations on the documentation submitted. At that time, the representatives also made general observations on the final written arguments of the State. On April 11, 2013, the Commission indicated that it had no observations to make on this documentation.

11. *Deliberation of this case.* Following the submission of these final observations, the Court deliberated on this Judgment during its ninety-ninth and one hundredth regular session.

III
PRIOR CONSIDERATIONS

A. Regarding the submission of the case to the Inter-American Court

A.1) Arguments of the Commission and of the parties

[7] In particular, the parties were asked to provide the following information and documentation: what is the legal regime applicable to precautionary measures such as those that were applied in this case (prohibition to dispose of and encumber property) in a civil action for damages? Copy of the Codes of Civil and Commercial Procedure and of Criminal Procedure in force at the time of the facts, that were applied in this case (either of the province of Buenos Aires or of the Nation), as well as any other relevant domestic legislation, and complete copy of all relevant articles, radio programs and documents, based on which the presumed victims were tried for the crime of defamation (*injurias*).

[8] In particular, the parties were asked to submit the following: (1) regarding the criminal proceedings: a copy of the appeal for reversal presumably filed against the decision of September 10, 1996, of the Supreme Court of Justice of the province of Buenos Aires, declaring the special remedy of unconstitutionality inadmissible, as well as the presumed decision in this regard of September 23, 1996, together with the reasoning for this (presumably set out in folio 1043 of the criminal case file), and (2) regarding the civil action and the precautionary measure prohibiting the sale or encumbrance of property: (a) explain whether the different appeals filed during the civil action had the effect of suspending it and, if so, which of them, as well as provide the corresponding supporting documentation; (b) explain whether there is a separate case file corresponding to the precautionary measure granted in this case in the context of the civil action and, if so, provide a complete and updated copy. If there is no separate case file, the State was asked to forward the following explanations or documents: (b.1) report on the results of the appeal filed by the presumed victims on November 15, 2001, against the general injunction against the sale or encumbrance of property, as well as the corresponding request of February 8, 2002, for the respective higher court to decide this appeal. If appropriate, provide a copy of the corresponding judicial decision, and (b.2) provide information on the results of the request of December 6, 2001, by which the presumed victims requested a counter-cautionary measure against the complainant's representative in the civil action for damages against them or, if applicable, provide a copy of the corresponding judicial decision, and (c) describe and provide details, in chronological order and disaggregated, of the different stages, appeals, petitions, and decisions in relation to the precautionary measure, in both the criminal proceeding and the civil action. They were also asked to provide the respective supporting documentation or, if appropriate, indicate the evidence to which it corresponded in the attachments that had already been submitted to the Court.

12. The State indicated, as "preliminary comments," that "the submission of the instant case to this jurisdictional instance, [was] incompatible with the function of guarantor of inter-American public order granted to the Commission." According to the State, "the matters submitted to the Court's analysis [in this case] have already been examined in previous cases," and concern "disputes between private individuals." It indicated that "the cases submitted to the Court should contribute to enhancing the standards for the protection of human rights," "involve innovative issues and […] respect the subsidiary nature of the system for the protection of human rights," in order "to avoid a jurisdictional repetition, and reserve the Court for cases with institutional significance." In this regard, it indicated that this was "reaffirmed by the Order of December 19, 2012," in which it was asserted that the expert opinion offered by the Commission had no relevant effects on inter-American public order." Meanwhile, the Commission affirmed that its authority to submit a case to the Court "is not limited, and does not distinguish whether or not a case has institutional significance, [because,] owing to the way in which it was designed, the system of individual petitions […] constitutes a system of justice accessible to everyone, irrespective of whether their case has special characteristics or refers to an innovative issue." In addition, the Commission clarified that "the concept of inter-American public order is limited to the Commission's procedural actions before the Court once a case has been submitted." The representatives did not refer to these arguments of the State.

A.2) Considerations of the Court

13. First, the Court notes that the State included what it called "preliminary comments" without indicating their purpose or making any specific request in relation to them. Nevertheless, the Court finds it desirable to include some considerations in this regard. The American Convention grants the Inter-American Commission the authority to determine whether to submit a case to the Court or to continue examining it and to issue a final report that it may or may not publish.[9] The Court has establishes that the Commission has discretional – although never arbitrary – powers to decide, in each case, whether the State's response to the report adopted under Article 50 of the Convention is appropriate or satisfactory, and whether it considers it pertinent to submit the case to the Court's consideration.[10] The Commission's assessment of whether or not to submit a case to the Court should be the result of its own autonomous procedure in its capacity as a supervisory organ of the American Convention.[11] This assessment should take into account the provisions of Article 45(2) of the Commission's Rules of Procedure which stipulate four criteria that the Commission must consider when adopting that decision: the position of the petitioner; the nature and seriousness of the violation; the need to develop or clarify the case law of the

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[9] Article 51(1) of the American Convention establishes that: "[i]f, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration." Meanwhile, Article 61(1) establishes that "[o]nly the States Parties and the Commission shall have the right to submit a case to the Court." See also, *Certain attributes of the Inter-American Commission on Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 the American Convention on Human Rights).* Advisory opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 47, and *Case of the Saramaka People v. Suriname. Preliminary objections.* Judgment of November 28, 1999. Series C No. 172, para. 39.

[10] *Cf. Certain attributes of the Inter-American Commission on Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 The American Convention on Human Rights), supra*, para. 50, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection.* Judgment of June 12, 2002. Series C No. 93, para. 33.

[11] *Cf. Case of the 19 Tradesmen v. Colombia. Preliminary objection, supra,* para. 31, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012 Series C No. 248, para. 38.

system, and the future effect of the decision within the legal systems of the Member States.[12] Despite this, the Court has the authority to review an alleged violation of due process in the proceedings before that organ.

14. The Court underlines, however, that the references to inter-American public order in its Rules of Procedure do not establish additional requisites to those stipulated in the Convention as regards the admissibility of the cases submitted to its jurisdiction. The considerations of the President of the Court in his Order of December 19, 2012, related to the admissibility of the expert witness offered by the Commission in its brief submitting the case,[13] but, in no way, constituted a determination regarding the importance for inter-American public order of the case as a whole, which – it should be repeated – is not a requirements for the admissibility of cases before the Court. Therefore, the Court rejects the State's arguments concerning the inadmissibility of submitting this case to the Court's consideration.

B. Regarding the representation of the Commission at the public hearing before the Court

15. At the public hearing before the Court, as well as in its final written arguments, the State indicated that "based on the provisions of Article 57 of the Convention," the Commission "should appear in all the cases before the Court, and failed to do so in the public hearing held in this case, at which […] no Commissioner was present." In addition, according to the State, this is contrary to Article 71 of the Commission's Rules of Procedure. For its part, the Commission indicated that the Court's Rules of Procedure "explicitly allow" this situation.

16. The Court notes that the State did not make any specific request when setting out this argument. However, the Court recalls that Article 24 of the Court's Rules of Procedure do not require the Commission to be represented before the Court by its commissioners. Likewise, neither the American Convention, nor the Statutes or the Rules of Procedures of the Court or of the Inter-American Commission include provisions establishing that the commissioners must appear in person at the public hearing before the Court, which is only one of the stages of the proceedings before the Court.[14] Therefore, as it has in other cases,[15] this Court rejects the alleged absence of representation of the Commission before the Court in this case.

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[12] The Rules of Procedure of the Inter-American Commission on Human Rights approved by the Commission at its 137the regular session held from October 28 to November 13, 2009, and amended on September 2, 2011, as well as the current Rules of Procedure which were amended at its 147th regular session held from March 8, 2013, to enter into force on August 1, 2013.

[13] In its brief submitting the case, the Commission offered the expert opinion of Julio César Rivera, who would testify on "the relationship that exists between the right to freedom of expression and judicial guarantees, specifically, to a reasonable time. The expert witness [would] offer relevant elements to be considered when examining whether delay in a sanctioning proceeding involving the right to freedom of expression c[ould] constitute a violation of the said right, irrespective of the outcome of the proceeding. The expert witness [would] also examine the effects of imposing protracted injunctive measures in the said proceedings on the exercise of the right to freedom of expression." In his Order of December 19, 2012 (*supra* note 5), the President considered that this testimony was not admissible, because its purpose did not "encompass information, knowledge or legal parameters concerning the protection of human rights" that affected inter-American public order in a significant manner, in keeping with the requirement established in Article 35(f) of the Court's Rules of Procedure.

[14] Article 24 of the Court's Rules of Procedure establish that "[t]he Commission shall be represented by the delegates it has designated for that purpose. Delegates may be assisted by any persons of their choice." According to Article 2(12), the term Delegates should be understood, for the effect of these Rules of Procedure, as "the persons designated by the Commission to represent it before the Court."

[15] *Cf. Case of Gangaram Panday v. Suriname. Preliminary objections.* Judgment of December 4, 1991. Series C No. 12, para. 27.

C. Regarding the factual framework of this case

17. The Court notes that the representatives added certain facts that the Commission had not included in its Merits Report. In particular, among their arguments, the representatives referred to: (i) presumed pressure and harassment against the newspaper *La Libertad* in the context of the facts of this case, as well as (ii) background information on investigative journalism carried out by the newspaper *La Libertad*, unrelated to this case, and supposed "persecution" suffered by this newspaper in 1948.

18. This Court recalls that the factual framework of the proceedings before the Court is constituted by the facts included in the Merits Report submitted to the Court's consideration. Although the presumed victims or their representatives may cite the violation of rights other than those contained in the Merits Report during contentious proceedings before this Court, it is not admissible for the parties to alleged new facts that differ from those contained in the said report, even though they may include those facts that explain, clarify or reject the facts mentioned in the report and have been submitted to the Court's consideration.[16] The exception to this principles are facts that are classified as supervening, provided they are related to the facts of the proceedings. The Court notes that the above-mentioned facts described by the representatives do not constitute facts that explain, clarify or reject those included in the Merits Report and are not supervening facts. Consequently, the Court cannot take them into consideration.

IV
PRELIMINARY OBJECTIONS

19. The State filed two preliminary objections: the alleged violation of due process in the proceedings before the Inter-American Commission and the alleged failure to exhaust domestic remedies. This Court will analyze the preliminary objections filed in the order in which they were submitted.

A. Alleged violation of due process in the proceedings before the Inter-American Commission

A.1) Arguments of the Commission and of the parties

20. The State asked the Court "to abstain from hearing this case" because, it argued, due process had been infringed during the proceedings before the Commission as a result of an inexcusable abuse of process by the Commission in relation to the period of almost four years that elapsed between the presentation of the petition and its notification to the State. First, the State indicated that "the fact that the applicable body of law does not include a specific time frame for processing the petition, does not mean that the Commission has unlimited time to do this." In this regard, the State explained that the excessive delay in this case entailed: (a) the indirect violation of Article 46(1)(b) of the Convention; (b) the violation of the State's right of defense, and (c) the application to this case of the principle of estoppel.

21. Regarding point (a), the State underscored that the object and purpose of [Article 46(1)(b)], which is supposed to safeguard legal certainty and stability, [...] is not satisfied [...] by mere compliance with the time frame by the petitioner, but rather must be complemented

[16] *Cf. Case of the Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 19.

by the Commission diligently forwarding the petition to the State, because until this transfer has been effected, the State is unaware that certain acts or omissions which occurred within the said State have been questioned before an international organ." Regarding point (b), namely the right of defense, the State emphasized that the diligent and timely forwarding of the petition "permits not only the design of a defensive strategy in an adequate temporal context, but even the possibility of adopting early measures to find a friendly settlement to the matter." Regarding point (c), the State indicated that "the Commission's prolonged and undisputable silence […] gave the State the legitimate expectation that, after a certain time had passed, those acts that could be attributed to its organs that had not been contested in the international sphere, [would] no longer be subject to review by this instance, and their legal consequences would be consolidated."

22. The State also indicated that, "at the first available procedural opportunity, [it had] filed a preliminary objection for a special ruling" on this point. Nevertheless, the State underscored that "the Commission did not even consider [this preliminary objection] in either its Admissibility Report or its Merits Report." In general, the State indicated that the Commission had not explained why it had taken four years just to carry out the formal examination of the complaint during the initial review of the petition. In this regard, it also stressed that an alleged lack of sufficient resources cannot be argued as an excuse for failing to comply with a reasonable time.

23. The representatives indicated that they had lodged their petition before the Commission "before the first 30 days of the time frame [of six months established in Article 46 of the Convention] had elapsed." They underlined that the said article "refers to the petitioner" and "in no way refers to the time frame accorded to the [Commission] to forward the complaint to the State." In their final written arguments, they argued that the State "is seeking to convert [them] into victims of [the Commission,] renouncing its direct responsibilities as a State [in] this case." They also emphasized that the State "alleges that it has suffered supposed harm owing to the [Commission's] delay, but does so in the abstract." They indicated that the Court "should weigh the hypothetical prejudice" suffered by Argentina against "the real prejudice suffered by two individuals at the hands of the State."

24. The Commission underlined that the State "has not explained the specific harm caused to its right of defense." In addition, it observed that "[t]he analogous application of Article 46(1)(b) of the American Convention to the 'opening of proceedings' has no basis in the said instrument [… because t[his time frame bears no relationship to the time frames for the processing of the said petitions by the Inter-American Commission." The Commission explained that "at the stage of the initial review […] different scenarios may arise that can delay the preliminary examination of a complaint." It argued that this "situation is perfectly compatible with the principle of accessibility that governs the system of individual petitions, which is established in Article 44 of the American Convention, and which does not require legal assistance to file a petition." It added that "the realities inherent in the Commission's work and the procedural delays that it faces contribute to these delays." In this regard, it indicated that "the Commission is currently making an immense effort – an enormous effort – to overcome these procedural delays, to obtain resources, […] and to ensure that time frames are reduced." In addition, the Commission clarified that "it had not ruled on this argument in its Admissibility Report, precisely because it was not related to any of the admissibility requirements […] or to any of the elements that define the Commission's competence."

A.2) Considerations of the Court

25. This Court has maintained that the Inter-American Commission has autonomy and independence to exercise its mandate as established by the American Convention and,

particularly, to exercise its functions in the procedure to process individual petitions established in Articles 44 to 51 of the Convention. However, in matters that it is examining, the Court has the authority to carry out a control of the legality of the Commission's actions.[17] This does not necessarily mean reviewing the proceedings that have been conducted before the Commission, unless one of the parties proves that a serious error has occurred that allegedly violates their right of defense.[18] In addition, the Court must ensure a just balance between the protection of human rights, the ultimate purpose of the inter-American human rights system, and the legal certainty and procedural balance that safeguards the stability and reliability of the international protection.[19]

26. The Court has indicated that the processing of individual petitions is governed by guarantees to ensure that the parties can exercise their right of defense during the proceedings. These guarantees are: (a) those related to the admissibility conditions of the petitions (Articles 44 to 46 of the Convention[20]), and (b) those related to the adversarial principle (Article 48 of the Convention) and procedural balance.[21] The principle of legal certainty must also be taken into consideration.[22]

27. Furthermore, it has been the Court's consistent case law that the party affirming that an act of the Commission during the proceedings before it has involved a serious error that harms that party's right of defense must prove this harm. Consequently, in this regard, a mere complaint or difference of opinion is not sufficient in relation to the actions of the Inter-American Commission.[23]

28. In this case, the petition was received on February 12, 1998 (*supra* para. 2.a) and was forwarded to the State on December 21, 2001; hence, it spent three years and ten months at the initial review stage.[24] Consequently, taking into account the State's arguments, the Court will now proceed to review the Commission previous actions and decisions in order to monitor that the admissibility requirements, and also the adversarial principle, procedural balance, and legal certainty were observed (*supra* para. 26).

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[17] *Cf. Control of Legality in the Exercise of the Authority of the Inter-American Commission on Human Rights (Arts. 41 and 44 to 51 of the American Convention on Human Rights*). Advisory opinion OC-19/05 of November 28, 2005. Series A No. 19, first and third operative paragraphs, and *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 48.

[18] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru.* Preliminary objections, merits, reparations and costs. Judgment of November 24, 2006. Series C No. 158, para. 66, and *Case of Furlan and family members v. Argentina, supra*, para. 48.

[19] *Cf. Case of Cayara v. Peru. Preliminary objections*. Judgment of February 3, 1993. Series C No. 14, para. 63, and *Case of Furlan and family members v. Argentina, supra*, para. 48.

[20] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 21, 1987. Series C No. 1, para. 85, and *Case of Furlan and family members v. Argentina, supra*, para. 49.

[21] *Cf. Control of Legality in the Exercise of the Authority of the Inter-American Commission on Human Rights (Arts. 41 and 44 to 51 of the American Convention on Human Rights*), *supra*, para. 27, and *Case of Furlan and family members v. Argentina, supra*, para. 49.

[22] *Cf. Control of Legality in the Exercise of the Authority of the Inter-American Commission on Human Rights (Arts. 41 and 44 to 51 of the American Convention on Human Rights*), *supra*, para. 27, and *Case of Furlan and family members v. Argentina, supra*, para. 49.

[23] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra*, para. 66, and *Case of Furlan and family members v. Argentina, supra*, para. 50.

[24] *Cf.* Charter of the Inter-American Commission forwarded to the Minister for Foreign Affairs, International Trade and Worship on December 21, 2001 (file of proceedings before the Commission, folio 524).

29. As the State has explained, the Court notes that neither in the American Convention, nor the Rules of Procedure of the Inter-American Commission is there any article that imposes a time frame for the Commission to carry out the initial review of petitions. However, the Court will examine the arguments and observations of the parties and the Commission in order to determine whether the Commission's delay at the initial review stage resulted in a violation of the State's right of defense, in such a way as to justify the inadmissibility of the case before this Court. To this end, based on the State's arguments, the Court will now examine: (a) whether the said delay constituted an indirect violation of Article 46(1)(b) of the Convention; (b) whether the actions of the Commission before forwarding the initial petition to the State could constitute estoppel and, lastly, (c) whether the said delay in forwarding the initial petition to the State resulted in a violation of Argentina's right of defense.

A.2.1) Interpretation of Article 46(1)(b) of the Convention, regarding the six-month time frame for lodging petitions before the Commission

30. Regarding the requirement established in Article 46(1)(b) of the Convention, this Court has indicated that it should be applied in keeping with the facts of the specific case in order to ensure the effective exercise of the right to lodge individual petitions.[25] For its part, the Inter-American Commission has recognized that "[t]he principles on which the inter-American human rights system is based evidently include that of legal certainty, which is the reason for the rule of six months and a reasonable time when the exceptions to the exhaustion of domestic remedies are applied."[26] Similarly, the European Court of Human Rights (hereinafter "European Court") has established that the purpose of a similar rule[27] in the European system is to ensure legal certainty, to guarantee that cases submitting matters relating to the European Convention on Human Rights are examined within a reasonable time, and to protect the authorities and other persons involved from finding themselves in a situation of lack of certainty for an extended period of time.[28]

31. The State has suggested that the Commission delayed excessively before forwarding it the initial petition, thus undermining the object and purpose of the rule included in Article 46(1)(b). This Court has established, pursuant to the context of application of the American Convention and its object and purpose, that procedural norms should be applied based on a standard of reasonableness; otherwise, there would be an imbalance between the parties and the attainment of justice would be adversely affected.[29] As the Court has indicated, the essential factor in the international jurisdiction is to ensure the necessary conditions to guarantee that the procedural rights of the parties are not weakened or unequal, and to achieve the objectives for which the different procedures have been designed.[30]

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[25] *Cf. Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012. Series C No. 257, para. 35.

[26] CIDH, Petition 943-04, Report No. 100/06, Gaybor Tapia and Colón Eloy Muñoz v. Ecuador, para. 20, Annual Report, 2006, OEA/Ser.L/V/II.127 Doc. 4 rev. 1. (2007), October 21, 2007. See also, CIDH, Case of 11,827, Report No. 96/98, Peter Blaine v. Jamaica, para. 52, Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1999).

[27] Article 35(1) of the European Convention on Human Rights establishes that: "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and *within a period of six months from the date on which the final decision was taken*" (italics added).

[28] *Cf.* ECHR, *P.M. v. the United Kingdom* (dec.), no. 6638/03, § A, 24 August 2004, and *Kemevuako v. The Netherlands* (dec.), no. 65938/09, § 20, 1 June 2010.

[29] *Cf. Case of the "White Van" (Paniagua Morales et al.). Preliminary objections*. Judgment of January 25, 1996. Series C No. 23, para. 40, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection, supra*, para. 28.

[30] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 33, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection, supra*, para. 28.

32. This Court considers that the standard of reasonableness, based on which the procedural norms should be applied (*supra* para. 31), means that a time frame such as the one proposed by the State would have to be established clearly in the norms that regulate the proceedings. This is particularly true considering that the presumed victims' right of petition established in Article 44 of the Convention[31] would be at stake based on acts or omissions of the Inter-American Commission over which the presumed victims have no control. In addition, if the said time frame existed, the applicable norms would also have to establish the legal consequences of failing to comply with it.[32]

33. Therefore, the Court considers that the excessive delay in the initial processing does not constitute an indirect violation of the norm established in Article 46(1)(b) of the American Convention. Nevertheless, in paragraphs 35 to 0 *infra* it will examine the alleged effects on the right of defense that could result from the fact that the duration of the initial processing of the petition was longer than reasonable.

A.2.2) Alleged application of the estoppel principle

34. According to international practice, when a party to a litigation has adopted a specific attitude that adversely affects its own position or benefits the position of the other party, under the estoppel principle, it cannot then assume another position contrary to the first.[33] The Court notes that the estoppel alleged by the State occurred owing to an omission by the Commission during the proceedings before it. In this regard, the Court notes that this argument is not admissible, because the Commission cannot be considered a party to the proceedings before it and, consequently, its actions during the said proceedings cannot result in estoppel.

A.2.3) Alleged violation of the State's right of defense

35. For the purposes of this case, it is necessary to examine Articles 27[34] and 31[35] of the Commission's 1980 Regulations, in force when it received the initial petition on February 12,

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[31] Article 44 of the Convention establishes that: "[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

[32] *Cf. Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of February 27, 2012. Series C No. 240, para. 33.

[33] *Cf. Case of Neira Alegría et al. v. Peru. Preliminary objections.* Judgment of December 11, 1991. Series C No. 13, para. 29, and *Case of García and family members v. Guatemala. Merits, reparations and costs.* Judgment of November 29, 2012. Series C No. 258, para. 31.

[34] Article 27 of the 1980 Rules of Procedure of the Commission established that: "1. The Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission and that fulfill all the requirements set forth in the Statute and in these Regulations. 2. If a petition or communication does not meet the requirements called for in these Regulations, the Secretariat of the Commission may request the petitioner or his representative to complete it. 3. If the Secretariat has any doubt as to the admissibility of a petition, it shall submit it for consideration to the Commission or to the Chairman during recesses of the Commission."

[35] Article 31 of the 1980 Rules of Procedure of the Commission, which regulated the initial processing, stipulated that: "1. The Commission, acting initially through its Secretariat, shall receive and process petitions lodged with it in accordance with the standards set forth below: (a) it shall enter the petition in a register especially prepared for that purpose, and the date on which it was received shall be marked on the petition or communication itself; (b) it shall acknowledge receipt of the petition to the petitioner, indicating that it will be considered in accordance with the Regulations; (c) if it accepts, in principle, the admissibility of the petition, it shall request information from the government of the State in question and include the pertinent parts of the petitions. 2. In serious or urgent cases or when it is believed that the life, personal integrity or health of a person is in imminent danger, the Commission shall request the promptest reply from the government, using for this purpose the means

1998, as well as Articles 26,[36] 29[37] and 30[38] of the Commission's 2000 Regulations,[39] in force when it forwarded the petition to the State on December 21, 2001. Both these Regulations, and also the current Rules of Procedure,[40] differentiate the admissibility stage from a stage

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it considers most expeditious. 3. The request for information shall not constitute a prejudgment with regard to the decision the Commission may finally adopt on the admissibility of the petition. 4. In transmitting the pertinent parts of a communication to the government of the State in question, the identity of the petitioner shall be withheld, as shall any other information that could identify him, except when the petitioner expressly authorizes in writing the disclosure of his identity. 5. The information requested shall be provided as soon as possible, within 120 days after the date on which the request is sent. 6. The government of the State in question may, with justifiable cause, request a 30 day extension, but in no case shall extensions be granted for more than 180 days after the date on which the first communication is sent to government of the State concerned. 7. The pertinent parts of the reply and the documents provided by the government shall be made known to the petitioner or to his representative, who shall be asked to submit his observations and any available evidence to the contrary within 30 days. 8. On receipt of the information or documents requested, the pertinent parts shall be transmitted to the government, which shall be allowed to submit its final observations within 30 days."

[36] Article 26 of the 2000 Regulations of the Commission stipulated the following: "1. The Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission and that fulfill all the requirements set forth in the Statute and in Article 28 of these Regulations. 2. If a petition does not meet the requirements called for in these Regulations, the Executive Secretariat may request the petitioner or his representative to complete it. 3. If the Executive Secretariat has any doubt concerning compliance with the said requirements, it shall consult the Commission."

[37] Article 29 of the 2000 Regulations of the Commission established that: "1. The Commission, acting initially through its Executive Secretariat, shall receive and carry out the initial processing of petitions lodged with as described below: (a) it shall enter the petition in a register recording the date on which it was received shall acknowledge receipt to the petitioner; (b) if the petition does not meet the requirements set forth in these Regulations, it may request the petitioner or his representatives to complete it in accordance with Article 26(2) of these Regulations; […] 2. In serious or urgent cases, the Executive Secretariat shall notify the Commission immediately."

[38] Article 30 of the 2000 Regulations of the Commission indicated that: "1. The Commission, through its Executive Secretariat, shall process petitions that meet the requirements established in Article 28 of these Regulations. 2. To this end, it shall transmit the pertinent parts of the petition to the State in question. The identity of the petitioner shall be withheld, unless he expressly authorizes the contrary. The request to the State for information shall not constitute a prejudgment with regard to the decision that the Commission may adopt on admissibility. 3. The State shall present its response within two months of the date the request was transmitted. The Executive Secretariat shall evaluate duly justified requests for an extension of this period. However, it shall not grant extensions that exceed three months from the date on which the first request for information was sent to the State. 4. In serious or urgent cases or when it is believed that the life, personal integrity or health of a person is in imminent danger, the Commission shall request the promptest reply from the State, using for this purpose the means it considers most expeditious. 5. Before ruling on the admissibility of the petition, the Commission may invite the parties to present additional observations, either in writing or at a hearing, as established in Chapter VI of these Regulations. 6. When the observations have been received or the time frame established has expired without receiving them, the Commission shall verify whether the reasons for the petition exist or subsist. If it considers that they do not exist or subsist, it shall archive the file.

[39] These Rules of Procedure entered into force on May 1, 2001, as established in their Article 78.

[40] Article 26 of the Commission's current Rules of Procedure is entitled "Initial Review" and establishes that: "1. The Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure. 2. If a petition or communication does not meet the requirements set for in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them. 3. If the Executive Secretariat has any doubt as to whether the requirements referred to have been met, it shall consult the Commission." The relevant part of Article 29 of the Rules of Procedure establishes that: "1. The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented. Each petition shall be registered, the date of receipt shall be recorded on the petition itself and an acknowledgement of receipt shall be sent to the petitioner. 2. The petition shall be studied in the order it was received; however, the Commission may expedite the evaluation of a petition in [certain] situations [described in this paragraph]." Also, the pertinent part of Article 30 of the Commission's current Rules of Procedure establishes that: "1. The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure. 2. For this purpose, it shall forward the relevant parts of the petition to the State in question. The request for information made to the State shall not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition." The Rules of Procedure of the Inter-American Commission on Human Rights approved by the Commission at its 137th regular period of

previously called "initial review." In particular, in Article 31 of the Commission's 1980 Rules of Procedure, this differentiation can be seen in paragraph "c" which establishes that "[i]f it accepts, in principle, the admissibility of the petition, [the Commission, acting initially through its Secretariat] shall request information from the Government of the State in question and include the pertinent parts of the petition." Furthermore, as of the Commission's 2000 Regulations, the initial review stage is expressly differentiated from the admissibility stage. During this first stage, the Executive Secretariat of the Commission may, *inter alia,* request the petitioner or his representative to complete the information presented, and decide to process petitions that comply with the requirements established in Articles 29[41] and 28[42] of the Commission's 1980 and 2000 Regulations, respectively. Once it has been decided to process the petition, the admissibility proceeding begins and the pertinent part of the petition are forwarded to the State in question. This procedure was decided by the Commission, based on the provisions of Article 39[43] of the Convention, as well as Articles 22[44] and 23[45] of the Commission's Statute.

36. In the instant case, the Court notes that this initital review stage lasted three years and ten months, which was the time that the Commission took to forward the petition to the State, which constitutes an excessive delay. Based on the State's argument, the Court will proceed to analyze whether this constituted a violation of Argentina's right of defense.

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sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1st, 2013.

41 Article 29 of the 1980 Rules of Procedure of the Commission established that: "[p]etitions addressed to the Commission shall include: (a) the name, nationality, profession or occupation, postal address, or domicile and signature of the person or persons making the denunciation; or in cases where the petitioner is a non-governmental entity, its legal domicile or postal address, and the name and signature of its legal representative or representatives; (b) an account of the act or situation that is denounced, specifying the place and date of the alleged violations and, if possible, the name of the victims of such violations as well as that of any official that might have been appraised of the act or situation that was denounced; (c) an indication of the State in question which the petitioner considers responsible, by commission or omission, for the violation of a human right recognized in the American Convention on Human Rights in the case of States Parties thereto, even if no specific reference is made to the article alleged to have been violated; (d) information on whether the remedies under domestic law have been exhausted or whether it has been impossible to do so.

42 Article 28 of the 2000 Rules of Procedure of the Commission indicated the following: "[p]etitions addressed to the Commission shall include the following information: (a) the name, nationality, and signature of the person or persons making the denunciation; or in cases where the petitioner is a non-governmental entity, the name and signature of its legal representative or representatives; (b) whether the petitioner desires his identity to be kept from the State; (c) the address to receive correspondence from the Commission and, if applicable, telephone and facsimile number, and e-mail address; (d) an account of the act or situation that is denounced, specifying the place and date of the alleged violations; (e) if possible, the name of the victim, as well as that of any public authority that might have been appraised of the act or situation that was denounced; (f) an indication of the State that the petitioner considers responsible, by act or omission, for the violation of a human right recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article alleged to have been violated; (g) compliance with the time frame established in Article 32 of these Regulations; (h) the steps taken to exhaust domestic remedies or whether it has been impossible to do so in accordance with Article 31 of these Regulations; (i) an indication of whether the denunciation has been submitted to any other international proceedings in accordance with Article 33 of these Regulations.

43 Article 39 of the Convention establishes that: "[t]he Commission shall prepare its Statute, which it shall submit to the General Assembly for approval. It shall establish its own Regulations."

44 Article 22 of the Commission's Statute stipulates: "1. The present Statute may be amended by the General Assembly. 2. The Commission shall prepare and adopt its own Regulations, in accordance with the present Statute.

45 Article 23(1) of the Commission's Statute indicates that: "[i]n accordance with the provisions of Articles 44 to 51 of the American Convention on Human Rights, the Regulations of the Commission shall determine the procedure to be followed in cases of petitions or communications alleging violation of any of the rights guaranteed by the Convention, and imputing such violation to any State Party to the Convention."

37. Argentina argued that the Commission's delay affected its right of defense becasue: (i) it could have designed "a defensive strategy in an adequate temporal context," and (ii) it prevented "the possibility of adopting early measures to find a friendly settlement to the matter" (*supra* para. **Error! Reference source not found.**), and also its right of defense was further violated owing to (iii) the absence of a response to these allegations in the Admissibility Report and the Merits Report. In this regard, the Court recalls that the admissibility of this type of argument depends on the State proving the specific harm caused to its right of defense in this case (*supra* para. 27).

38. In this regard, the Court considers that Argentina has not revealed the strategy that it was prevented from exercising owing to the passage of time. This Court notes that during the processing of the case before the Commission and before the Court, the State has had the opportunity to present its defense arguments, and has not advised this Court which aspect of this defense depended, from the point of view of time, on the immediacy of the facts or that the passage of the said initial time prevented it from obtaining any specific piece of evidence. Furthermore, the State has not revealed or offered any reason to explain how the possible initial harm to its right of defense was not rectified by the numerous opportunities subsequently provided to enable it to present its defense arguments. In addition, although the State argues that a more expeditious transmittal of the petition would have allowed it to offer a friendly settlement, the fact is that it had many opportunities to offer this while the petition was being processed before the Commission and, at no time during this procedure, did it mention that it sought this type of settlement, even when faced with the express willingness of the presumed victims who, on several occasions, requested a conciliation hearing.[46] To the contrary, the State expressly indicated that it did not wish to reach a friendly settlement in this case.[47] The State has not provided any evidence to prove that its position would have been different during the time the petition was at the initial review stage. Consequently, the Court considers that the State has not shown in what way the Commission's conduct specifically affected or violated its right of defense during the proceedings before that organ.

39. Furthermore, the Court notes that the State did, in fact, presented this preliminary objection in its first brief in the proceedings before the Commission and that the latter did not respond to these arguments in either its Admissibility Report or its Merits Report.[48] In this regard, the Court recalls that, as of its first cases, it has recognized that the Convention does not require the Commission to take any explicit action in relation to the admission of a petition[49] and, consequently, does not regulate the contents of an Admissibility Report. Nevertheless, the Commission's Rules of Procedure in force at the time the Admissibility Report was issued did establish that a decision on admissibility should be issued, but did not specify what this should contain.[50] Also, while the American Convention expressly requires the

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[46] *Cf.* Brief of the representatives of August 20, 2008, in the proceedings before the Inter-American Commission (file of proceedings before the Commission, folio 826), and brief of the representatives of September 9, 2008 in the proceedings before the Inter-American Commission (file of proceedings before the Commission, folio 839).

[47] *Cf.* The State's brief of January 23, 2009, in the proceedings before the Inter-American Commission (file of proceedings before the Commission, folio 1117).

[48] *Cf.* The State's brief of February 21, 2002, in the proceedings before the Inter-American Commission (file of proceedings before the Commission, folios 659 to 665); Admissibility Report No. 39/08, Petition 56-98, Carlos and Pablo Mémoli *v.* Argentina, issued by the Inter-American Commission on July 23, 2008 (file of proceedings before the Commission, folios 779 to 790), and Merits Report No. 74/11, Case of 12,653, Carlos and Pablo Mémoli *v.* Argentina, July 20, 2011 (file of proceedings before the Commission, folios 1329 to 1351).

[49] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 40*, and Case of Genie Lacayo v. Nicaragua. Preliminary objections.* Judgment of January 27, 1995. Series C No. 21, para. 36.

[50] Article 37 of the Commission's 2006 Rules of Procedure established that: "1. Once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter. The reports on

Court to provide the reasons for its rulings, this international instrument does not establish the same requirement for the Commission's reports.[51] Moreover, this requirement was not established in the Commission's Rules of Procedure in force when it issued its Merits Report in this case.[52] However, the Court recalls that a State that has been accused of violating the Convention may, in exercise of its right of defense, argue before the Commission any of the provisions of Articles 46 and 47 and, if the Commission admits that argument, the State may request that the processing of the petition cease and that it be filed.[53] If the Commission provided the reasoning on which its reports are based, this would allow the State to know that the Commission had considered its defense arguments when taking the respective decision.

40. Although reasoning a decision does not require a detailed response to each and every argument of the parties,[54] the preliminary objection filed by the State was an important part of its defense, even though it was not directly related to an admissibility requirement. Nevertheless, the Court considers that the absence of a specific response to the State's argument on this point is not, in itself, sufficient for it to be considered a serious error that harmed the State's right of defense and that could result in the inadmissibility of this case before the Court.

41. Nonetheless, this Court emphasizes that the Commission must guarantee, at all times, the reasonableness of the time frames during the processing of its proceedings. However, within certain temporal and reasonable limits, certain omissions or delays in the observance of the Commission's own procedures may be excused if an adequate balance is maintained between justice and legal certainty.[55] The foregoing consideration allow the conclusion to be reached that the State has not proved that the length of time that the petition spent at the stage of the initial review resulted in non-compliance with the procedural norms of the inter-American system or a serious error that affected its right of defense, in a way that justified the inadmissibility of this case.

42. In addition, the Court considers that the Commission's delay in processing cases before that organ does not constitute *per se* sufficient reason to sacrifice the right of the presumed victims to have access to the Inter-American Court. If the argument that the excessive duration of the initial review (in this case, more than three years) could constitute an obstacle for the submission of the case to the Court were accepted, this would affect the

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admissibility and inadmissibility shall be public and the Commission shall include them in its Annual Report to the General Assembly of the OAS. 2. When an admissibility report is adopted, the petition shall be registered as a case and the proceedings on the merits shall be initiated. The adoption of an admissibility report does not constitute a prejudgment as to the merits of the matter. […]".

[51] Regarding the report under Article 50, the Convention establishes that "the Commission shall […] draw up a report setting forth the facts and stating its conclusions"; while Article 66(1) of the Convention establishes that: "[r]easons shall be given for the judgment of the Court."

[52] Article 43 of the Commission's 2009 Rules of Procedure established that: "[t]he 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," while Article 44 established that: "[i]f [the Commission] establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question."

[53] *Cf. Certain attributes of the Inter-American Commission on Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 The American Convention on Human Rights), supra*, para. 41.

[54] *Cf. Case of Apitz Barbera et al. ("First Contentious-Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 90, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 146.

[55] *Cf. Case of Cayara v. Peru, supra*, para. 42, and *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 45.

presumed victims' access to inter-American justice, which would run counter to the essential purpose of the inter-American system to promote the observance and defense of human rights. Therefore, this Court rejects this preliminary objection.

B. Alleged failure to exhaust domestic remedies

B.1) Arguments of the Commission and of the parties

43. In its answering brief of June 22, 2012, the State indicated that a decision was pending on a "special appeal on unconstitutionality" filed by the presumed victims requesting the annulment of their convictions "as a result of the enactment of Law 26,551." On July 4, 2012, it was declared that this appeal had been granted erroneously. Following this decision, in its oral arguments during the hearing, and in its final written arguments, the State argued that the presumed victims should have filed an appeal for review and not a special appeal on unconstitutionality, which it was declared had been granted erroneously. In addition, taking advantage of the right to a rejoinder during the said hearing, the State indicated that, "what Mr. Mémoli should have done [was] to present an appeal for review, including a plea regarding the unconstitutionality of the limits established in the Code of Criminal Procedure with regards to reviews." Despite this, Argentina stressed that, following the decision of July 4, 2012, "the special federal appeal before the Supreme Court of Justice of the Nation was available," although it had no record that it had been filed by Messrs. Mémoli. The State explained that the presentation of the special appeal on unconstitutionality "qualified as a new act," so that "in order to guarantee [its] right of defense in the international sphere adequately," it had made this argument before the current procedural instance. In addition, it indicated that the preliminary objection was filed "subsidiarily, for the hypothetical case that [the facts denounced by the presumed victims] are considered to be [of public interest]."

44. The representatives indicated that they had exhausted "all the remedies to access first the [Commission] and then this [Court]." In this regard they argued that the Supreme Court of Justice of the province of Buenos Aires had already decided that "the [appeal] on unconstitutionality was inadmissible and [that] even if it examined the [appeal] for review, this was not admissible either," and that article "2 of the Criminal Code on the most favorable law" was not admissible either. They underscored that "there are many restrictions to obtain access to the [Supreme] Court [of Justice of the Nation]." They also indicated that requiring them to continue appealing would "not only be a legal absurdity, but also […] a callous requirement that violated the American Convention" and, in this regard, they indicated that it would be contrary to the principle of *ne bis in idem*.

45. The Commission noted that "[t]he supervening procedural situations [occurred] prior to the submission [of the case] to the Inter-American Court, as a result of amendments to the law. This situation does not have the effect of modifying, retroactively, compliance with the admissibility requirements," because "the issue of the exhaustion of domestic remedies has been precluded." In this regard, it indicated that "[t]here is no basis in the Convention or the Rules of Procedure for the Inter-American Court to be able to analyze the failure to exhaust supervening domestic remedies based on information provided after the Commission's Admissibility Report. Furthermore, this proposition has no legal basis and would result in legal uncertainty and imbalance in the system of petitions and cases to the detriment of the victims." Despite this, "these new circumstances may be taken into account when evaluating the reparations that would be pertinent for the situation that exists when the judgment is delivered."

B.2) Considerations of the Court

46. Article 46(1)(a) of the American Convention establishes that, in order to determine the admissibility of a petition or communication lodged before the Inter-American Commission in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.[56] However, this supposes not only that these remedies exist formally, but also that they must be adequate and effective, as a result of the exceptions established in Article 46(2) of the Convention.[57]

47. It has also been the Court's consistent case law that an objection to the Court's exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be filed at the appropriate procedural moment,[58] namely during the first stages of the admissibility proceedings before the Commission,[59] and the remedies that must be exhausted and their effectiveness must be described in detail. This way in which the Court has interpreted Article 46(1)(a) of the Convention for over two decades is in keeping with international law,[60] on the basis of which it is understood that following the said appropriate procedural moment, the principle of procedural preclusion comes into operation. In the instant case, the State did not argue the failure to exhaust domestic remedies during the admissibility stage before the Commission;[61] this objection was filed for the first time in the State's answering brief before this Court, so that its filing before the Court is time-barred.

48. In this regard, the Court observes that the amendment to the definition of the offense of defamation in the Criminal Code, promulgated on November 26, 2009, and the filing of the appeal on unconstitutionality on November 23, 2009, constitute supervening facts that were not included in the initial petition regarding which the representatives allege the violation of a right not included in the Merits Report (*supra* para. 5 and *infra* para. 150). Therefore, the principle of procedural preclusion is not applicable to the admissibility of these facts.[62] Nevertheless, the Court stresses that this principle is applicable to all the other facts of this case.

49. Since this is a supervening fact, it was not possible for the State to argue the failure to exhaust domestic remedies during the admissibility stage of the proceedings before the Commission. Nevertheless, the Commission is responsible for ensuring compliance with the admissibility requirements established by the Convention, even though, in exceptional circumstances, the Court may review the actions of the Commission in those matters submitted to the Court's consideration (*supra* paras. 25 and 27).

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[56] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 85, and *Case of the Santo Domingo Massacre v. Colombia, supra. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 33.

[57] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits*. Judgment of July 29, 1988. Series C No. 4, para. 63, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 33.

[58] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 34.

[59] *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 81, *and Case of the Santo Domingo Massacre v. Colombia, supra*, para. 34.

[60] *Cf. Case of Reverón Trujillo v. Venezuela*. *Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 22, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 34.

[61] In the Admissibility Report, the Commission considered that the requirement to exhaust domestic remedies established in Article 46(1)(a) of the Convention had been complied with by the appeals filed in the criminal proceedings (*infra* paras. 75 to 90). *Cf.* Admissibility Report No. 39/08, Petition 56-98, Carlos and Pablo Mémoli *v.* Argentina, July 23, 2008 (file of proceedings before the Commission, tome III, folio 788).

[62] *Cf. Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 25, 2010. Series C No. 212, para. 28.

50. This Court considers that the State should have presented the arguments on admissibility concerning these new facts at the first possible occasion before the Commission. In this regard, the Court notes that more than 10 months passed between the date on which the law was amended and the appeal on unconstitutionality was filed, and the date on which the Merits Report was issued. During that time, on February 1, 2010, the presumed victims advised the Commission of the said amendment to the law, asking that it be applied to them.[63] However, in the Commission's case file there is no record that the State advised the Commission about these new facts or presented any type of argument about the existence of new remedies available to the victims as a result of this until after the Merits Report had been issued.[64] The Court underscores that, during this time, the Commission granted the State at least one opportunity to present observations on the said amendment to the law, without the State presenting the information that it has now presented to this Court.[65]

51. Based on the above, the Court finds that the alleged failure to exhaust domestic remedies in relation to the supervening facts resulting from the 2009 amendment to the law was not filed at the opportune procedural moment before the Commission, so that its presentation before this Court is time-barred. Consequently, the Court rejects the preliminary objection of failure to exhaust domestic remedies filed by Argentina.

V
COMPETENCE

52. The Inter-American Court is competent, in the terms of Article 62(3) of the Convention, to hear this case, because Argentina has been a State Party to the American Convention since September 5, 1984, and accepted the contentious jurisdiction of the Court on that date.

VI
EVIDENCE

53. Based on the provisions of Articles 50, 57 and 58 of the Rules of Procedure, as well as on its case law on evidence and its assessment,[66] the Court will examine and assess the

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63 *Cf.* The presumed victims' brief of January 14, 2010, received on February 1, 2010 (file of proceedings before the Commission, folios 1194 and 1195).

64 *Cf.* The State's brief of November 28, 2011 (file of annexes to the final written arguments of the representatives, folio 3528).

65 The presumed victims' brief of January 14, 2010, received on February 1, 2010, was forwarded to the State, which was granted a specific time frame "to present any observations it deemed opportune." However, the State did not respond to this request for observations, but asked for an extension on July 22, 2011, which was not granted, because the Commission had issued the Merits Report in this case on July 20, 2011. *Cf.* The presumed victims' brief of January 14, 2010, received on February 1, 2010 (file of proceedings before the Commission, folios 1194 to 1195); letter of the Inter-American Commission to the Minister for Foreign Affairs, International Trade, and Worship of June 20, 2011 (file of proceedings before the Commission, folio 1188), and letter of the Inter-American Commission to Carlos and Pablo Mémoli of June 20, 2011 (file of proceedings before the Commission, folio 1191). See also, the State's briefs presented to the Inter-American Commission on July 22, 2011 (file of proceedings before the Commission, folios 1356 and 1357), and letter of the Inter-American Commission to the Minister for Foreign Affairs, International Trade, and Worship of August 3, 2011 (file of proceedings before the Commission, folio 1324).

66 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Suárez Peralta v. Ecuador, supra*, para. 30.

documentary probative elements provided by the parties on different procedural occasions, as well as the helpful evidence incorporated *ex officio* by this Court (*infra* paras. 60 and 61). To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding legal framework.[67]

A. Documentary evidence

54. The Court has received different documents presented as evidence by the Inter-American Commission, the representatives, and the State, attached to their main briefs (*supra* paras. 1, 5 and 6) and to the representatives' observations on the preliminary objections filed by the State (*supra* para. 7), as well as helpful evidence provided by the representatives and the State that was requested by the Court or its President (*supra* paras. 8, 9 and 10).[68]

B. Admission of the evidence

55. In this case, as in others, the Court grants probative value to those documents presented opportunely by the parties and the Commission that were not contested or opposed and the authenticity of which was not challenged.[69]

56. With regard to the newspaper articles presented by the parties and the Commission together with their different briefs, this Court has determined that they can be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related to the case.[70] The Court decides to admit those documents that are complete or that, at least, allow their source and date of publication to be appreciated, and will assess them taking into account the whole body of evidence, the observations of the parties, and the rules of sound judicial discretion.[71]

57. Also, regarding some documents indicated by the parties and the Commission by means of electronic links,[72] the Court has established that, if a party provides, at least, the direct electronic link to the document cited as evidence and it is possible to access it, neither legal certainty nor the procedural balance are affected, because it can be found immediately

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[67] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits, supra*, para. 76, and *Case of Suárez Peralta v. Ecuador, supra*, para. 30.

[68] The representatives and the State did not offer testimonial statements, expert opinions, or statements of the presumed victims as evidence in this case. The Commission offered an expert opinion that was not admitted by the President of the Court in his Order of December 19, 2012 (*supra* footnotes 5 and 13).

[69] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 140, *and Case of Suárez Peralta v. Ecuador, supra*, para. 32.

[70] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 146, and *Case of Suárez Peralta v. Ecuador, supra*, para. 33.

[71] In particular, the Court admits newspaper articles that were provided within the case file of the civil action and in the case file of the criminal proceeding opened against Messrs. Mémoli, as well as the newspaper articles published by Messrs. Mémoli and the *Sociedad Italiana*, provided in the file of the proceedings before the Commission and as part of the annexes to the representatives' final arguments, because they are directly related to the facts of this case.

[72] In particular, the following document provided by electronic links are admitted: Law 26,551, Criminal Code of the Nation (cited by the Commission in its Merits Report, available at: http://www.infoleg.gob.ar/infolegInternet/annexes/160000-164999/160774/norma.htm); Law 3,589, Code of Criminal Procedure of the province of Buenos Aires (annex 2 to the State's brief with final arguments, available at: http://www.gob.gba.gov.ar/legislacion/legislacion/l-3589.html), and Code of Civil and Commercial Procedure of the province of Buenos Aires (annex 1 to the State's brief with final arguments, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

by this Court and by the other parties.[73] In this case, neither the other parties nor the Commission opposed, or submitted observations on, the content and authenticity of such documents.

58. Regarding the procedural opportunity for the presentation of documentary evidence, according to Article 57(2) of the Rules of Procedure, generally this should be presented together with the briefs submitting the case, with pleadings and motions, or answering the submission, as appropriate. The Court recalls that evidence provided outside the appropriate procedural opportunities is not admissible, unless one of the exceptions established in the said Article 57(2) of the Rules of Procedure is alleged; namely *force majeure* or serious impediment or if it refers to an event that occurred after the procedural occasions indicated.

59. The representatives provided certain documentation together with their observations on the preliminary objections indicating that it was "new evidence arising in recent months to show, once again, the violation of judicial guarantees by the State," based on the "last part of Article 57 of the Court's Rules of Procedure." In this regard, the Court notes that not all the documents conform to the description alleged by the representatives, or are even related to the facts and purpose of this case.[74] Therefore, pursuant to Article 57(2) of the Rules of Procedure, the Court only admits the information and documentation that is subsequent to the presentation of the pleadings and motions brief and that is relevant for deciding this case.[75] This information and documentation will be assessed in the context of the body of evidence and according to the rules of sound judicial discretion.

60. The State and the representatives presented certain documentation together with their final written arguments in response to requests for information and helpful evidence made by the Court and its President (*supra* paras. 8, 9 and 10). No objections were raised to the admissibility of this documentation, and its authenticity and truth were not challenged. Consequently, pursuant to Article 58(b) of the Rules of Procedure, the Court finds it in order to admit the documents provided by the representatives and Argentina that were requested by this Court or its President as helpful evidence. This information and documentation will be assessed in the context of the body of evidence and according to the rules of sound judicial discretion.

61. Notwithstanding the above, the Court observes that, with their final written arguments, both the State and the representatives presented additional documents to those

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[73] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 44.

[74] In particular, the Court does not admit the following documents, because they are not relevant to this case (because they are not related to the alleged facts or violations), or because they are not subsequent to the pleadings and motions brief: (Annex A) "Newspaper article from *Clarín* dated December 1997, where the court proposes to dismiss cases that are not significant"; (Annex B) "Newspaper article, where the '*Kirchnerismo*', the governing party, represented by Dr. Salgado, proposes greater control over judges"; (Annex F) "Document with illustration presented in a 1999 criminal trial where the judge violated art. 207 of the CPCC"; (Annex H) "Denunciation of judges of the Mercedes courts for malfeasance on August 17, 2012, before the court attorney," and (annex I) "Magazine of the *Clarín* newspaper of August 26, 2012, with a note on the front page relating to the illegal detention of an individual for seven years."

[75] In particular, the Court admits the following documents: (Annex C) "Ruling of the Criminal Chamber rejecting appeal on unconstitutionality and for review. 2009"; (Annex D) "Ruling of the Provincial Court, not annexed by the State, rejecting appeal on unconstitutionality and for review. 2012"; (Annex E) "1996 Decision of the Criminal Chamber granting the appeal on unconstitutionality to [the presumed victims]"; (annex G) "Civil case file from fs. 705 to 777 and at September 13, 2012, respectively, not annexed by the State"; (H) "Denunciation of judges of the Mercedes courts for malfeasance before the court attorney on August 17, 2012," and (J) "Original invoices of expenditure arising from sending the petition by DHL, $911 and invoice for 516 photocopies amounting to 206.40 pesos."

requested by this Court or its President (*supra* para. 10). In this regard, the State argued that the documentation presented by the representatives was not admissible because it was time-barred, in addition to being "legally irrelevant for this case," and because some of it was presented "without any context" or was "out of date." The Court notes that one of the documents presented by the representatives bears no relationship to this case, and is therefore inadmissible.[76] To the contrary, the Court notes that, even though other documents provided by the State and by the representatives were not requested, they could be useful to decide this case, because they help give context to other evidence provided to the case file, as well as some of the parties' arguments.[77] Therefore, in accordance with Article 58(a) of the Rules of Procedure and having granted the parties an opportunity to submit their observations (*supra* para. 10), the Court finds it in order to admit those documents that are relevant for the examination of this case, and they will be assessed in the context of the body of evidence and according to the rules of sound judicial discretion.

62. Lastly, this Court notes that, in their brief with observations on the helpful evidence, the representatives included general observations on the final written arguments of the State, even though they had been advised, in a note of the Secretariat of March 25, 2013, that the time frame was granted to present observations on the helpful evidence provided by the State and did "not constitute a new procedural opportunity to expand arguments." The Court notes that the presentation of observations on the final written arguments of the parties is not contemplated in the Court's Rules of Procedure, and was not requested by the Court in this case. Therefore, the Court considers that it is not in order to admit the said brief, with the exception of the observations included under the subtitle "Observations on the documentary annex of the State."

VII
PROVEN FACTS

63. In this chapter, the Court will establish the proven facts of this case, based on all the probative elements in the case file.

A. Background to the criminal complaint and civil action against Messrs. Mémoli

64. Carlos Mémoli is a pediatrician and, in 1990, he was a member of the Management Committee of the *Asociación Italiana de Socorros Mutuos, Cultural and Creativa "Porvenir de*

[76] In particular, the copy of a newspaper with the declarations of Judge Zaffaroni "to illustrate" precautionary measures in Argentina, identified as No. 2.

[77] In particular, the State presented a complete copy of the criminal file of the proceeding for defamation against Messrs. Mémoli; a copy of a decision of April 6, 2006, in which Pablo Carlos Mémoli is admonished, and a copy of the newspaper *La Libertad* of March 6, 2013, all of which this Court considers useful for the complete analysis of this case. For their part, the representatives provided copies of documents concerning the civil action opened against them (copy of the remedy of complaint of December 11, 1996, judgment of the Supreme Court of Justice of the Nation of October 3, 1997, and judgment of the Supreme Court of Justice of the Nation of December 10, 1997), copies of documents relating to the administrative complaint made before INAM (copy of the decision of the National Mutual Action Institute of June 12, 1991, and copy of the notification of the National Mutual Action Institute of June 11, 1991), as well as documents related to the *Asociación Italiana de Socorros Mutuos* and the matter of the irregular sale of the burial niches in the municipal cemetery (copy of the publication of March 13, 1996, entitled "*Asociación Italiana de Socorros Mutuos 'Porvenir de Italia'*"; copy of a declaration by a judge who was a member of the Italian Association; copy of the letter of Rolando Argentino Cristófaro, identified with the number 7; copy of ordinance No. 114 of December 21, 1984, leasing part of the cemetery to the Italian Association, identified with the number 8, and copy of a lease on the municipal cemetery, identified with the number 10), and a report of the *Centro de Estudios Legales y Sociales* (CELS) on the *Kimel* case and the need to amend the civil norms that had affected Mr. Kimel's freedom of expression, identified with the number 45, all of which the Court considers useful for the analysis of this case, insofar as they help to clarify, and to provide context to, some of its facts.

Italia" (hereinafter "the Italian Association" or "the Association").[78] Pablo Carlos Mémoli (hereinafter "Pablo Mémoli"), Carlos Mémoli's son, is a journalist and a lawyer, and Managing Director of *La Libertad*, a newspaper founded in 1945, published twice a month in San Andrés de Giles, a town 100 kilometers from Buenos Aires.[79]

65. In 1984, the Municipality of San Andrés de Giles leased the Italian Association a plot of land in the Municipal Cemetery for "the construction of burial niches [so that it could], offer them to its members, by instalment payments."[80] The Italian Association offered these burial niches to its members, built in the so-called "Italian Vault," "under sales contracts."[81]

66. In 1989, the Italian Association began to offer an Italian language course. Clotilde Romanello, wife of the Vice President of the Italian Association (Humberto Romanello), was appointed course Director, and her son, Sergio Romanello, was appointed Assistant Director and teacher.[82]

67. According to Carlos Mémoli, his wife, Daisy Sulich de Mémoli, offered her services to participate "in an honorary capacity" as a teaching assistant. Following "constant obstacles" or requests for explanations that went unanswered about the "family privileges" granted to Mr. Romanello, it was suggested that Mrs. Mémoli take part in a public competition to see who the most qualified candidate was.[83] According to Carlos Mémoli, Daisy Sulich came forward and presented her diplomas and curriculum vitae, while Mr. Romanello's son and wife did not do

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[78] *Cf.* Certification of membership payment issued by the Italian Association (file of proceedings before the Commission, folio 840), and decision of June 6, 1990, of the Criminal Judge of the province of Buenos Aires (file of annexes to the Merits Report, annex 4, folio 218). Under the provisions of article 2 of Law No. 20,321, mutual associations are associations that are "freely constituted, not-for-profit, by persons inspired by solidarity, in order to offer each other mutual assistance in the event of future risks or to contribute to their material and spiritual well-being, by regular contributions" (file of annexes to the State's final written arguments, annex II, folio 3772). According to information provided by Carlos Mémoli in a radio program broadcast on May 10, 1990, he had "been a member of the Italian Association for around one year." *Cf.* Transcript of program broadcast by Radio Vall on May 10, 1990, included in the case file of the criminal proceedings (file of annexes to the State's final written arguments, annex III, folio 3923).

[79] *Cf.* Pleadings and motions brief (merits file, folio 85), brief with final arguments of the representatives (merits file, folio 700); *La Libertad* newspaper dated September 3, 2004 (file of proceedings before the Commission, folio 1377), and 2004 Santa Clara de Asks Award (file of proceedings before the Commission, folio 1374). The State specified that San Andrés de Giles is 110 kilometers from Buenos Aires. *Cf.* Brief with final arguments of the State (merits file, folio 833).

[80] Judgment of the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Province of Buenos Aires, of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folios 80 and 81). See also: Ordinance No. 114 of December 17, 1984, of the Town Council of San Andrés de Giles (file of annexes to the State's final written arguments, annex III, folio 3864), and Ordinance No. 147/88, Official gazette for the period January-December 1988 of the Town Council of San Andrés de Giles (file of proceedings before the Commission, folios 876 and 877).

[81] Judgment of the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Province of Buenos Aires, of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folio 81).

[82] *Cf.* Communiqué (*solicitada*) entitled "*Autoritarismo e irregularidades de una Comisión Directiva"* [Authoritarianism and irregularities of a Management Committee], published by Carlos Mémoli in the newspaper *La Libertad* on April 14, 1990 (file of annexes to the State's final written arguments, annex III, folio 3881); transcript of the program broadcast by Radio Vall on May 10, 1990, included in the case file of the criminal proceeding (file of annexes to the State's final written arguments, annex III, folio 3923), and brief of lawsuit for defamation against Messrs. Mémoli (file of annexes to the State's final written arguments, annex III, folio 4152). According to the Diccionario de la Real Academia Española a "*solicitada*" is an article or news item that a private individual is interested in seeing published and that, at his request, is incorporated into the newspaper against payment.

[83] *Cf.* Communiqué (*solicitada*) entitled "*Autoritarismo e irregularidades de una Comisión Directiva"* published by Carlos Mémoli in the newspaper *La Libertad* on April 14, 1990 (file of annexes to the State's final written arguments, annex III, folio 3881).

this.[84] According to the members of the Management Committee of the Italian Association, Mrs. Sulich de Mémoli was not accepted as an assistant for the Italian course, because "according to the teacher offering the course, her appointment was unnecessary," as was the holding of a public competition.[85]

68. On March 21, 1990, this dispute was aired in an Assembly of the Italian Association, during which it was decided to suspend Carlos Mémoli and his wife from the Association for 24 months.[86] The Mémolis appealed against this suspension from the Association. However, the suspension was confirmed during an Assembly of the Italian Association on May 11, 1990.[87]

69. On April 11, 1990, Carlos Mémoli filed a criminal complaint against Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz, members of the Management Committee of the Italian Association, before the Criminal Judge of the province of Buenos Aires, indicating that the offer of the burial niches constituted "the offense of fraud" because "the lot where the vault of [the Italian Association] is situated is located on land belonging to the public domain."[88] According to the versions of Carlos and Pablo Mémoli, this complaint was made at the request of several members of the Association.[89]

70. On June 6, 1990, the Judge responsible for hearing the complaint for fraud in the case of the burial niches decided to dismiss the case provisionally, because "there was insufficient merit." In his decision, the Judge indicated that, based on "all the documents in the proceedings," he "had to presume that [the accused] committed an excusable legal error by structuring the use of burial niches [… by means of sales contracts] owing to erroneous advice." Thus, he considered that the accused "were acting in good faith; in other words, without ruses or deceit or any other fraudulent conduct." Nevertheless, the Judge recognized that "from the first, a contract with an impossible purpose was decided, which was naturally invalid," but that this was changed for a commodate agreement "without prejudice to the

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[84] *Cf.* Communiqué (*solicitada*) entitled "*Autoritarismo e irregularidades de una Comisión Directiva"* published by Carlos Mémoli in the newspaper *La Libertad* on April 14, 1990 (file of annexes to the State's final written arguments, annex III, folio 3881); transcript of the program broadcast by Radio Vall on May 10, 1990 included in the case file of the criminal proceeding (file of annexes to the State's final written arguments, annex III, folio 3923), and Report of the INAM Monitoring Department, of April 1991 (file of annexes to the State's final written arguments, annex III, folios 3901 and 3903).

[85] *Cf.* Communiqué of May 9, 1990, issued by the members of the Management Committee (file of annexes to the State's final written arguments, annex III, folios 3928 and 3930), and complaint for libel and defamation against Carlos and Pablo Mémoli, filed by Alberto Salaberry, on behalf of Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz (file of annexes to the State's final written arguments, annex III, folio 4153).

[86] *Cf.* Report of the Head of the INAM Monitoring Department of April1991 (file of annexes to the State's final written arguments, annex III, folio 3901); report of the Head of the INAM Legal Affairs Department of May 13, 1991 (file of annexes to the State's final written arguments, annex III, folio 3906) and judgment of Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 132 and 133).

[87] *Cf.* Report of the INAM Monitoring Department of April 1991 (file of annexes to the State's final written arguments, annex III, folio 3901); report of the INAM Monitoring Department of May 13, 1991 (file of annexes to the State's final written arguments, annex III, folio 3906), and judgment of Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 132 and 133).

[88] Decision of June 6, 1990, of the Criminal Judge of the province of Buenos Aires in case No. 73,679 (file of annexes to the Merits Report, annex 4, folio 218).

[89] *Cf.* Transcript of the program broadcast by Radio Vall on May 10, 1990, included in the case file of the criminal proceeding (file of annexes to the State's final written arguments, annex III, folio 3926); transcript of the program broadcast by Radio Vall on May 4, 1990, included in the case file of the criminal proceeding (file of annexes to the State's final written arguments, annex III, folios 3915 and 3916), and brief of March 2, 1998, signed by Carlos Mémoli answering the civil complaint (file of annexes to the Merits Report, annex 21, folio 275).

possibility of, in the future, by mutual agreement, structuring the deal legally." The Judge also indicated that "at present, no patrimonial damage had been caused," and that "the implications of the new legal mechanism established for the relationship should be discussed in the administrative and/or civil jurisdiction." Consequently, the criminal Judge decided to dismiss the case provisionally because "there was insufficient merit […] since the perpetration of the offense investigated had not been proved."[90] This decision was appealed, but the appeal was rejected on June 13, 1990.[91]

71. In parallel to this criminal proceedings, Carlos and Pablo Mémoli also filed a complaint before the National Mutual Action Institute (hereinafter "INAM"), requesting an investigation of the Italian Association and its Management Committee, for supposed accounting irregularities in the administration of funds, owing to the treasurer's failure to submit balance sheets and reports; supposed irregularities in the appointment of the teacher for the Italian School; the supposed fraud committed in relation to the case of the burial niches, and supposed errors committed in the publication of the announcements to convene two Assemblies of the Italian Association.[92] On June 19, 1991, the Directors of INAM issued a decision in which it was decided "[t]o reject, in part, the complaint filed by Carlos Mémoli." The INAM considered, *inter alia*, that the matter relating to the Italian School was "an internal matter of the association." In addition, it concluded that "although an error had been made, [because monthly reports and quarterly statements had not been provided as required by the Association's Statutes], no irregularity had been detected, and it had not been proved that any offense had been committed, so that they would [only] be required to comply strictly with the provisions in force regarding the administration of the Association's funds." Furthermore, it decided "[t]o require the entity to ratify the decisions" of the Special General Assembly of May 11, 1990, "because it was not in compliance with the deadline established for the publication of official announcements." Lastly, it indicated that "the said Assembly should have approved the Regulations of the Association's Vault and [of the] Italian language course, and these should then have been forwarded to this Institution."[93]

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[90] Decision of June 6, 1990, of the Criminal Judge of the province of Buenos Aires in case No. 73,679 (file of annexes to the Merits Report, annex 4, folios 219 and 220).

[91] *Cf.* Report of the INAM Monitoring Department of May 13, 1991 (file of annexes to the State's final written arguments, annex III, folio 3907).

[92] *Cf.* Judgment of the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Province of Buenos Aires of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folio 81), and judgment of Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 133).

[93] In this decision, the INAM Board excluded the aspect of the complaint corresponding to the issue of the burial niches in the municipal cemetery, indicating that the criminal judge had ordered the provisional dismissal. Regarding the publication of official announcements, it indicated that "although it is true that the convocation was disseminated widely, the fact is that the legal provisions were not complied with." *Cf.* Decision No. 509 of June 19, 1991, of the INAM Board (file of annexes to the State's final written arguments, annex III, folios 3912 to 3914). "The Permanent Legal Service of [INAM] intervened," in this decision, and reports were prepared by the Legal/Accounting Department (of March 1991) and the Monitoring Department (of April 1991), where it was recorded that neither the monthly reports nor the quarterly balance sheets "ordered by the Association's statute, [had been produced, so that m]anagement is at fault in this regard"; however, the Association's books show that "the administration is correct and no prejudices for the Association have been noted." Also, these reports show that the Italian Association had not approved the Regulations for the services of the "Italian Vault" or for the Italian School, and "if they provide […] services that are offered by the mutual association, […] they should be regulated and approved by INAM." Report of the INAM Monitoring Department of April 1991 (file of annexes to the State's final written arguments, annex III, folio 3903). Also, *Cf.* Report of the INAM Legal Affairs Department of May 13, 1991 (file of annexes to the State's final written arguments, annex III, folio 3908), and report of the INAM Legal/Accounting Department of March 20, 1991 (file of annexes to the State's final written arguments, annex III, folios 3899 and 3900).

72. In April 1991, the Italian Association convened its regular General Assembly, including on the agenda a request of several members of the entity to expel from the Association Carlos Mémoli and his wife, who had been suspended since March 1990 (*supra* para. 68). In "letters document" (*cartas documentos*)[94] of April 4 and 12, 1991, Carlos Mémoli and Daisy Sulich de Mémoli were informed of this situation "[i]n order to guarantee their right of defense."[95] In response, on April 16, 1991, Mr. Mémoli and Mrs. Sulich de Mémoli communicated their "irrevocable resignation of their membership in the association."[96]

73. During and after these events, Carlos Mémoli sent a series of "letters document" to the members of the Management Committee of the Italian Association, and also, together with his son, Pablo Mémoli, published several articles in *La Libertad* and took part in radio broadcasts, denouncing these situations and others, which they characterized as irregularities or non-compliance with the norms in force by the said Management Committee.[97]

B. Criminal proceeding against Carlos and Pablo Mémoli

74. In April 1992 Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz (hereinafter "the complainants," or "the plaintiffs," in the civil proceeding – *infra* paras. 95 to 108) filed a "complain for libel and defamation against Pablo Mémoli and Carlos Mémoli."[98] The complainants stated that, after "Daisy Sulich de Mémoli [had not been hired] as a teacher at the Italian School, […] [Carlos Mémoli and Pablo Mémoli] began a smear campaign against [the complainants]" (*supra* paras. 67 and 73).[99] In particular, the complainants accused the presumed victims owing to statements made in around twenty documents or interventions in newspaper articles, 'letters document,' and communiqués (*solicitadas*), as well as interventions in radio programs, where the presumed victims had referred to the administration of the Italian Association and the case of the burial niches.[100]

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[94] According to the information in the case file, a "letter document" is a type of official document in Argentina (based on the way in which it is sent and the formalities observed). The Court understands that it consists in a letter by which the sender formally requires the recipient to do something, or officially notifies the latter of something, and it constitutes a form of legal notification that is valid without judicial procedures and that does not require notarizing.

[95] "Letters document" of April 4 and 12, 1991, addressed to Carlos Mémoli and Daisy Sulich de Mémoli by the Italian Association (file of annexes to the State's final written arguments, annex III, folios 3983 to 3990).

[96] "Letter document" of April 16, 1991, signed by Carlos Mémoli and addressed to the President of the Italian Association presenting his resignation from the Association (file of annexes to the State's final written arguments, annex III, folios 3991 to 3994), and "letter document" of April 16, 1991, signed by Daisy Sulich de Mémoli and addressed to the President of the Italian Association presenting her resignation from the Association (file of annexes to the State's final written arguments, annex III, folios 3995 and 3996).

[97] *Cf.* Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 133 and 175), and special federal appeal filed on October 8, 1996 (file of annexes to the Merits Report, annex 1, folio 10).

[98] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 131), and complaint for libel and defamation against Carlos and Pablo Mémoli, filed by Alberto Salaberry, on behalf of Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz (file of annexes to the State's final written arguments, annex III, folios 4151 to 4192).

[99] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 132).

[100] In particular, the complainants denounced Messrs. Mémoli for four letters document of April 6, 1990; several publications made in the newspaper *La Libertad* between April 14, 1990, and November 25, 1990, and also on May 28, 1991; certain documents presented to INAM dated May 3, and June 21 and 27, 1990, and their interventions in two programs broadcast by Radio Vall on May 4 and 10, 1990. *Cf.* Complaint for libel and defamation against Carlos and Pablo Mémoli, filed by Alberto Salaberry, on behalf of Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz (file of annexes to the State's final written arguments, annex III, folios 4154, 4167, 4172 to 4180).

B.1) First Instance decision

75. On December 29, 1994, Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes delivered the judgment in first instance. In this decision, the Court established that Pablo Mémoli had committed the offense of defamation owing to some phrases included in: (1) an article entitled "*Maniobras de una Comisión Directiva,*" [A Management Committee's intrigues] published on April 28, 1990, where Pablo Mémoli referred to the upcoming regular Assembly of the Italian Association and indicated that the members of the Management Committee were allegedly accessories to the offense of fraud, as well as mentioning what he considered irregularities in the accounting committed by the Association's treasurer; (2) an editorial article entitled "*El dolo en el caso de los nichos,"* [Fraud in the case of the burial niches], published on April 28, 1990, in *La Libertad,* where presumably Pablo Mémoli "seeks to prove that the complainants acted with the intention to cause harm, because they knew or should have known that it was not possible to sell the burial niches"; (3) a column published under the pseudonym "Chusman" in *La Libertad* of April 28, 1990, mocking the facts relating to the case of the burial niches; (4) an intervention in a program broadcast by Radio Vall on May 4, 1990, where Pablo Mémoli referred to the supposed arbitrary administration, corruption, and failure to respond of the Italian Association in relation to the case of the burial niches, among other matters; (5) an intervention in a program broadcast by Radio Vall on May 10, 1990, in which Carlos and Pablo Mémoli participated, and reference was made to the case of the burial niches, the exchange of sales contracts for commodate contracts, and the supposed pressure exerted by some members of the Management Committee of the Italian Association, and (6) an article entitled "*Caso Nichos: el juez dijo que los boletos de compraventa son de objeto imposible e inválidos. Todos los compradores sin excepción fueron perjudicados*" [Burial niches case: the judge said that the object of the sales contracts is imposible and invalid. All the purchasers were prejudiced], published in *La Libertad* on June 16, 1990, in which Pablo Mémoli stated that "the case file reveals the wilful intent" with which the members of the Management Committee of the Italian Association acted in relation to the sale of the burial niches, even though the decision had been issued to provisionally dismiss the case concerning the presumed fraud in this regard.[101]

76. In that decision it had also been concluded that Carlos Mémoli had committed the offense of defamation for statements made in: (1) the program broadcast by Radio Vall on May 10, 1990, in which he took part together with Pablo Mémoli (*supra* (5)), and (2) for a statement included in a document presented to INAM on June 27, 1990.[102]

77. In particular, regarding the article "*Maniobras de una Comisión Directiva*"[103] (*supra* para. 75.1), the first instance judge considered that the statement in which the members of

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[101] *Cf.* Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 177 to 204, 212 to 216).

[102] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 194 to 199, 202 to 204 and 214).

[103] This article states: "Since the beginning of the month, Romanello, Piriz and Guarracino have been maneuvering to continue entrenched in the Italian Association of San Andrés de Giles. There are members of the Management Committee who follow them blindly. Half of them are relatives or friends of those denounced or are related to them professionally. Unfortunately, those concerned do not inform the latter that they are accessories to the presumed offense of fraud and that they could be prosecuted alongside them [Romanello, Piriz and Guarracino] for preventing this denunciation from being investigated by the Association. The members of the Management Committee have rejected the request for an investigation; they have refused this and are helping those concerned to conceal the issue by going from house to house, person to person, seeking unconditional support. […] In a 'letter document' at the end of this edition, we are asked to retract without telling us why we must do this; without showing how we are mistaken. Not only will we not retract, but we accuse all the signatories as accessories because they are

the Management Committee, who included the complainants, were referred to as "accessories to the presumed offense of fraud," and that "in addition [to the complainants], the other members of the Management Committee would be prosecuted," constituted defamation, inasmuch as "the complainants were being defamed by conjectures." In addition, the said judge considered that the statements made by Pablo Mémoli in the said article about the Association's annual accounts and the possible lack of truth of the invoices, was "a libelous assessment." In the opinion of this judge:

> The indication of a categorical result to a criminal proceeding that has recently started [...] goes beyond an analysis of the news or the criticism of a mandate, and enters the realm of the characterization of conducts, which they had even been warned to abstain from by 'letter document' [... and] it was done with full knowledge of the intention with which it was written, and that the opinions were detrimental and with the intention to reproduce them. [...] [Regarding Mr. Mémoli's statement about the truth of the Association's balance sheets, he considered] that this is not a criticism, [... nevertheless,] the intention to question the actions of [Messrs. Romanello and Piriz], ironically, is evident from the article. [...] There is *animus injuriandi* [because] there was understanding and the intention to say what was said and the way in which it was expressed, which, at the very least, was aimed at trying to discredit the persons named before the Association. And, fundamentally because it is possible to give an opinion without going to these extremes.[104]

78. The court also considered defamatory the content of the article "*El dolo en el caso de los nichos*"[105] of April 28, 1990 (*supra* para. 75.2), because "not only are dishonorable comments made, but also fraudulent conduct [was] attributed in the absence of a judicial ruling, even satirizing the issue and not leaving any doubts in the air about certain acts, but affirming them, producing disrepute, [...] knowing what [was] said and done."[106] In addition, the court examined a column published under the pseudonym "*Chusman*" (*supra* para. 75.3), published in the same issue, and determined that it was "offensive, constituting the offense

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not explaining the issue to the members who feel defrauded. All of them should respond before the courts. [...] The friends of these men have already been invited to attend the Assembly meeting. [...] The issue of the burial niches is not included on the agenda and, therefore, will not be discussed. Elections will be held for a new President to replace Guarracino, and this will be his relative Guido Salese, Guarracino will be Secretary, and Romanello will continue to be Vice President. The Treasurer, Piriz, whose term ends, will be re-elected. In other words, nothing will change. The treasurer is accused of having violated the Statute by never producing accounts [...] over the last year, and some sources indicate that he has not done so in the last five years. Piriz always reads out the financial statement during the regular General Assembly without any type of control. In other words, he reads out whatever he wants. [...] Today, they have hired an accountant to produce the annual accounts. This professional began to work around April 9 on the invoices and documentation presented by Romanello and Piriz, which, logically, coincides perfectly to produce a healthy balance sheet. The difference stems from the fact that, logically, the accountant will not investigate the truth of these invoices and, in good faith, will work on them. *LA LIBERTAD* will investigate." Article entitled "*Maniobras de una Comisión Directiva*," published in the newspaper *La Libertad* on April 28, 1990, included in the file of the criminal proceedings against Carlos and Pablo Mémoli for libel and defamation (file of annexes to the State's final written arguments, annex III, folio 3797).

[104] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 179, 180 and 182).

[105] This article states: "We believe that an offense leading to a public action has been committed; not only should the press intervene, but also any citizen who becomes aware of a presumed fraud. No one can hide these offenses without becoming an accessory. [...] The six lawyers consulted by this newspaper left no doubt about this deception. [...] In 1985, sales contracts were drawn up; in 1987, some of the 'purchasers' were made to sign a commodate contract and, in 1988, sales contracts were again issued to those who acquired burial niches in an expansion carried out. We believe that throughout all this time, and based on this signed documentary evidence, [the complainants] cannot argue that they acted in good faith in this regard, because both they and the notary who advised them could have rectified any initial theoretical error. For five years they have done nothing; the procedures have been repeated and, to date, they have not explained the matter to anyone. This is why we believe that they acted with wilful intent (aware of what they were doing). [...] Therefore, we believe that wilful intent existed, unless [the complainants] show that they came from another planet, sold burial niches for five years, spoke to no one, and left for another galaxy." Article entitled "*El dolo en el caso de los nichos,*" published in *La Libertad* on April 28, 1990 (file of annexes to the final written arguments of the representatives, folio 3718).

[106] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 184).

of defamation because [the phrase "suspicion did not fall on the possible offenders, but on the victims or those who denounced them"] denigrates the reputation of the complainants," so that "Pablo Mémoli, author of this publication, should also respond for the offense of defamation."[107]

79. The court also determined that certain statements[108] made by Pablo Mémoli during the radio program of May 4, 1990, constituted the offense of defamation (*supra* para. 75.4).[109] The first instance court considered that:

> It is evident that [the statements of Pablo Mémoli,] where he accuses [the complainants of] acting with subterfuges (*tretas*) and deceit (*manganetas*), may be considered defamatory, because the obvious intention is to discredit the complainants in their actions as members of the Italian Association, at the very least, attributing them with dishonorable conduct. Moreover, if we abide by the grammatical meaning of the word subterfuge (*treta)* which signifies: 'trick, ruse, artifice …' and 'deceit' (*manganeta*) 'trickery, subterfuge, etc…,' we have proof of the offense of defamation. [He also considered that] paragraphs [in which] the complainants are classified as corrupt, a word […] used repeatedly in the said paragraphs and addressed at the three members of the Management Committee, must be considered to have a discrediting content, because it affects their reputation," which constitutes the offense of defamation.[110]

80. Also, both Carlos and Pablo Mémoli were convicted of the offense of defamation owing to certain statements made during the radio program of May 10, 1990[111] (*supra* paras. 75.5 and 76.1). The court indicated that, based on the said statements, "they [had] attributed malicious conduct to the complainants"; they had "harmed the honor of [the complainants]

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[107] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 185). Despite having requested it (*supra* para. 8 and note 7), the Court does not have the complete text of this article.

[108] The first instance court examined nine parts of the broadcast by Pablo Mémoli and considered that five of them "did not constitute, in [its] understanding, defamation, because [they were] opinions on the matter, which could not be considered denigrating." Regarding the fifth of these statements, the judge considered that "by mentioning that it was a crude deception, it should be taken into account that, at the time of the broadcast, there had been no judicial decision on the issue," and that, therefore, "what was the basis for a criminal complaint that was under investigation, c[ould not be considered defamatory." Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 192 and 193).

[109] During this program, Carlos Mémoli said: "In this case we have no explanations. Thus, this Management Committee – which is not the Management Committee; we accuse Messrs. Romanello, Guarracino, and Piriz who is the treasurer, of all these arbitrary, authoritarian manoeuvers,; they don't provide any explanations, they do whatever they want. Many things surprise us; the complaint has been filed before the judge; yesterday, we went to the court and we were very surprised, extremely surprised; we are acting honestly and in good faith and with the truth, which is the only thing that we want to find, and these individuals are acting with lies, with subterfuges and deceit, which obviously we are discovering and, with our lack of experience, we have to combat them. Two newspapers have printed serious accusations, but no one has offered any explanations, and just yesterday, May 3, a communiqué appears stating that: The Management Committee of the *Asociación Italiana de Socorros Mutuos, Cultural y Recreativa*, as a result of the false accusations that are public knowledge, invites the members of the association, owners of the right to the burial niches in the Vault, to a meeting to be held in the offices of the Rotary Club of this town on Saturday, May 5, that is, tomorrow, at 10 a.m., in order to clarify any doubts and confusion that may exist with regard to the said burial niches, all caused by unknown intentions of those who publish unfounded falsehoods. I invited those who signed this […] and, to date, we have had no response in this regard, apart from the fact that this is public knowledge." Transcript of the intervention of Pablo Mémoli in the program broadcast by Radio Vall on May 4, 1990, included in the case file of the criminal proceeding (file of annexes to the State's final written arguments, annex III, folio 3916).

[110] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 193 and 194).

[111] As in the case of another radio program, the first instance court cited parts of the program and considered that nine of the 13 parts identified by the complainants as defamatory were "mere comments or opinions on a certain topic" and did not have a defamatory content. *Cf.* Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 197 to 199).

because they attributed dishonest actions to them, […] since, by accusing them of lying, […] the complainants' reputation was harmed, because their honesty was being questioned with the adjectives used about their actions."[112]

81. That court also examined an article by Pablo Mémoli entitled "*Caso Nichos: el juez dijo que los boletos de compraventa son de objeto imposible e inválidos*" (*supra* para. 75.6). Since this article was published after the judge had issued his decision on the presumed fraud concerning the burial niches (*supra* para. 70), the first instance judge considered that the statements made by Pablo Mémoli, attributing wilful intent to the complainants' actions, constituted the offense of defamation.[113] According to this decision:

> An article subsequent to [the judicial decision on dismissal] refers to fraud, classifying the act as presumed fraud, despite the judge's decision, and using terms that can be considered denigrating, because they affect the honor of the targeted individuals in the Association and […] were written with full knowledge of what was being done and said and, what is even more serious, even though a judicial decision existed that indicated the contrary. Therefore, [Pablo Mémoli] must face criminal charges for defamation as the author of the said publication.[114]

82. Finally, the first instance court considered that certain statements made by Carlos Mémoli in a document submitted to INAM on June 27, 1990 (*supra* para. 76.2) also constituted the offense of defamation. The court determined that "the word 'unscrupulous' used to describe the three complainants were excessive in the context of the submission [to INAM], constituting a voluntary digression to insult them, because the attempted personal affront was neither necessary nor essential in the context of the complaint made, and […] was included with full knowledge of what was said and done."[115]

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[112] In particular, the first instance court considered the following statements detrimental: (1) "[…] thus, this shows that they drew up this sales contract with full knowledge, perhaps, that it was incorrect; this is why, in our newspaper, we explain this as fraud " (attributed to Pablo Mémoli); (2) […] we are sure, we have documentation, everything is written down, we are not inventing anything, we don't need to lie, not even to be slightly deceitful about anything, absolutely anything; but they do, they do and they are doing so" (attributed to Pablo Mémoli); (3) "[…] denigrating also" (attributed to Pablo Mémoli); (4) "[…] denigrating and lying, intimidating some people, threatening others, this is not correct […]" (attributed to Carlos Mémoli). Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 195, 197 and 198).

[113] This article reads: "This newspaper, under the responsibility of its director, considered the act to be presumed fraud, and we continue to maintain this, because the case file reveals the fraud from the evidence provided by the accused who did not hesitate to be (mendacious) and (fallacious), before the courts themselves. When the judge referred to a contract with an impossible object, in our opinion, he was saying that they sold what could not be sold. […] There is no doubt that everyone who bought what could not be sold was defrauded […]." Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 199 and 200). See also, Article entitled "*Caso Nichos: el juez dijo que los boletos de compraventa son de objeto imposible e invalidos*" by Pablo Mémoli, published on June 16, 1990, in the newspaper *La Libertad* in San Andrés de Giles (file of annexes to the final written arguments of the representatives, folios 3719 and 3718).

[114] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 200 and 201).

[115] In this document Carlos Mémoli states, *inter alia*, the following: he "reiterate[s] once again that, in [his] opinion, INAM, as a monitoring body, should take control urgently of the Management Committee of the Italian Association of San Andrés de Giles. The totally 'DISCRETIONAL" administration of [the complainants] over the last six years is notorious. […] It is essential that INAM end this take-over and the repeated violations of the Statute; the impunity with which those who stand in the way of three unscrupulous members of the Management Committee, such as Guarracino, Piriz and Romanello, who, abusing their circumstantial majority, commit any act of arbitrariness, are suspended. […] Based on all these considerations, and the irregular publication of official announcements, the expenses incurred by the Institution because of the Management Committee, the doubtful actions of the treasurer; the actions to avert a balance sheet prepared by our accountant, and in defense of the Institution, we request the annulment of the report of the INAM accounting lawyer because it is partial and irregular from every point of view, and neither in keeping with nor based on law." Document of June 27, 1990, addressed by Carlos Mémoli to INAM that is included in the case file of the criminal proceeding (file of annexes to the State's final written arguments, annex III, folios 3952 to 3956). In his decision, the first instance judge rejected that the other parts of the said document that

83. In addition, the court considered that the statements contained in the other documents, articles and communications based on which the complaint was filed against Messrs. Mémoli did not constitute the offenses of libel or defamation.[116] The court also underscored that, "the evidence provided to the case file d[id] not reveal that the complainants had made any insulting remarks about the respondents, which eliminates the possibility of compensation for them."[117] Regarding the "freedom of the press cited by Pablo Mémoli," the first instance court indicated that the fact that criminal charges were brought against Mr. Mémoli for some of his published statements, "does not mean […] a restriction or limitation of the freedom cited," because "freedom of the press […] cannot protect, giving rise to impunity, those who cite it and, by their actions, harm the rights of third parties that also deserve protection."[118] In addition, the first instance court expressly ruled on "Pablo Mémoli's attempted defense based on public interest," indicating that:

> The central element of the dispute is a private institution and the matters that are discussed or decided in it affects its members, but not the whole community; and, furthermore, it is possible to criticize what is happening in a specific institution, without resorting to insults.[119]

84. Based on all the above considerations, the first instance court sentenced Carlos Mémoli "to a suspended sentence of one month's imprisonment, with costs," while Pablo Mémoli was sentenced "to a suspended sentence of five months' imprisonment, with costs." Regarding the complaint for damages, the court determined that "it was not in order to admit it, since they had not appeared before the court as plaintiffs demanding damages." The court ordered that the judgment be published in *La Libertad* and broadcast on Radio Vall in a single FM program.[120]

B.2) Decision on appeal

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had been indicated by the complainants as insulting, constituted the offense of defamation, because he considered that "separately and in their context, they do not appear to have been said with *animus injuriandi*, because they are part of a presentation to an administrative authority in defense of the signatory's rights and in keeping with his authority because he had been member of the association." Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 204).

[116] In particular, the "letters document" of April 6, 1990, and the publication of an article entitled "*Autoritarismo e Irregularidades de Miembros de una Comisión Directiva*" [Authoritarianism and irregularities of members of a Management Committee] in *La Libertad* on April 14, 1990, both by Carlos Mémoli; articles "*Denuncian presunta defraudación*" [Presumed fraud denounced] of April 14, 1990, "*Toman declaración a adquirientes de nichos*" [Statements taken from those who acquired burial niches] of April 28, 1990, "*Caso nichos: Torpe amenaza a la libertad"* [Burial niches case: clumsy threat to freedom] of November 25, 1990, and another article of May 28, 1991, the columns of "*Chusman*" of April 14 and July 15, 1990, all the documents of Pablo Mémoli, as well as the documents of May 3 and June 21, 1990, submitted to INAM. *Cf.* Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 170, 172, 173, 174, 175, 177, 185, 186, 201, 202, 204, 205, 206 and 207).

[117] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 210)

[118] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 209 and 210).

[119] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folio 208).

[120] *Cf.* Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes of December 29, 1994, case No. 71,114 (file of annexes to the Merits Report, annex 3, folios 210, 211, 214 and 215).

85. Messrs. Mémoli and the representative of the complainants appealed the first instance decision.[121] On November 28, 1995, a hearing was held on the case and, the same day, it was decided to convene another hearing, because "the complainants did not have the opportunity to answer the arguments of the respondents," and this was held on December 5, 1995.[122] The following day, the presumed victims requested the annulment of the said hearing, indicating that it was not contemplated by law and that, by granting the complainants the opportunity to dispute [their arguments], the respondents were "left in a position of inequality before the law."[123]

86. On December 28, 1995, the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, province of Buenos Aires delivered judgment in second instance.[124] The Chamber referred to the request for annulment filed by Messrs. Mémoli's lawyers concerning the hearing held on December 5, 1995. In this regard, the Chamber indicated that it had been held because the complainants' lawyer "had been deprived of considering and disputing the arguments of the other party, because he had made his arguments first [at the hearing held on November 28], thus being placed in a situation of inequality." In addition, the Chamber indicated that "if new arguments were admitted, logically, the situation would be never-ending"[125] and, therefore, rejected the presumed victims' request for annulment.

87. Regarding the merits, the Chamber confirmed fully the decision of the first instance court. The Chamber agreed with the considerations of the first instance court concerning the reasons why some of the statements made by the Messrs. Mémoli, issued in two radio programs, four newspaper articles and one document, constituted the offense of defamation (*supra* paras. 77 to 82), and also confirmed that the other statements for which the presumed victims had been sued did not constitute the offense of either defamation or libel (*supra* para. 83). In particular, regarding the conviction for defamation resulting from the article entitled "*Maniobras de una Comisión Directiva*" (*supra* paras. 75.1 and 77), the Chamber considered that "freedom of the press and the journalist's duty to provide information" alleged by Pablo Mémoli was no "excuse," because "the rights recognized by the [Constitution] are not absolute, but end where the rights of third parties begin." It also indicated that:

> The first duty of the press is objectivity, and the right to publish its opinions must be implemented within the limits of reasonableness; however, this responsibility is exceeded unnecessarily not only when the journalist is not objective, but also when unnecessarily insulting expressions are used that affect the reputation or rights of third parties.[126]

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121 *Cf.* Judgment of the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, province of Buenos Aires, of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folios 63 to 129).

122 *Cf.* Record of the hearing of November 28, 1995 (file of proceedings before the Commission, folios 932 to 943); notification of November 28, 1995 (file of proceedings before the Commission, folio 944), and record of the hearing of December 5, 1995 (file of proceedings before the Commission, folios 945 to 951).

123 Request for annulment of December 6, 1995, of the hearing held on December 5, 1995 (file of proceedings before the Commission, folios 952 and 953).

124 *Cf.* Judgment of the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, province of Buenos Aires, of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folios 63 and 68).

125 Judgment of Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Province of Buenos Aires, of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folio 79).

126 Judgment of Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Province of Buenos Aires, of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folios 89 and 90).

88. Furthermore, the Chamber expressly rejected the alleged status of public interest of the statements made by Messrs. Mémoli. In this regard, in the said decision it indicated that "furthermore, neither can the citing [by the presumed victims] of 'to defend or to guarantee actual public interest' be admitted" because "when the law (C.P. 111)[127] refers to 'public interest,' it is basically referring to the usefulness for the whole population or of all the components of a social group and this essentially in relation to the interest of the State, to its legal interests, all of this compared to a more or less general interest, but only of persons or associations." The Chamber confirmed "the suspended sentences of one month's imprisonment for Carlos Mémoli and five months' imprisonment for Pablo Mémoli, with costs, and the obligation of both of them, within ten days […] to publish the sentencing part of the judgment."[128]

B.3) Subsequent remedies

89. The presumed victims filed an appeal for clarification of the second instance judgment, which was declared inadmissible on April 25, 1996.[129] In addition, they filed an appeal for declaration of nullity and non-applicability of the law against the second instance judgment before the Supreme Court of the province of Buenos Aires, where they questioned the decision concerning the hearing of December 5, 1995 (*supra* paras. 85 and 86), and that it had not taken into account, among other matters, "the defense argument made by Pablo Mémoli, as a journalist, of the right to freedom of the press."[130] On April 18, 1996, the Second Chamber for Criminal and Correctional Matters of Mercedes decided "[t]o refer the special appeal on unconstitutionality to the Supreme Court of Justice of the province of Buenos Aires," while it declared that the special appeal on non-applicability of the law was inadmissible.[131]

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[127] Article 111 of the Argentine Criminal Code, in force at the time, established: "[a]nyone accused of libel can only prove the truth of the imputation in the following cases: (1) If the purpose of the imputation was to defend or guarantee an actual public interest; (2) If the act attributed to the offended person has resulted in a criminal proceeding; (3) if the complainant should request the evidence of the accusation made against him. In these cases, if the truth of the imputation is proved, the accused is absolved from punishment." Report of the *Centro de Estudios Legales y Sociales* (CELS) on the case of *Kimel* (file of annexes to the final written arguments of the representatives, folio 3554). Despite having been asked (*supra* para. 8 and note 7), none of the parties provided a copy of the Criminal Code in force at the time of the sentences imposed on Messrs. Mémoli, so that the Court took the text of Article 111 of the Criminal Code from other documents provided to the body of evidence, such as the one indicated *supra*.

[128] Judgment of the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, province of Buenos Aires of December 28, 1995, case No. 55,964 (file of annexes to the Merits Report, annex 2, folios 110 and 128).

[129] *Cf.* Decision on the appeal for clarification of April 25, 1996 (file of annexes to the Merits Report, annex 5, folios 222 and 223). In this regard, the Code of Criminal Procedure of the province of Buenos Aires stipulates that this remedy "shall be granted to the parties only for clarifying an obscure or uncertain concept that may be contained in the decision or judgment that decides some interlocutory proceeding or finalizes the case. It may also be used to decide on a point that is accessory or secondary to the main matter, and that may have been omitted when deciding the latter." *Cf.* Code of Criminal Procedure of the province of Buenos Aires. Law 3,589, art. 289 (file of annexes to the State's final written arguments, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-3589.html).

[130] Appeal for declaration of nullity and non-applicability of the law, undated (file of proceedings before the Commission, folios 431 to 450).

[131] Decision of April 18, 1996 (merits file, Annex E, folio 499). Article 349 of the Code of Criminal Procedure establishes that the appeal on unconstitutionality is appropriate: "1. In the case of final judgments in last instance that are delivered in violation of articles 156 and 159 of the Provincial Constitution. 2. If the interested party has discussed the constitutionality of laws, decrees, ordinances or regulations that statute on matters regulated by the said Constitution and the final judgment is contrary to the claims of the appellant." In addition, article 350 establishes that the remedy of non-applicability of the law "[i]s appropriate in all cases in which the final judgment revokes an acquittal or imposes a punishment of more than three years' imprisonment." Code of Criminal Procedure of the province of Buenos Aires. Law 3,589, arts. 349 and 350 (file of annexes to the State's final written arguments, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-3589.html)

90. On September 10, 1996, the Supreme Court of Justice of the province of Buenos Aires declared the special appeal on unconstitutionality inadmissible, indicating that the grounds submitted concerned "issues that were unrelated to that appeal, but rather concerned the appeal of non-applicability of the law."[132] The presumed victims filed an appeal for reversal of this decision indicating that "even though the Appellate Chamber erroneously admitted the remedy […] of unconstitutionality, an error that the defense had not noted at the time, it was clear from what had been said […] that an appeal for declaration of nullity and non-applicability of the law had been filed."[133] Nevertheless, this appeal was declared inadmissible.[134] Subsequently, Messrs. Mémoli filed a special federal appeal before the same Supreme Court of Justice, which the latter rejected on November 26, 1996.[135] Following the rejection of this special appeal, the presumed victims filed a remedy of complaint before the Supreme Court of Justice of the Nation, which was found inadmissible on October 3, 1997, based on the provisions of article 280 of the Code of Civil and Commercial Procedure of the Nation.[136] Following this decision, the criminal judgment was final.[137] The presumed victims filed another appeal for reconsideration of the judgment, but this was rejected on December 10, 1997.[138]

B.4) Facts subsequent to the criminal proceeding

91. On November 18, 2009, Law 26,551 was enacted amending articles of the Criminal Code of the Nation relating to the offenses of defamation and libel. This law modified the criminal definition of defamation, based on which the presumed victims in this case had been convicted.[139] The Law was promulgated on November 26, 2009.

92. On November 23, 2009, the presumed victims filed an appeal on unconstitutionality before the Appellate and Criminal Guarantees Chamber requesting the acquittal of the two convicted men and that an order be issued to the civil court that was hearing the case for

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[132] Judgment of the Supreme Court of Justice of the province of Buenos Aires of September 10, 1996, case No. 63.249 (file of annexes to the Merits Report, annex 27, folio 325).

[133] Appeal for reversal of September 19, 1996 (file of proceedings before the Commission, folio 457).

[134] *Cf.* Decision of September 23, 1996 (file of annexes to the State's final written arguments, annex III, folio 5457).

[135] *Cf.* Special federal appeal filed on October 8, 1996 (file of annexes to the Merits Report, annex 1, folios 6 to 61) and Judgment of the Supreme Court of Justice of the province of Buenos Aires of November 26, 1996, case No. 63,249 (file of annexes to the Merits Report, annex 32, folios 338 and 339).

[136] *Cf.* Remedy of complaint of December 11, 1996 (file of annexes to the Merits Report, annex 29, folios 329 to 332) and judgment of the Supreme Court of Justice of the Nation of October 3, 1997, case No. 55,964 (file of annexes to the Merits Report, annex 7, folio 227). That same day, the presumed victims filed an appeal for reversal before the Supreme Court of Justice of the Nation against the same decision of November 26, 1996, which was rejected on December 27, 1996. *Cf.* Appeal for reversal of December 11, 1996 (file of proceedings before the Commission, folio 462) and decision of December 27, 1996 (file of proceedings before the Commission, folio 466).

[137] *Cf.* Judgment of December 9, 2009 (file of annexes to the answer, annex 2, folio 2820).

[138] *Cf.* Appeal for reconsideration of the judgment of October 9, 1997 (file of proceedings before the Commission, folios 469 to 471) and judgment of the Supreme Court of Justice of the Nation of December 10, 1997, case No. 55,964 (file of annexes to the Merits Report, annex 8, folio 229).

[139] The new article 110 of the Criminal Code establishes: "[a]nyone who intentionally dishonors or discredits a particular individual shall be punished by a fine of one thousand five hundred pesos ($1,500) to twenty thousand pesos ($20,000). In no instance shall expressions referring to matters of public interest or those that are not affirmative constitute the offense of defamation. Nor shall words harmful to honor constitute the offense of defamation when they are relevant to a matter of public interest. Law 26,551, available at: http://www.infoleg.gob.ar/infolegInternet/annexes/160000-164999/160774/norma.htm (cited by the Commission).

damages.[140] This request was based, *inter alia*, on the fact that the "National Congress had enacted a new law that decriminalizes libel and defamation [in compliance with the order issued by the Inter-American Court in the *Kimel* case]," so that, pursuant to the Criminal Code, they argued that "the new law entered into effect automatically."[141]

93. On December 9, 2009, the above-mentioned Chamber rejected the action on unconstitutionality *in limine.* Subsequently, it determined that, "in fact, what the petitioner is seeking is the review of the judgment," which was not admissible either, "even in view of the new avenue that could – perhaps – be explored." The Chamber declared the appeal for review inadmissible, "because [the case] did not meet one of the requirements" established for this appeal, as the application of the amendment to the law would "merely play an instrumental role" because the term of the punishment had concluded. The Chamber indicated that, in order to apply a more favorable criminal law retroactively, "it is necessary that the more favorable law has been enacted during the sentence […], even if this is suspended," and that "the appeal for review is inadmissible when the term of the punishment has concluded." To reach this conclusion, the Chamber took into account that the period of four years had passed "for it to be considered that [the conditional conviction] had not been handed down," and the period of 8 to 10 years, for the reinstatement of "the possibility of a second conditional conviction"; also that "the latter [period] coincided with that of the expiry of the registration of the said conviction […] and, consequently, the maximum time within which the conviction could be taken into consideration as a computable factor."[142]

94. Following the rejection of an appeal for clarification[143] on December 23, 2009, the presumed victims file filed a special remedy of unconstitutionality against the judgment[144] (*supra* para. 93). In February and May 2010, this remedy was admitted and referred to the Supreme Court of Justice of the province of Buenos Aires,[145] which declared that "the special remedy of unconstitutionality had been admitted erroneously" on July 4, 2012. In this decision, all the judges considered that the remedy had been admitted erroneously, because there was no evidence that "any constitutional matter had been decided, nor could any grounds or wrongful act be observed." In his opinion, one of the judges of the Supreme Court added that the presumed victims' arguments "lack the minimum supporting documentation required in order to be considered." In addition, this judge concluded that "the arguments [were] inappropriate to prove that the [*Kimel*] case and this one [were] similar." After repeating the Chamber's decision on the admissibility of the appeal for review, he indicated that "no evidence about the facts that justified the conviction had been added in order to corroborate that it entail[ed] a supposed impairment of the right to freedom of expression on issues of significant public interest," and that, furthermore, no "documentation [had been provided] that prove[d] that the appellants were being sued for compensation, which was a substantial issue, because, it was precisely on this circumstance that the wrongful act was

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140 *Cf.* Brief of November 23, 2009 (file of annexes to the answer, annex 2, folios 2808 to 2813).

141 Brief of November 23, 2009 (file of annexes to the answer, annex 2, folio 2813).

142 Judgment of December 9, 2009 (file of annexes to the answer, annex 2, folios 2824 to 2826).

143 *Cf.* Briefs of December 11, 2009 (file of annexes to the answer, annex 2, folios 2832 and 2833 to 2834) and Decision of December 17, 2009 (file of annexes to the answer, annex 2, folios 2835 to 2836).

144 *Cf.* Brief of December 23, 2009 (file of annexes to the answer, annex 2, folios 2843 to 2848).

145 *Cf.* Decision of February 9, 2010 (file of annexes to the answer, annex 2, folios 2849 to 2850), and note of May 28, 2010 (file of annexes to the answer, annex 2, folio 2855). Following an error in notification, the presumed victims were notified on December 15, 2010. *Cf.* note of December 15, 2010 (file of annexes to the answer, annex 2, folio 2859).

founded."[146] The other judges did not examine the possibility of a review of the criminal conviction.

C. Civil proceedings against Carlos and Pablo Mémoli[147]

95. In December 1997, the complainants, now plaintiffs (Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz), filed a civil action for damages against Carlos and Pablo Mémoli, based on the final criminal convictions handed down against them[148] (*supra* paras. 74, 84, 88 and 90).

96. A dispute arose at the start of the civil proceeding with regard to the notification of the complaint, which prevented it from progressing for almost four years, owing to the way in which the plaintiffs had filed the complaint and the fact that the presumed victims considered that they had been notified of the complaint prematurely (before the plaintiffs had presented all their arguments). The complaint for damages filed on December 29, 1997, stated that it sought to interrupt prescription, owing to the moral wrong caused by the defamation committed by the respondents, which had been adjudicated in the criminal jurisdiction[149] (*supra* paras. 74 to 90). Before receiving formal notification, the presumed victims "notified themselves of the complaint" on February 10, 1998, and filed an objection of *res judicata* and prescription of the civil action.[150] Owing to this personal notification, different remedies were filed because "the plaintiff's right to expand […] or modify [… the complaint] had been impeded."[151] During this time, the case file was referred to the Appellate Chamber on three occasions, because the first two times the Chamber decided to return the proceedings to the first instance court so that it would decide other remedies that were pending.[152] Also, at the same time, the parties filed appeals for a declaration of nullity against the actions of one of the plaintiffs' lawyers who had not presented a power of attorney.[153] In December 2000, the Appellate Chamber decided that the personal notification of Messrs. Mémoli was not "a valid notification," so that the time limit established for the "requirement of answering" the notification of the pleading of the other party had not commenced. Consequently, in March

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146 Judgment of July 4, 2012, of the Supreme Court of Justice of the province of Buenos Aires (merits file, Annex D, folios 520 to 533).

147 In this section, the Court will only establish the most relevant facts of the said civil proceeding, taking into account the violations alleged in this case.

148 According to article 1101 of the Civil Code of the Nation Argentina: ''[i]f the criminal action shall have preceded the civil action, or was filed during the latter, the accused shall not be convicted in the civil proceeding before he is convicted in the criminal proceeding." Civil Code of the Argentine Nation. Law 340, article 1101 (file of annexes to the representatives' final arguments, folio 2878, available at: http://www.codigocivilonline.com.ar/codigo_civil_online_1066_1106.html).

149 *Cf.* Pleading of the complaint of December 29, 1997 (file of annexes to the answer, annex 1, folios 1794 to 1799).

150 *Cf.* Brief of February 10, 1998 (file of annexes to the answer, annex 1, folios 1813 to 1818).

151 Brief of February 19, 1998 (file of annexes to the answer, annex 1, folio 1823); brief of March 17, 1999 (file of annexes to the answer, annex 1, folios 1937 to 1944); brief of March 24, 1998 (file of annexes to the answer, annex 1, folios 1884 to 1886), and brief of June 8, 1999 (file of annexes to the answer, annex 1, folios 1958 to 1960).

152 *Cf.* Decision of May 27, 1999 (file of annexes to the answer, annex 1, folio 1953); decision of September 12, 2000 (file of annexes to the answer, annex 1, folio 1990), and decision of October 25, 2000 (file of annexes to the answer, annex 1, folio 1991).

153 *Cf.* Brief of August 3, 1998 (file of annexes to the answer, annex 1, folios 1909 and 1910); decision of October 16, 1998 (file of annexes to the answer, annex 1, folio 1911), and brief of August 11, 1998 (file of annexes to the answer, annex 1, folio 1923).

2001, notice was served of the complaint and its expansion.[154] On March 29, 2001, the presumed victims answered the expansion of the complaint and reiterated the objections filed concerning *res judicata* and prescription.[155] On May 18, 2001, the judge considered that "the objections of prescription and *res judicata* [had been] answered in the proper time and form" and delayed dealing with the alleged prescription "until delivering the final judgment" because it was not "evident"; he also ordered that evidence be received on the objection of *res judicata.*[156] The presumed victims filed an appeal for reversal and a subsidiary appeal (for financial relief) against this decision.[157]

97. In September 2001, the presumed victims reached an out of court agreement with two of the plaintiffs (Antonio Guarracino and Humberto Romanello), and therefore, as of that date, the civil proceeding only referred to the complaints of one plaintiff (the treasurer Juan Bernardo Piriz). In this regard, Messrs. Mémoli agreed to pay the two plaintiffs three thousand pesos, "without this signifying any recognition of rights of the plaintiffs," while the two plaintiffs undertook to pay the costs of the proceedings to Messrs. Mémoli. Based on this agreement, on October 18, 2001, Messrs. Mémoli waived the objection of *res judicata* and asked that the complaint be rejected *in limine*. Nevertheless, the judge decided that the brief "was not supported by any procedural norm that would justify its admissibility."[158]

98. Following the out of court settlement, Messrs. Mémoli insisted on the objection of prescription filed previously (*supra* para. 96). Thus, between December 2001 and February 2002, they repeated an appeal filed against the decision to deal with the objection of prescription in the judgment on the merits, which had not been decided (*supra* para. 96),[159] and various remedies were filed in this regard.[160] On February 26, 2002, the judge revoked the decision of May 18, 2001 (*supra* para. 96), and decided "[t]o defer the objections of prescription and *res judicata* to the time when the judgments were handed down," because the former "c[ould] not be decided merely by law" and the latter was "directly linked to the arguments […] on merits."[161] The presumed victims requested the annulment of this interlocutory judgment and asked that the subsidiary appeal they had filed be admitted.[162] The judge granted the appeal and, on March 19, 2002, ordered that the file be referred to the

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[154] At first, the judge only notified the expansion of the complaint. Subsequently, Messrs. Mémoli indicated that it was necessary to notify the original complaint, and this was done on March 27, 2001. *Cf.* Decision of December 14, 2000 (file of annexes to the answer, annex 1, folios 1992 to 1994), Decision of March 2001 (file of annexes to the answer, annex 1, folio 2000), Brief of March 22, 2001 (file of annexes to the answer, annex 1, folio 2008) and decision of March 27, 2001 (file of annexes to the answer, annex 1, folio 2009).

[155] *Cf.* Brief of March 29, 2001 (file of annexes to the answer, annex 1, folios 2028 to 2031).

[156] On May 23, 2001, it was placed on record that, on May 17, 2001, a brief had been received from the plaintiffs in which they responded to the preliminary objection concerning *res judicata* that had not been added to the case file, and the judge decided to reiterate his decision of May 18. *Cf.* Decision of May 18, 2001 (file of annexes to the answer, annex 1, folio 2056), and decision of May 23, 2001 (file of annexes to the answer, annex 1, folio 2068).

[157] *Cf.* Brief of May 23, 2001 (file of annexes to the answer, annex 1, folios 2069 and 2070), and brief of May 28, 2001 (file of annexes to the answer, annex 1, folio 2072).

[158] Out of court settlement of September 11, 2001 (file of annexes to the Merits Report, annex 24, folios 307 to 308); brief of October 18, 2001 (file of annexes to the answer, annex 1, folio 2112), and decision of October 18, 2001 (file of annexes to the answer, annex 1, folio 2113).

[159] *Cf.* Brief of December 4, 2001 (file of annexes to the answer, annex 1, folio 2124); decision of December 20, 2001 (file of annexes to the answer, annex 1, folios 2137 and 2138), and brief of December 21, 2001 (file of annexes to the answer, annex 1, folio 2139).

[160] *Cf.* Brief of February 8, 2002 (file of annexes to the answer, annex 1, folios 2141 and 2142), and brief entitled "report on another error" (file of annexes to the answer, annex 1, folio 2144).

[161] Interlocutory decision of February 26, 2002 (file of annexes to the answer, annex 1, folios 2145 to 2147).

[162] *Cf.* Brief of March 4, 2002 (file of annexes to the answer, annex 1, folios 2148 and 2149).

Appellate Chamber.[163] One year later, in March 2003, the Appellate Chamber declared that the appeal had been granted erroneously.[164] According to the information provided to the Court, the objection of prescription filed by the presumed victims has still not been decided.

99. In September 2003, six years after the civil action commenced, the proceeding was opened to evidence, initially for 20 days. Following this decision, the evidence offered by the parties to the complaint, and also the expansion of the complaint and the answer were admitted.[165] Furthermore, a hearing was convened in order to "know the positions of the respondents," as well as other hearings to receive the testimony of the witnesses.[166] In addition, the other courts that had been involved in the case were asked to forward the evidence provided by the parties at the opportune moment.[167] This evidence included some cassettes forwarded by the presumed victims, so that in October and November 2006, the judge asked the Departmental Chamber if "it had on record the names of experts whose expertise consisted in the transcription of [cassettes]." In November 2007, the presumed victims asked that another request be sent to the Departmental Chamber about the experts on record, because no response had been received.[168]

100. In 2009, an effort was made at conciliation between the plaintiff and the respondents, but the attempts were unsuccessful. Specifically, on August 11, 2009, the parties were convened to a hearing that was held on September 23, where it was decided that "in view of the efforts to achieve a conciliation, the parties ask[ed] that the proceeding be suspended until September 30, 2009, and that another hearing be established […] on th[at day]." On September 30, the parties advised that they had not reached an agreement, so that this procedure was concluded.[169]

101. From 2009 to 2012 the proceeding continued at the evidence stage. During this time, there was some activity with regard to the transcription of the cassettes requested by the presumed victims (*supra* para. 99), which remained pending. In particular, on September 11, 2009, the judge declared "that the said evidence that was pending production had been waived." The presumed victims recalled that they had not desisted from this transcription, but rather, to the contrary, "had been requesting it and reiterating this for the last 11 years." Nevertheless, on October 30, 2009, the judge decided "to declare the respondent negligent in

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163 *Cf.* Decision of March 4, 2002 (file of annexes to the answer, annex 1, folio 2151); brief of March 19, 2002 (file of annexes to the answer, annex 1, folios 2154 to 2159), and decision of March 19, 2002 (file of annexes to the answer, annex 1, folio 2160).

164 *Cf.* Decision of March 20, 2003 (file of annexes to the answer, annex 1, folios 2167 and 2168).

165 *Cf.* Decision of September 18, 2003 (file of annexes to the answer, annex 1, folio 2183 and 2196), and decision of September 14, 2004 (file of annexes to the answer, annex 1, folio 2213).

166 *Cf.* Decision of July 27, 2004 (file of annexes to the answer, annex 1, folio 2196); decision of October 6, 2004 (file of annexes to the answer, annex 1, folio 2219); decision of October 6, 2004 (file of annexes to the answer, annex 1, folio 2226); decision of August 5, 2005 (file of annexes to the answer, annex 1, folio 2258), and record of the hearing of September 26, 2005 (file of annexes to the answer, annex 1, folios 2421 and 2422).

167 *Cf.* note of September 14, 2004 (file of annexes to the answer, annex 1, folio 2215); decision of June 19, 2008 (file of annexes to the answer, annex 1, folio 2623), and decision of August 31, 2009 (file of annexes to the answer, annex 1, folios 2656 and 2657).

168 *Cf.* Decision of October 12, 2006 (file of annexes to the answer, annex 1, folio 2561); decision of November 9, 2006 (file of annexes to the answer, annex 1, folio 2581), and brief of November 30, 2007 (file of annexes to the answer, annex 1, folio 2614).

169 *Cf.* Decision of August 11, 2009 (file of annexes to the answer, annex 1, folio 2655); record of the hearing of September 23, 2009 (file of annexes to the answer, annex 1, folio 2663), and record of the hearing of September 30, 2009 (file of annexes to the answer, annex 1, folio 2667).

the production of the evidence."[170] The presumed victims filed an appeal for reversal and a subsidiary appeal against this decision.[171] Following the reiteration of the appeal, on February 5, 2010, the judge decided "to annul the declared negligence," because "the only evidence pending production in the complaint was the transcription of the audio [cassettes]."[172] On March 23, 2010, the presumed victims again repeated that they had been requesting the transcription of the cassettes for more than 10 years, without this having been done.[173] On November 29, 2010, "the [Departmental] Expertise Advisory Services [reported that] it did not have an expert with expertise in the transcription of [cassettes]";[174] accordingly, Messrs. Mémoli asked that an expert translator be appointed to prepare the transcript.[175] On May 27, 2011, an expert was appointed to prepare the transcript. However, in May 2012, the judge asked another court to forward "the technical elements to listen to [cassettes], offered as evidence."[176] The plaintiff then asked that the expert be assigned to prepare the transcript of the cassettes.[177]

102. In parallel, the presumed victims made specific requests to locate and forward some of the cassettes that the court that was hearing the case had not yet received from other courts which, at some time, had been responsible for the proceeding or for some procedure within it (*supra* para. 99). In particular, in April 2011, the presumed victims asked that the request be reiterated to forward the cassettes to the court and recalled that, in addition to the seven cassettes that had already been sent by a judge who had been hearing the case, there were still another 12 or more cassettes.[178] That month, the court forwarded some notes dated February 2011 indicating that the cassettes requested were not in its secretariat.[179] Consequently, in April 2011, the presumed victims asked, *inter alia*, that the complaint be archived, or the annulment of all the proceedings to date declared, because evidence fundamental for their defense had been mislaid.[180] On April 27, 2012, the presumed victims reiterated that a request for annulment was pending owing to the loss of evidence.[181] The Court has no information on the result of this appeal for a declaration of nullity, and does not know whether, at some time after April 2012 and before the delivery of this Judgment, the cassettes, which were the only pending evidence, were found and transcribed.

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170 Decision of September 11, 2009 (file of annexes to the answer, annex 1, folio 2664); brief of September 25, 2009 (file of annexes to the answer, annex 1, folio 2665), and decision of October 30, 2009 (file of annexes to the answer, annex 1, folio 2684).

171 *Cf.* Brief of November 9, 2009 (file of annexes to the answer, annex 1, folios 2685 and 2686); decision of November 18, 2009 (file of annexes to the answer, annex 1, folio 2687), and decision of November 27, 2009 (file of annexes to the answer, annex 1, folio 2691).

172 Decision of February 5, 2010 (file of annexes to the answer, annex 1, folio 2707).

173 *Cf.* Brief of March 23, 2010 (file of annexes to the answer, annex 1, folio 2725).

174 Decision of November 29, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1659).

175 *Cf.* Brief of February 28, 2011 (file of annexes to the answer, annex 1, folio 2759).

176 Note of April 27, 2012 (merits file, annex G, folio 442), and note of May 27, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1680).

177 *Cf.* Brief of May 29, 2012 (merits file, annex G, folio 443).

178 *Cf.* Brief of April 8, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1669).

179 *Cf.* Notes of February 11, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1673).

180 *Cf.* Brief of March 1, 2011 (file of annexes to the pleadings and motions brief, annex 2, folios 1675 and 1676).

181 *Cf.* Brief of April 27, 2012 (merits file, annex G, folio 434).

103. In addition, since the proceeding was opened for evidence in 2003 (*supra* para. 99), both the presumed victims and the plaintiff have filed different remedies or requests concerning other aspects of the evidence stage. In particular, the presumed victims filed two appeals for annulment and a subsidiary appeal, which were rejected because, according to the provisions of the Code of Civil and Commercial Procedure, "the decisions of the judge on the production, denial and substantiation of evidence [cannot be appealed]."[182] They also submitted two briefs[183] that were also rejected because the Procedural Code did not provide for them.[184] In addition, as of March 2006, both parties asked that the evidence stage be declared concluded on at least five occasions.[185] Furthermore, both parties requested that the opposite party be declared negligent on several occasions.[186]

104. In addition, on several occasions starting in August 2008, the presumed victims asked that the complaint be rejected based on what they alleged were "new facts" (the judgment in the *Kimel* case, the admission of this case before the inter-American system, and the amendment of the law on defamation), all of which, in their opinion, would have direct effects in their favor in the said proceedings. The presumed victims asked that the complaint be rejected based on these "new facts" in August 2008, and in October and November 2009, respectively.[187] On March 23, 2010, the judge decided that the changes in the law did not meet the definition of a new fact.[188] However, following an appeal by the presumed victims, the judge rejected his findings concerning the new fact in his preceding decision and granted the appeal with a deferred effect.[189] On June 14, 2010, the case file was forwarded to the Departmental Chamber which decided that the case file had been forwarded prematurely, because the procedural requirements established by law had not been met.[190] The Court has

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[182] Brief of September 16, 2004 (file of annexes to the answer, annex 1, folios 2217 and 2218); decision of October 6, 2004 (file of annexes to the answer, annex 1, folios 2219 and 2220); brief of October 8, 2004 (file of annexes to the answer, annex 1, folio 2235); decision of October 22, 2004 (file of annexes to the answer, annex 1, folio 2236); Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 377 (file of annexes to the State's final written arguments, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html). The presumed victims also submitted a request to reject the expansion of the examination, which was rejected on the same grounds. *Cf.* Brief of October 25, 2004 (file of annexes to the answer, annex 1, folios 2238 to 2239), and decision of July 27, 2005 (file of annexes to the answer, annex 1, folio 2245).

[183] *Cf.* Brief of May 10, 2006 (file of annexes to the answer, annex 1, folios 2503 to 2505), and brief of May 23, 2006 (file of annexes to the answer, annex 1, folio 2507). See also, decision of May 17, 2006 (file of annexes to the answer, annex 1, folio 2506).

[184] *Cf.* Decision of May 26, 2006 (file of annexes to the answer, annex 1, folios 2508 and 2509).

[185] *Cf.* Brief of March 3, 2006 (file of annexes to the answer, annex 1, folios 2261 to 2263); brief of October 18, 2006 (file of annexes to the answer, annex 1, folio 2566); brief of December 1, 2006 (file of annexes to the answer, annex 1, folio 2582); brief of May 12, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1642), and brief of November 19, 2011 (file of annexes to the pleadings and motions brief, annex 2, folios 1698 and 1699).

[186] *Cf.* Brief of October 18, 2006 (file of annexes to the answer, annex 1, folio 2566); brief of December 1, 2006 (file of annexes to the answer, annex 1, folio 2582); brief of March 3, 2006 (file of annexes to the answer, annex 1, folios 2261 to 2454); brief of March 28, 2006 (file of annexes to the answer, annex 1, folios 2476); brief of June 12, 2008 (file of annexes to the answer, annex 1, folio 2621); decision of July 1, 2008 (file of annexes to the answer, annex 1, folio 2625); brief of February 10, 2009 (file of annexes to the answer, annex 1, folio 2651); brief of October 8, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1655), and brief of November 19, 2011 (file of annexes to the pleadings and motions brief, annex 2, folios 1698 and 1699).

[187] *Cf.* Brief of August 22, 2008 (file of annexes to the answer, annex 1, folio 2636); brief of October 2009 (file of annexes to the answer, annex 1, folio 2673), and brief of November 23, 2009 (file of annexes to the answer, annex 1, folios 2692 to 2703).

[188] *Cf.* Decision of March 23, 2010 (file of annexes to the answer, annex 1, folio 2720).

[189] *Cf.* Decision of April 9, 2010 (file of annexes to the answer, annex 1, folio 2727).

[190] *Cf.* note of June 14, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1646), and decision of June 23, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1648)

no information on the result of this legal remedy following the said decision; moreover, the case file does not reveal any decision in relation to the presumed victims requests concerning the merits.

105. Finally, throughout the civil proceeding, different problems have arisen with regard to the judges appointed to hear the case: some judges have recused themselves, while Messrs. Mémoli have recused or denounced others for supposed irregularities. In particular, three first instance judges recused themselves from the case owing to a situation of "moral violence."[191] In addition, the presumed victims recused at least two judges and one registrar, and one of the judges was recused twice.[192] In each case, the Appellate Chamber denied these recusals.[193] On August 17, 2012, the presumed victims denounced the first instance judge in charge of the case and the members of the Appellate Chamber for "malfeasance in office and [presumed] unlawful association." In addition, in the context of the procedure on precautionary measures in September 2012, the presumed victims presented two new recusals.[194] However, the Court's case file does not contain the responses to these recusals and allegations.

106. On March 12, 2008, following a complaint filed by the presumed victims, the Supreme Court of Justice of Buenos Aires indicated that the judge responsible for the main court case processed before the Fourth Court for Civil and Commercial Affairs had decided to recuse herself from the case (*supra* para. 105) and, "subsequently, as a member of the First Chamber for Civil and Commercial Matters, signed the decision contested by the complainant," and even though the "recusal prevented the said judge from intervening," the Chamber "endorsed the decision [following an appeal for reversal]."[195] The Supreme Court considered that this situation "did not cause any prejudice to the processing of the case." Nevertheless, the judge recommended "that – hereafter – the pertinent evidence should be monitored to ensure that actions such as this [were] not repeated."[196] Moreover, with regard to the judge of the First Court for Civil and Commercial Matters, the Supreme Court noted that "there ha[d] been a delay in deciding the request to consider that the evidence stage had expired, so that, even though the case file was away from the court on two occasions, a considerable delay has been verified."[197] Consequently, the Supreme Court decided to apply

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191 Decision of June 11, 2001 (file of annexes to the answer, annex 1, folio 2077); decision of June 5, 2003 (file of annexes to the answer, annex 1, folio 2173), and decision of March 23, 2006 (file of annexes to the answer, annex 1, folio 2602).

192 *Cf.* Decision of October 7, 2005 (file of annexes to the answer, annex 1, folio 2426); brief of July 27, 2006 (file of annexes to the answer, annex 1, folio 2544), and brief of March 6, 2012 (file of annexes to the pleadings and motions brief, annex 2, folio 1715).

193 *Cf.* Decision of March 14, 2006 (file of annexes to the answer, annex 1, folio 2462); note of September 12, 2006 (file of annexes to the answer, annex 1, folio 2552), and decision of March 6, 2012 (file of annexes to the pleadings and motions brief, annex 2, folios 1716 and 1717).

194 *Cf.* Briefs of September 2012 (merits file, annex G, folios 491 to 495).

195 Judgment of the Supreme Court of Justice of the province of Buenos Aires of March 12, 2008 (file of annexes to the Merits Report, annex 25, folio 311).

196 Judgment of the Supreme Court of Justice of the province of Buenos Aires of March 12, 2008 (file of annexes to the Merits Report, annex 25, folios 313 and 314).

197 Judgment of the Supreme Court of Justice of the province of Buenos Aires of March 12, 2008 (file of annexes to the Merits Report, annex 25, folio 313).

"the disciplinary sanction of an admonition" to this judge.[198] The Supreme Court also decided to issue a warning to another judge for the delay in the execution of the Mémoli fees.[199]

107. Meanwhile, in April 2006, the judge of the case issued a "call to attention" to Pablo Mémoli "indicating that hereafter he should respect the obligation to observe proper decorum in his briefs."[200] In response to another communication from Pablo Mémoli, the judge repeated the foregoing and ordered that Pablo Mémoli receive the disciplinary sanction of an admonition.[201] In February 2011, the judge who was hearing the case at that time again issued a warning to the presumed victims and ordered that the brief be removed from the file.[202]

108. According to information provided to the Court, the civil proceedings remains pending the decision in first instance, and the latest information in the case file are the denunciations for malfeasance in office filed by the presumed victims and the challenges to the judge in the context of the precautionary measures in August and September 2012 (*supra* para. 105). In addition, regarding the merits of the matter, there is no record in the case file that the evidence stage has been concluded, because the transcription of the cassettes offered as evidence by the presumed victims and plaintiffs in this proceeding remains pending and also, if applicable, the request for annulment filed by the presumed victims based on the supposed loss of some of the cassettes (*supra* paras. 101 and 102).

D. Precautionary measure of injunction against the sale or encumbrance of property

109. On March 1, 1996, in the context of the criminal proceeding, the complainants, Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz, requested an "injunction against the sale or encumbrance of the property of […] Carlos and Pablo Mémoli," arguing that "if the result persists when the Supreme Court has ruled, the right to receive damages will arise, and also the professional fees of the lawyers concerned."[203] The measure was granted on March 8, 1996.[204] Messrs. Mémoli appealed this decision.[205] On April 18, 1996, the Appellate Chamber for Criminal Matters confirmed the decision that had been appealed ordering the injunction on disposing of the property.[206] On April 22, that year, Messrs. Mémoli filed an appeal for clarification, but the Chamber considered that it could not find "any doubtful or obscure concept in the decision issued," and therefore declare the appeal

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198 Judgment of the Supreme Court of Justice of the province of Buenos Aires of March 12, 2008 (file of annexes to the Merits Report, annex 25, folio 314).

199 *Cf.* Judgment of the Supreme Court of Justice of the province of Buenos Aires of March 12, 2008 (file of annexes to the Merits Report, annex 25, folios 311 and 314).

200 Decision of April 6, 2006 (file of annexes to the answer, annex 1, folio 2483).

201 *Cf.* Decision of June 21, 2006 (file of annexes to the State's final written arguments, annex V, folios 5851 and 5852).

202 *Cf.* Decision of February 3, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1661).

203 Request for an injunction on the sale or encumbrance of property of March 1, 1996 (file of annexes to the Merits Report, annex 9, folios 231 and 232).

204 *Cf.* Decision of the First Judge of Criminal and Correctional Matters of March 8, 1996 (file of annexes to the Merits Report, annex 10, folio 234). The complainant's representative stated that "he accepted responsibility for the losses that the precautionary measure ordered […] could cause the other party." *Cf.* note of March 13, 1996 (file of proceedings before the Commission, folio 382).

205 *Cf.* Appeal (file of annexes to the Merits Report, annex 11, folios 236 to 239).

206 *Cf.* Judgment on the appeal of April 18, 1996 (file of annexes to the Merits Report, annex 12, folio 241), and certification of notification dated April 19, 1996 (file of annexes to the Merits Report, annex 6, folio 225).

inadmissible.[207] On September 18, 2001, the court hearing the case annulled the precautionary measure, considering that the higher court in the criminal proceeding had "rejected […] thee civil actions filed in this jurisdiction, because the complainant had not appeared as a complainant claiming damages."[208]

110. Subsequently, in October 2001, the complainant and plaintiff Piriz requested a general injunction against the sale or encumbrance of property in the context of the civil proceeding, indicating that, owing to the "guilty verdict in the criminal jurisdiction, there was a possibility of obtaining an order for precautionary measures in the proceedings for damages, since there is no longer any doubt about the admissibility of the claim, only about the amount (arts. 1102 and similar of the Civil Code)." The measure was ordered on October 31, 2001.[209] The representative of plaintiff Piriz stated that "he accepted responsibility for the losses that the precautionary measure ordered […] could cause the other party."[210] The presumed victims appealed this decision and, subsequently, filed an appeal for reversal and a subsidiary appeal, indicating, *inter alia,* that the decision had been taken "without any legal grounds." On December 20, 2001, the first instance judge decided not to admit the appeal for reversal, but granted the appeal requesting the appellant to present a copy of the pertinent parts of the case file.[211]

111. The following day, the presumed victims presented the necessary copies and, on February 8, 2002, they requested that the case file be referred to the higher court for a decision on the appeal.[212] On December 6, 2001, the presumed victims asked the representative of complainant Piriz to assume responsibility for "the costs and losses that could arise, if he has requested [the injunction] without justification."[213] However, the Court has no information in the case file on the results of these requests.

112. The measure was re-registered at the request of complainant Piriz in October 2006 and December 2011.[214] The presumed victims filed an appeal for reversal and subsidiary appeal against the last decision on re-registration, but on December 30, 2011, the judge decided that the decision could not be reconsidered and granted "the appeal, without

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207 *Cf.* Appeal for clarification of April 22, 1996 (file of annexes to the Merits Report, annex 13, folios 244 and 245), and decision of April 25, 1996 (file of annexes to the Merits Report, annex 5, folio 222).

208 Order of the judiciary of the province of Buenos Aires of September 18, 2001, case No. 62,821 (file of annexes to the Merits Report, annex 14, folios 247 and 248).

209 *Cf.* Decision of October 31, 2001 (file of annexes to the answer, annex 1, folio 2117).

210 Note of November 1, 2001 (file of annexes to the answer, annex 1, folio 2118). In this regard, the Code of Civil and Commercial Procedure establishes that "[t]he precautionary measure may only be decided under the responsibility of the party who requests it, who must provide security for all the costs and harm that could be caused, if it has been requested without justification. The judge shall graduate the type and amount of the security in keeping with the greater or lesser plausibility of the justification and the circumstances of the case. Guarantees from banking institutions or individuals with proven financial reliability may be offered." Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 199 (file of annexes to the State's final written arguments, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html)

211 *Cf.* Briefs of November 15, 2001 (file of annexes to the answer, annex 1, folios 2121 and 2126), and decision of December 20, 2001 (file of annexes to the answer, annex 1, folio 2137).

212 *Cf.* Brief of December 21, 2001 (file of annexes to the answer, annex 1, folio 2139), and brief of February 8, 2002 (file of annexes to the answer, annex 1, folio 2142).

213 Brief of December 6, 2001 (file of annexes to the answer, annex 1, folio 2131).

214 *Cf.* Note of October 2006 (file of annexes to the answer, annex 1, folio 2564), and decision of December 16, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1705).

suspending the effects of the measure."[215] On June 11, 2012, the judge determined that complainant Piriz had not responded to the notification and, therefore, considered "that the claim was no longer valid as he had failed to take advantage of it" and ordered that the proceeding be referred to the higher court.[216] On August 1, 2012, the presumed victims reiterated their request for a decision on this appeal.[217] The Appellate Chamber considered that "despite the ample and flexible criteria that should prevail when analyzing the requirements to be met in the technical content of the brief with grievances, since the petition [of the presumed victims] does not provide any evidence to be able to examine this (art. 260 CPCC), [the Chamber] finds that it must declare the relinquishment of the appeal."[218] The presumed victims filed an appeal for the reversal of this decision, which was declared inadmissible.[219] The Court has not received any more recent information on whether the precautionary measures remain in force.

VIII
FREEDOM OF EXPRESSION AND PRINCIPLE OF LEGALITY AND RETROACTIVITY, IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS AND THE OBLIGATION TO ADOPT PROVISIONS OF DOMESTIC LAW

113. In this chapter, the Court will summarize the arguments of the Inter-American Commission and of the parties, and will then rule on the alleged violation of freedom of expression, and the alleged violation of the principle of legality and retroactivity to the detriment of Carlos and Pablo Mémoli.

A. The alleged violation of freedom of expression

A.1) Arguments of the Commission and of the parties

114. The Commission indicated that "any measure that restricts freedom of expression must comply with three requirements established in Article 13(2) [of the American Convention]." It pointed out that the parties agree that the criminal conviction of the presumed victims signified a restriction of freedom of expression. The Commission indicated that the Court "has already concluded [in the *Kimel* case] that the definition of the offense of defamation that existed when Carlos and Pablo Mémoli were sentenced in the criminal jurisdiction was incompatible with the Convention," so that "[i]n strict application of this case law," it concluded that the criminal sanction imposed violated freedom of expression. The Commission indicated that, since the requirement of legality was not met, "it was unnecessary to continue [analyzing] the three requirements," in relation to the alleged restriction imposed. The Commission argued that the statements made by Messrs. Mémoli

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[215] Brief of December 30, 2011 (file of annexes to the pleadings and motions brief, annex 2, folios 1706 and 1707), and decision of December 30, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1708).

[216] *Cf.* Decision of June 11, 2012 (merits file, annex G, folio 444).

[217] *Cf.* Brief of August 1, 2012 (merits file, annex G, folio 468).

[218] Decision of August 7, 2012 (merits file, annex G, folio 481). In this regard, Article 260 of the Code of Civil and Commercial Procedure establishes that: "[t]he brief with the grievance shall contain the specific and reasoned critique of the parts of the ruling that the appellant considers erroneous. It is not sufficient to refer to previous presentations. This brief shall be notified for 10 or 5 days to the other party according to whether it refers to ordinary or summary proceedings." Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 260 (file of annexes to the brief with final written arguments of the State, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

[219] *Cf.* Brief of August 9, 2012 (merits file, annex G, folio 484), and decision of August 16, 2012 (merits file, annex G, folio 486).

related to matters of public interest because they were "made based on actual facts that truly constituted an irregular administration of public property," and the fact that it was private individuals who administered that property "in no way decreased the genuine interest of the Association in knowing whether the said property was being administered appropriately." In addition, it underscored that "the statements of Messrs. Mémoli [related] to the possible perpetration of an offense in the administration of public property [and] was not without grounds," so that "the sentences that were imposed on them were not necessary in a democratic society." According to the Commission, "even if the statements of Messrs. Mémoli had not referred to the administration of public property, they should be characterized as of public interest," because they involved "the possible defrauding" of "the inhabitants of San Andrés de Giles" with funds dedicated to the burial of their family members, which "affects social property," so that "it may be a matter of legitimate general interest" and should be subject to public discussion. In addition, the Commission emphasized "the good faith of those who made the allegations." Therefore, in the Commission's opinion, "the subsequent imposition of liability on them was disproportionate."

115. The representatives "endorsed" the Commission's arguments with regard to this violation. In addition, they stressed that Carlos Mémoli had been given a suspended sentence of one month's imprisonment for a "two-second comment" made in a radio program and "another comment in an administrative file," while Pablo Mémoli "used the radio to explain [why] the matter of burial niches was a serious irregularity committed in relation to the municipal public cemetery." They indicated that "the newspaper *La Libertad* conducted an investigation," during which it published some articles on the topic, "which had to be sufficiently convincing and vehement, with the result that "two years later, the 'purchasers' [were given] […] certificates of contributions [in which] their financial collaboration to the builder of the burial niches was 'acknowledged.'" They explained that the Mémoli's allegations were of public interest, because "[e]very country, town and area has its own interests, issues and concerns." According to the representatives, the public interest "refers to any event or act involving a public or private individual that can cause danger or harm to the rest of the collectivity, in either the political, economic, social, environmental, religious or any other type of activity." They indicated that the allegations concerned public interest because "the municipal cemetery is the final resting place of all human beings and it was known that irregularities had been committed in this area"; also that "[d]eath is a topic of profound public interest owing to the idiosyncrasies of our people." They argued that "the system to eliminate independent media […] is similar to, although more subtle, [than the practices of previous Argentine governments because] it uses justice itself to intimidate and/or annihilate a communication medium." They explained that the Italian Association "[r]ectified its [legal] situation following [their] allegations." The representatives also indicated that, owing to their allegations, "INAM urged the Mutual, […] to rectify [its] situation" and some "private individuals who had been harmed appeared [before] the courts because they felt they had been defrauded," so that this is not a "simple issue between private individuals, as the State says." They emphasized that "*La Libertad* denounced a chain of responsibilities that included public officials who looked the other way, and did not exclude them," so that the newspaper "fulfilled its social role of examining and investigating, [and] […] discovered the truth."

116. The State argued that the Commission had "failed to justify [this] violation with a specific and direct account of the facts of the case, but had merely provided a theoretical description of the right to freedom of expression." It stressed that, "by excluding the offense of defamation from statements relating to matters of public interest, [this Court presumably considered that] the relevant Argentine laws were in keeping with the standards for freedom of expression established in the Convention." However, it indicated that, contrary to the *Kimel* case, in this matter public interest was not involved, so that the conviction for defamation was "absolutely compatible with the right to freedom of expression and does not constitute an

internationally wrongful act." It argued that this was a dispute of a private nature, to which the Court's legal doctrine concerning the different threshold for protecting the honor of certain public persons does not apply. It explained that "the individuals who filed a lawsuit against the presumed victims are private citizens," and none of the parties involved the municipality at any stage of the proceedings. It argued that the connection that the representatives are attempting to make with the municipal cemetery "is absolutely tangential and anecdotic in relation to the central element and the real origin of the dispute," because the statements considered defamatory did not refer to the administration of municipal functions. It indicated that "no one could consider that the erroneous interpretation of the Association Mutual […], attempting to obtain title to the graves, could be attributed to the State." The State argued that, "[t]he deciding factor is not the public nature of the property, but rather the conduct of those persons who exercise public functions or are involved voluntarily in matters related to this exercise." It indicated that "[t]he State regulates the activities of the Mutual Associations as it regulates any other type of association, [but t]he mere existence of a monitoring body does not convert what is private into something public," because "the State's responsibility, in its function of control, exists even when it does not inspect or verify," which did not occur in this case where "INAM fulfilled its functions." It clarified that article 110 of the Criminal Code was not repealed, but rather statements relating to matters of public interest or those that are not affirmative were decriminalized.

A.2) Considerations of the Court

A.2.1) Freedom of expression and protection of honor and reputation

117. The Court notes that Messrs. Mémoli were convicted based on statements that were considered defamatory or derogatory to the reputation of three members of the Management Committee of the Italian Association of San Andrés de Giles, in the context of public, administrative and criminal allegations by the presumed victims concerning the administration of the Italian Association and what, at the time, they alleged was presumed fraud committed by the said members of the Management Committee in relation to the invalid sale of burial niches in the town's municipal cemetery (*supra* paras. 73 to 88).

118. As in other cases submitted to this Court, in this one there is an underlying conflict between the right to freedom of expression, recognized in Article 13 of the Convention, and the protection of honor and reputation established in Article 11 of this instrument. Thus, the Court must determine whether the State acted in a manner that was contrary to the Convention when deciding a conflict of rights between private individuals in the domestic sphere.

119. The Court's case law has developed extensive content for the right to freedom of thought and expression embodied in Article 13 of the Convention. The Court has indicated that this article protects the right to seek, receive and impart ideas and information of all kinds, as well as to receive and be aware of the information and ideas imparted by others.[220] The Court has indicated that freedom of expression has both an individual and a social dimension,[221] which are both equally important and must be ensured fully and simultaneously in order to ensure the complete effectiveness of this right in the terms of Article 13 of the

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[220] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights).* Advisory opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 137.

[221] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, paras. 30 to 33, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 137.

Convention.[222] For the ordinary citizen, the awareness of the opinions of others or the information that others possess is as important as the right to impart his own opinions and information.[223] Consequently, in light of both dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily prohibited or prevented from expressing his own thoughts and therefore represents a right of each individual; but, on the other hand, it also involves a collective right to receive any information and to be aware of the expression of the opinions of others.[224]

120. In addition, the Inter-American Court has emphasized that "the profession of journalism […] entails, precisely, seeking, receiving and imparting information. Hence, the exercise of journalism requires the individual to become involved in activities that are defined or encompassed by the freedom of expression guaranteed in the Convention."[225] The professional exercise of journalism "cannot be differentiated from freedom of expression; to the contrary, both elements are evidently interrelated, because the professional journalist is not, and cannot be, anything else than a person who has decided to exercise freedom of expression continuously, steadfastly, and for remuneration."[226] In this case, one of the presumed victims is a journalist who claims protection under Article 13 of the Convention.

121. Nevertheless, the Court deems it pertinent to clarify that this does not mean that journalists are exempt from responsibilities in the exercise of their freedom of expression. The abusive exercise of freedom of expression, either by a private individual or by a journalist, may be subject to the subsequent imposition of liability pursuant to Article 13(2) of the Convention.

122. Furthermore, in the context of freedom of information, this Court considers that journalists have an obligation to verify, reasonably although not necessarily exhaustively, the facts on which they base their opinions. In other words, it is valid to require fairness and diligence in crosschecking sources and seeking information. This implies the right of the community not to receive a manipulated version of the facts. Consequently, journalists have the obligation to take a critical distance from their sources and compare them with other relevant information.[227] Similarly, the European Court has indicated that freedom of expression does not guarantee unlimited protection for journalists, even in matters of public interest. Even though they enjoy the protection of freedom of expression, journalists must, when exercising their duties, abide by the principles of responsible journalism, namely to act in good faith, provide accurate and reliable information, objectively reflect the opinions of

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222 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, para. 33, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 137.

223 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, para. 32, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 138.

224 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, para. 30, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 138.

225 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, para. 72, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 140.

226 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, para. 74, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 140.

227 *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 79.

those involved in a public debate, and refrain from pure sensationalism.[228] Furthermore, the European Court has indicated that the practice of responsible and ethical journalism is of special relevance in contemporary society where the media not only inform but can also suggest, by the way in which they present the information, how it is to be assessed.[229]

123. Freedom of expression is not an absolute right. This freedom may be subject to conditions and even limitations;[230] in particular when it interferes with other rights guaranteed by the Convention.[231] Article 13(2) of the Convention, which prohibits prior censorship, also establishes the possibility of claiming the subsequent imposition of liability for the abusive exercise of this right, even to ensure "respect for the rights or reputations of others" (subparagraph (a) of Article 13(2)). These limitations are exceptional in nature and should not prevent, beyond what is strictly necessary, the full exercise of freedom of expression and become a direct or indirect mechanism of prior censorship.[232] Thus, the Court has established that liability may be imposed subsequently, if the right to honor and reputation has allegedly been harmed.

124. Article 11 of the Convention establishes that everyone has the right to have his honor respected and his dignity recognized. The Court has indicated that the right to honor "recognizes that everyone has the right to have his honor respected, prohibits any unlawful attack on honor or reputation, and imposes on State the duty to provide legal protection against such attacks. In general, the Court has indicated that the right to honor is related to self-esteem and self-worth, while reputation refers to the opinion that others have of a person."[233]

125. Article 11(2) of the Convention prohibits arbitrary or abusive interference in the private life of an individual or unlawful attacks on his honor and reputation by private third parties or public authorities.[234] Thus, it is legitimate for the person who considers that his

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[228] *Cf.* ECHR, *Novaya Gazeta and Borodyanskiy v. Russia*, no. 14087/08, § 37, 28 March 2013. In this decision, the European Court indicated the following: "[i]n this respect the Court reiterates that Article 10 does not guarantee wholly unrestricted freedom of expression to the press, even with respect to coverage of matters of serious public concern. While enjoying the protection afforded by the Convention, journalists must, when exercising their duties, abide by the principles of responsible journalism, namely to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism." Similarly, see: *Pedersen and Baadsgaard v. Denmark* [Grand Chamber], no. 49017/99, § 78, ECHR 2004-XI, and *Stoll v. Switzerland* [Grand Chamber], no. 69698/01, § 103, ECHR 2007-V.

[229] *Cf.* ECHR, *Stoll v. Switzerland* [Grand Chamber], no. 69698/01, § 104, ECHR 2007-V, and *Novaya Gazeta and Borodyanskiy v. Russia*, no. 14087/08, § 42, 28 March 2013. In these decisions, the European Court stated that: "[t]hese considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance."

[230] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, para. 36, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 43.

[231] *Cf. Case of Kimel v. Argentina, supra*, para. 56, and *Case of Usón Ramírez v. Venezuela*. *Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 48.

[232] *Cf. Case of Herrera Ulloa v. Costa Rica, supra*, para. 120, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 43.

[233] *Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs*. Judgment of January 27, 2009. Series C No. 193, para. 57, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 286.

[234] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006 Series C No. 148, para. 194, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 48

honor has been affected to have recourse to the judicial mechanisms that the State has established to protect it.[235] In addition, Article 11(3) of the Convention specifically imposes on States the duty to provide the protection of the law against such interference. The State is obliged to guarantee to those who feel that their right to honor has been harmed, the appropriate judicial mechanisms to establish the corresponding responsibilities and punishments. If it does not do so, the State could incur international responsibility. Consequently, the State has the obligation to ensure the right to honor and reputation by positive actions, which may entail, in some cases, the adoption of measures designed to ensure this right, protecting it from the interference of public authorities, as well as of private individuals or institutions, including the media.[236]

126. The Court reiterates its consistent case law, to the effect that "it does not find that a punishment in relation to the expression of information or opinions is contrary to the Convention."[237] Both the civil and the criminal jurisdiction are legitimate, under certain circumstances, and insofar as they meet the requirements of necessity and proportionality, as a means for the subsequent imposition of liability for the expression of information or opinions that affect honor or reputation.[238] While Article 13(2)(a) of the Convention establishes that "respect for the rights or reputations of others" may be grounds for the subsequent imposition of liability for the exercise of freedom of expression,[239] Article 11 of the Convention establishes the protection of the honor and dignity of everyone (*supra* para. 124). Consequently, as it has established in other cases, the protection of the honor and reputation of everyone constitutes a legitimate purpose for the subsequent imposition of liability pursuant to this provision of the Convention.[240] This Court has also established that the criminal jurisdiction may be appropriate to safeguard the right that it is intended to protect, to the extent that it is able to contribute to achieve this objective.[241]

127. Both freedom of expression and the right to honor, which are both rights protected by the Convention, are extremely important; hence both rights must be guaranteed in a way that ensures that they coexist harmoniously.[242] Each fundamental right must be exercised respecting and safeguarding the other fundamental rights. The State plays a central role in this process of harmonization, endeavoring to establish the necessary responsibilities and

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235 *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 101, and *Case of Usón Ramírez v. Venezuela*, *supra*, para. 46.

236 *Cf. Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 49.

237 *Case of Kimel v. Argentina, supra*, para. 78, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 55.

238 *Cf. Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 49

239 The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has ruled similarly. See, for example, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/14/23, 4 June 2012, para. 80; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, ''Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development," A/HRC/7/14, February 28, 2008, para. 39, and Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, implementation of General Assembly resolution 60/251 of 15 March 2006 entitled "Human Rights Council," A/HRC/4/27, 2 January 2007, para. 46.

240 *Cf. Case of Herrera Ulloa v. Costa Rica, supra*, para. 120, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 53.

241 *Cf. Case of Kimel v. Argentina, supra*, para. 78, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 53.

242 *Cf. Case of Kimel v. Argentina, supra*, para. 51, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 50.

penalties to achieve this objective.[243] The need to protect the rights that could be affected by an abusive exercise of freedom of expression calls for due observance of the limits established by the Convention in this regard.[244] The settlement of a dispute between both rights requires weighing them based on a judgment of proportionality and, to this end, each case must be examined taking into account its characteristics and circumstances, in order to assess the existence and intensity of the elements on which this judgment is based.[245]

128. The Court will now examine the compatibility with the American Convention of the subsequent imposition of liability on Messrs. Mémoli, taking into account the above-mentioned standards.

A.2.2) The subsequent imposition of liability in this case

129. Based on some arguments of the representatives, this Court observes that, when examining the above-mentioned public interventions by means of newspaper articles or radio programs, it is not required to analyze whether Messrs. Mémoli effectively committed the offense of defamation against the members of the Management Committee of the Italian Association. This falls within the competence of the domestic courts. What corresponds to this Court is the examination of whether, when subsequently imposing liability on Messrs. Mémoli for the exercise of their freedom of expression, the State respected and guaranteed the relevant Convention-based requirements.

130. In this regard, Article 13(2) of the American Convention establishes that the subsequent imposition of liability for the exercise of freedom of expression must comply with all the following requirements: (i) it must be expressly established by law, in both the formal and substantial sense;[246] (ii) it must respond to an objective permitted by the American Convention ("respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals"), and (iii) it must be necessary in a democratic society (and to this end must comply with the requirements of suitability, necessity and proportionality).[247] In this case, the Court will analyze whether the sentences for defamation imposed on Messrs. Mémoli met these requirements.

131. The Court recalls that Carlos and Pablo Mémoli were convicted in the criminal jurisdiction to a suspended sentence of one and five months' imprisonment, respectively, for the offense of defamation owing to statements made in seven interventions that both the first instance court and the chamber of second instance considered to have denigrated or discredited the honor or the reputation of the complainants. At the same time, Messrs. Mémoli were acquitted of the offense of defamation for the other interventions of which they had been accused, as well as for the offense of libel for all the interventions for which they had been criminally prosecuted (*supra* paras. 75 to 88).

132. Regarding the first requirement of Article 13(2) of the Convention (established by law), the Court observes that, in this case, Messrs. Mémoli were convicted of the offense of

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243 *Cf. Case of Kimel v. Argentina, supra*, para. 75, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 50.

244 *Cf. Case of Kimel v. Argentina, supra*, para. 56, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 50.

245 *Cf. Case of Kimel v. Argentina, supra*, para. 51.

246 *Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 35 and 37.

247 *Cf. Case of Tristán Donoso v. Panama, supra*, para. 56.

defamation in force at the time, and defined in article 110 of the Criminal Code of the Nation. This article established that "[a]nyone who dishonors or discredits another person shall be punished by a fine of one thousand pesos to ninety thousand pesos or imprisonment from one month to one year."[248]

133. The Court notes that, contrary to the argument of the Commission, in the *Kimel* case, this Court did not consider that, in general, the offenses of libel and defamation were incompatible with the American Convention. As the Court has reiterated in its consistent case law, punishment for the expression of information or opinions is not considered contrary to the Convention (*supra* para. 126). In the *Kimel* case, the Court ruled specifically on articles 109 and 110 of the Criminal Code in force at the time, establishing that they did not meet the standards of strict legality required in criminal matters[249] owing to "the lack of sufficient precision in the criminal laws that penalize libel and defamation," which, moreover, had been acknowledged by the State itself.[250] It is on this basis that the Inter-American Court established, specifically, that this "lack of precision" should be rectified.[251] When Argentina corrected the said lack of precision, by Law 26,551 of November 2009, amending the definitions that existed in the Criminal Code, the Inter-American Court determined that the State had complied fully with its obligation to adapt its domestic law to the American Convention.[252]

134. According to the information in the case file, the Court notes that Messrs. Mémoli were convicted based on a norm established in the Argentine legal system designed to protect a legitimate objective compatible with the Convention: the protection of the honor and reputation of others (*supra* para. 126). The Court's considerations in the *Kimel* case on the substantive legality of the norm that defined libel as an offense in the Argentine legal system are not applicable to this case,[253] owing to a difference in the factual and legal nature of the case.

135. The criminal proceedings against Eduardo Kimel in Argentina was based on an analysis he made in his 1998 book entitled "*La masacre de San Patricio*"[254] of the murder of five Pallotine Fathers, which occurred in Argentina on July 4, 1976, during the last military dictatorship.[255] In this book, Mr. Kimel examined, *inter alia*, the judicial measures taken to investigate the massacre. With regard to a judicial decision adopted on October 7, 1977, Mr.

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248 Report of the *Centro de Estudios Legales and Sociales* (CELS) on the *Kimel* case (file of annexes to the final written arguments of the representatives, folio 3554); Merits Report of the Commission (merits file, folio 22), and pleadings and motions brief of the representatives (merits file, folio 93). Despite the Court's request, none of the parties provided a copy of the Criminal Code in force at the time of the sentence imposed on Messrs. Mémoli (*supra* para. 8 and footnotes 7 and 127).

249 *Cf. Case of Kimel v. Argentina, supra,* paras. 63 to 67.

250 *Cf. Case of Kimel v. Argentina, supra,* paras. 66 and 67.

251 *Case of Kimel v. Argentina, supra,* para. 128.

252 *Cf. Case of Kimel v. Argentina*. *Monitoring compliance with judgment*. Decision of the Court of May 18, 2010, Considering paragraph 35. Law 26,551 of 2009 amended the definition and sanction of the offense of defamation of which Messrs. Mémoli were convicted, so that: (i) the requirement of fraud for the perpetration of the offense was expressly included; (ii) the possibility was eliminated that statements related to matters of public interest or those that were not affirmative could constitute presumptions of defamation; (iii) the possibility was eliminated that "expressions that harmed honor" could constitute the offense of libel "when related to a matter of public interest," and (iv) the punishment of imprisonment was eliminated for the perpetration of this offense.

253 *Cf. Case of Kimel v. Argentina, supra*, paras. 61 to 67.

254 *Cf. Case of Kimel v. Argentina, supra*, para. 41.

255 *Cf. Case of Kimel v. Argentina, supra*, para. 41.

Kimel had indicated – and this is why he was prosecuted – that the federal judge who was heard the case:

> Adopted all required steps and procedures. He collected the police reports containing the preliminary information, requested and obtained forensic and ballistics reports, and summoned to appear many of those who could provide information for the elucidation of the case. Notwithstanding, an examination of the judicial record raises an initial question: Did the authorities actually intend to discover indications that might lead to the perpetrators? Under the military dictatorship judges were normally acquiescent, if not accomplices to the dictatorial regime. In the case of the Pallotine Fathers, the judge […] complied with most of the formal requirements of the investigation, even though it is evident that a number of decisive elements that could have shed light on the murder were not taken into account. The evidence that the order to carry out the murder had originated within the military structure in power paralyzed the investigation, bringing it to a standstill.[256]

136. In that case, the Court concluded that the criminal provisions concerning defamation and libel had been deficient, because the said "lack of precision" did not allow the prohibited conducts in the analytical statements for which Mr. Kimel had been accused to be determined with exactitude and, in addition, the grounds for considering Mr. Kimel's criticisms wrongful or illegal were not sufficiently foreseeable.[257] In order to illustrate the effect that the said "lack of precision" had on Mr. Kimel's freedom of expression, the Court underscored that, in that case, the victim had been sentenced in first instance for defamation (*injurias*), acquitted in second instance, and convicted in cassation for the crime of libel (*calumnia*).[258]

137. In this case, the situation is different from that of the *Kimel* case, because it was sufficiently foreseeable that certain statements and characterizations used by Messrs. Mémoli (in which the presumed victims accused the complainants as possible authors of or accessories to the offense of fraud, referred to them as "criminals," "unscrupulous," "corrupt" and said that they had "used subterfuges (*tretas*) and deceit (*manganetas*)," among other matters) could result in a judicial action for the alleged harm to the honor or reputation of the complainants.

138. In addition, the Court reiterates that Article 11(3) of the Convention, in combination with Article 11(2), establishes that "[e]veryone has the right to the protection of the law against [arbitrary or abusive interference with his private life] or [unlawful] attacks [on his honor or reputation]." Therefore, in compliance with this provision of the Convention, the recourse to judicial mechanisms to obtain protection against attacks on the honor and reputation of the individual, including the abusive exercise of freedom of expression that could harm the said rights, is a valid and legitimate measure under the American Convention (*supra* paras. 125 and 126).

139. Taking into account that the convictions imposed on Messrs. Mémoli were established by law and responded to an objective permitted in the Convention (the protection of the reputation of others), this Court notes that the said criminal sanctions complied with two of the requirements established in Article 13(2) of the Convention (*supra* para. 130). Regarding the third requirement (the need for the subsequently imposition of liability), the Court recalls that it does not find that criminal measures in relation to the imparting of information or opinions is contrary to the Convention (*supra* para. 126). However, as it has established in other cases, this possibility must be analyzed with special care, weighing up in this regard the extreme gravity of the conduct of the individuals imparting the information and opinions, the wilful intent in the way in which they acted, the characteristics of the harm unjustly caused,

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256 *Case of Kimel v. Argentina, supra*, para. 42.

257 *Cf. Case of Kimel v. Argentina, supra*, paras. 66, 67 and 128.

258 *Cf. Case of Kimel v. Argentina, supra*, paras. 64 and 65.

and other information that reveals the absolute need to use, in a truly exceptional way, criminal measures. At all time, the burden of proof must fall on the party who makes the accusation. In this regard, the Court has taken note of the evolution of the case law of other courts aimed at promoting, with balance and rationality, the protection deserved by rights that are apparently in conflict, without weakening the guarantees that are required by freedom of expression as a bulwark of a democratic regime.[259]

140. The Court also underscores that the international jurisdiction is of a contributing and complementary nature and, thus, the Court does not fulfill the functions of a court of "fourth instance."[260] This means that the Court is not a higher court of a court of appeal to decide disagreements between the parties on some implications of the assessment of evidence or the application of domestic law in aspects that are not directly related to compliance with international human rights obligations.[261] The Court recognizes that, when examining compliance with certain international obligations, there may be an intrinsic interrelation between the analysis of international law and domestic law. However, in strict observance of its subsidiary competence, the Court considers that, in a case such as this one, it must verify whether the State authorities made a reasonable and sufficient weighing up between the two rights in conflict, without necessarily making an autonomous and independent weighing, unless the specific circumstances of the case require this.

141. The Court notes that the statements of Messrs. Mémoli were examined in detail by the domestic judicial authorities when deciding the criminal conviction against them. When reviewing the need to establish criminal sanctions against Messrs. Mémoli, the courts of both first and second instance examined thoroughly the characteristics of the statements made by Messrs. Mémoli based on which the complaint had been filed against them. In this regard, the Court notes that: (i) the convictions for defamation were the result of a detailed analysis of each of the interventions, exempting Messrs. Mémoli of responsibility for statements considered "opinions that did not disparage the complainants"[262] and holding them responsible for statements included in the said interventions that, in the understanding of the domestic judicial authorities, had exceeded a simple opinion or analysis of the news, with the purpose of disparaging or defaming one or several of the complainants or, for example, constituted "a voluntary digression to insult them," without being "necessary or essential for the claim made" (*supra* paras. 77 to 82 and 87); (ii) the domestic courts verified the existence of *animus injuriandi* or malice as regards the statements for which they were convicted; (iii) they acquitted the presumed victims for most of the interventions based on

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259 *Cf. Case of Kimel v. Argentina, supra*, para. 78, citing: ECHR, *Mamère v. France,* no. 12697/03, § 27, ECHR 2006-XIII; *Castells v. Spain*, 23 April 1992, §§ 42 and 46, Series A no. 236, and *Cumpănă and Mazăre v. Romania* [Grand Chamber], no. 33348/96, § 115, ECHR 2004-XI.

260 The Preamble to the American Convention states that the international protection "reinforce[es] or complement[s] the protection provided by the domestic law of the American States." See also, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (arts. 74 and 75). Advisory opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 31; *The Word "Laws" in Article 30 of the American Convention on Human Rights, supra*, para. 26, *Case of Velásquez Rodríguez vs. Honduras*. *Merits, supra*, para. 61 and *Case of Palma Mendoza et al. v. Ecuador. Preliminary objection and Merits.* Judgment of September 3, 2012. Series C No. 247, para. 16.

261 *Cf. Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits.* Judgment of November 28, 2006. Series C No. 161, para. 80, and *Case of Palma Mendoza et al. v. Ecuador, supra*, para. 16.

262 In this regard, see, for example, with regard to the radio program of May 4, 1990, the first instance court considered that four of the phrases for which Messrs. Mémoli were charged were "opinions on the topic, regarding which it cannot be said that they were disparaging," while, with regard to the radio program of May 10, 1990, the first instance court considered that nine of the statements based on which the presumed victims were accused were "simple comments on opinions concerning a certain topic" and did not have a defamatory content (*supra* footnotes 108 and 111).

which the complaint was filed, as well as for the offense of libel, and (iv) when acquitting them for these statements, the domestic courts distinguished that some of these statements constituted opinions or were of a hypothetical nature in order to exempt them from criminal liability for the offense of libel and defamation,[263] or constituted "accounts of facts or "newspaper stories."[264]

142. The Court also notes that the presumed victims alleged the need for protection of their freedom of expression before the domestic courts and, in both instances, it was not considered that this was sufficient justification for the harm verified to the complainants' reputation (*supra* paras. 83 and 87). The Court recalls that freedom of expression is not an absolute right and that it may be subject to the subsequent imposition of liability based on the protection of the rights of others; in this case, the right to honor and reputation of the complainants (*supra* paras. 123, 126 and 127). Thus, the Court takes note of the findings of the domestic judicial authorities according to which "freedom of the press is not an absolute right, but must coexist, in harmony, with the other rights guaranteed to the citizens."[265] Similarly, the Court recalls its case law, according to which both rights of the Convention deserve equal protection and must coexist harmoniously (*supra* para. 127). The Court reiterates that, in this harmonization process, the State must establish the responsibilities and penalties that may be necessary to achieve this objective (*supra* paras. 125 and 127).

143. In this regard, the Court takes note that the Argentine judicial authorities who intervened in this case examined the statements made by Messrs. Mémoli and their impact on the honor and reputation of third parties. In this Court's opinion, this examination constituted a reasonable and sufficient weighing up of the two rights in conflict, which justified the subsequent imposition of liability against them. Given the nature of the proceedings before this Court, private individuals whose honor and reputation have been harmed have not taken part in them. Consequently, this Court considers that, in this case, the domestic judicial

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[263] See, for example, that the first instance court acquitted Messrs. Mémoli: (i) with regard to the "letters document" of April 6, 1990, considering that, since they did not contain the specific accusation of an offense (because the said document used the expression "presumed fraud"), there was no defamation, while there was no libel because Mr. Mémoli, as a member of the Italian Association, was acting "in defense of the Association's interests and, consequently, was expressing his opinion that, ultimately, would be subject to the decision of the other members"; (ii) regarding the communiqué (*solicitada*) entitled "*Autoritarismo e irregularidades de un miembro de una Comisión Directiva,*" Carlos Mémoli was acquitted considering that he was "expressing publicly his opinion on the administration of the association" and, with regard to treasurer Piriz, "demanded compliance with a statutory obligation," without accusing them of an offense; in general, it constituted "a criticism of the Management Committee's administration of the association," so that it did not constitute defamation or libel because this opinion "could not dishonor them and did not related to the actual person, in addition to not having been made with the specific malice required by the definition of the offense"; (iii) regarding Pablo Mémoli's article entitled "*Denuncian presunta defraudación*," he was acquitted, considering that "this article was written in the conditional tense, and without making a categorical reference to the criminal liability of [the complainants]", and finding that the content of the article refers "to the essence of the information, without being able to say that it contains an accusation of an offense or an attack on the honor of or a denigration of the [complainants]." Judgment delivered by Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes in case No. 71,114 on December 29, 1994 (file of annexes to the Merits Report, annex 3, folios 171, 172, 173 and 177).

[264] See, for example, the considerations of the first instance court acquitting Messrs. Mémoli for the article entitled "*Toman declaración a adquirientes de nichos*," published on April 28, 1990, in *La Libertad*, which indicates that "neither the phrase [for which the complaint was filed against them] nor the context reveal defamatory expressions, because it merely gives an account of the facts." In addition, with regard to Pablo Mémoli's article entitled "*Caso nichos: Torpe amenaza a la libertad*," the first instance court considered that there was no *animus injuriandi*, because "it is merely a newspaper story and it even refers to problems in INAM and to a threat received," that had been reported, and which had given rise to this publication and "in no way affects the complainants' honor." Judgment delivered by Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes in case No. 71,114 on December 29, 1994 (file of annexes to the Merits Report, annex 3, folios 185, 186 and 206)

[265] Judgment of Court No. 7 for Criminal and Correctional Affairs of the Judicial Department of Mercedes in case No. 71,114 on December 29, 1994 (file of annexes to the Merits Report, annex 3, folio 210).

authorities were in a better position to assess which right suffered most harm. The Court emphasizes that the statements characterized as libelous were published in a medium that reached many more people than the members of the Mutual Association, so that the honor and the reputation of the complainants was possibly affected before a much larger audience than the one that might benefit from this information. Furthermore, bearing in mind that the domestic judicial authorities concluded that certain characterizations used by Messrs. Mémoli harmed the complainants' reputation unnecessarily, the Court observes that the subsequent imposition of liability in this case constitutes compliance by the State with the obligation established in Article 11(3) of the Convention, according to which everyone must be protected again abusive attacks on their honor and reputation (*supra* paras. 125 and 138).

144. In addition, regarding the punishment imposed on Messrs. Mémoli, the Court recalls that it cannot substitute for the domestic authorities in the individualization of the penalties corresponding to offenses established in domestic law,[266] notwithstanding its obligation to analyze the requirement that these penalties comply with the requirements for the subsequent imposition of liability, pursuant to Article 13(2) of the American Convention and the case law of this Court. In this case, Carlos and Pablo Mémoli were given a suspended sentence of one month's and five months' imprisonment, respectively. In other words, Carlos Mémoli was sentenced to the minimum term of imprisonment established by domestic law, while Pablo Mémoli was sentenced to less than half the permitted term of imprisonment (*supra* paras. 131 and 132).[267] In the instant case, this Court observes that the punishments imposed on Messrs. Mémoli were not excessive or manifestly disproportionate in a way that affected their right to freedom of expression.

145. In addition, the Court notes that a central aspect of the dispute between the parties relates to whether or not the information contained in the statements for which Messrs. Mémoli were convicted constituted public interest. In this regard, the Court deems it pertinent to clarify that Article 13 of the Convention protects statements, ideas or information "of all kinds," whether or not they are of public interest. Nevertheless, when such statements refer to issues of public interest, the judge must assess the need to limit freedom of expression with special care (*supra* para. 139).

146. In order to protect freedom of expression, the Court has considered of public interest opinions or information on matters in which the Association had a legitimate interest to keep itself informed, to know what had an impact on the functioning of the State, or affected general right or interests, or had significant consequences for it.[268] Contrary to other cases decided by this Court, in the instant case, the statements for which Messrs. Mémoli were convicted did not involve public figures or officials[269] and did not relate to the functioning of State institutions.[270] Rather, the Court notes that the accusations and statement for which

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[266] *Cf. Case of Vargas Areco v. Paraguay. Merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 155, para. 108, and *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits and reparations.* Judgment of May 26, 2010. Series C No. 213, para. 150.

[267] Article 110 of the Criminal Code in force at the time established that: "[a]nyone who dishonors or discredits another person, shall be punished with a fine of one thousand pesos to ninety thousand pesos or imprisonment from one month to one year" (*supra* para. 132).

[268] *Cf. Case of Tristán Donoso v. Panama, supra,* para. 51, *and Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 61.

[269] *Cf. Case of Herrera Ulloa v. Costa Rica, supra*, para. 131; *Case of Ricardo Canese v. Paraguay, supra*, paras. 91 to 94 and 97; *Case of Kimel v. Argentina, supra*, para. 51; *Case of Tristán Donoso v. Panama, supra*, para. 121, and *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 63.

[270] Such as the Foreign Investments Committee (*Case of Claude Reyes v. Chile. Merits, reparations and costs.* Judgment of September 19, 2006. Series C No 151, para. 73), or the Armed Forces *(Case of Vélez Restrepo and family members v. Colombia, supra*, para. 145).

Messrs. Mémoli were convicted occurred in the context of a dispute between private individuals concerning matters that, possibly, would only affect the members of a private mutual association, without any indication that the content of this information would have any relevance or impact that would go beyond the Association and be of significant interest to the rest of the population of San Andrés de Giles. To the contrary, according to the case file, the accusation of fraud filed by Messrs. Mémoli owing to the "case of the burial niches" was examined by the court and, on June 6, 1990, the judge hearing the charges dismissed the case understanding, among other matters, that the accused had been acting in good faith, and, at that time, no patrimonial damage had been verified (*supra* para. 70). In parallel to this criminal accusation, Messrs. Mémoli filed a complaint before the National Mutual Action Institute (INAM) asking it to investigate the Italian Association and its Management Committee, among other reasons, for the supposed fraud committed in the case of the burial niches. In June 1991, the Directors of INAM issued a decision in which it was considered that, in the matter of the burial niches, no offense had been committed, but that the Association should draw up regulations in this regard to be approved by INAM (*supra* para. 71).

147. Consequently, the facts of the instant case do not reveal that the information contained in the statements made by Messrs. Mémoli is of public interest. Even though certain information concerning private individuals or organizations may be classified as information of public interest, in this case two domestic courts analyzed and rejected this argument, and did not consider it a sufficient reason to justify the defamatory or derogatory statements made against the reputation of the complainants (*supra* paras. 83 and 88). In addition, the Court underlines that, a judge of the Supreme Court of Justice of the province of Buenos Aires ruled similarly when disallowing the application of the new criminal definition of defamation to Messrs. Mémoli (*supra* para. 94). Referring back to its consideration on the impossibility of acting as a fourth instance (*supra* para. 140), the Court does not find it justified in a case such as this one to substitute or annul the decision of the domestic courts in this regard. Moreover, the case file shows that the specific matter of the burial niches, which would allegedly be of "public interest," was examined by the courts in an independent proceeding, as well as by the supervisory entity of mutual associations such as the Italian Association.

148. Consequently, in keeping with the circumstances of this case, the protection of the complainants' right to honor and reputation is a legitimate framework for the proceedings in which Messrs. Mémoli appeared, and the Court does not find that the reasoning set out by the Argentine judicial authorities in their decision determining the resulting liability of Messrs. Mémoli violates the Convention.

149. Based on all the above considerations, the Court concludes that the subsequent imposition of liability on Messrs. Mémoli for the exercise of their freedom of expression was established by law, respecting an objective permitted by the Convention, and was not manifestly excessive or disproportionate, given the circumstances of this case and the analysis made by the domestic judicial authorities. Therefore, the Court considers that Argentina did not violate Article 13 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Carlos and Pablo Mémoli.

B. The alleged violation of the principle of legality and retroactivity

B.1) Arguments of the Commission and of the parties

150. In this case, the representatives argued that, following the amendment of the law, which "eliminates the punishment of imprisonment for anyone in case of defamation," Article 9 of the Convention was violated "by failing to apply the most favorable law for the Mémoli," considering that "[the] punishment had concluded." They stressed that "the civil case is based

exclusively on the criminal conviction," which the State itself had acknowledged in its answering brief; hence, in the absence of the criminal conviction, there would be no grounds for the civil complaint. In addition, they argued that the criminal conviction had represented "a legal impediment" for Pablo Mémoli to take part in a competition for the position of judge of a misdemeanors court of San Andrés de Giles, as well as "to obtain a radio license." Based on these facts, the representatives also argued the violation of Article 23 of the Convention to the detriment of Pablo Mémoli. To counter the State's argument that the presumed victims erred in requesting the application to their case of the amended law, by an appeal on unconstitutionality, they indicated that "the judges changed [the said] remedy […], [that was supposedly] erroneous […], to an appeal for review, and both the chamber and the court indicated that it was not in order to acquit them," so that "even presenting the appeal for review correctly, […], [their request] would have been rejected."

151. The State emphasized that, in their pleadings and motions brief, the presumed victims "had merely copied the text [of Article 9 of the Convention] without indicating any specific connection to the facts of the case." It also indicated that Messrs. Mémoli failed to provide evidence for their assertions, and that "the supposed restrictions suffered by Pablo Mémoli to his political rights were established by law and permitted by the […] Convention." According to the State, Messrs. Mémoli "opted to file remedies that were patently inappropriate," because "[i]nstead of requesting their acquittal by the application of the […] most favorable law […], they insisted […] on filing the appeal on unconstitutionality," and "[w]hen rejecting the appeals […], the Supreme Court of the province of Buenos Aires expressly indicated that the case had not decided constitutional matters and it did not note any grievances of the presumed victims that could be described in those terms." In addition, Argentina pointed out that Messrs. Mémoli had note even provided "the minimum evidence required to process the said special remedy," but rather "had merely asserted the existence of an action for damages based exclusively on the criminal conviction."

152. The Commission did not include the alleged violation of Article 9 (based on the principle of legality and the retroactive application of the law) in its Merits Report. However, in its final written observations, it underlined that Messrs. Mémoli "have taken measures at the domestic level" for the annulment of the criminal conviction against them, "without having obtained a favorable response," even though, in the Commission's opinion, "they were not obliged to take such measures that the State should have taken *ex officio*, given the evident violations already declared by the Inter-American Commission and that the Inter-American Court is in the process of deciding on the merits following long years of inter-American litigation." It indicated that, owing to the public interest of the statements made by Messrs. Mémoli, the application of the criminal law now in force in Argentina, "pursuant to the principle of the most favorable law," "necessarily should lead to the annulment of the criminal conviction and the dismissal of the civil proceeding against them" or, "at least, to the lifting of the precautionary measure." It indicated that "there is no doubt" that the criminal conviction "continues to produce legal effects, because it serves as grounds for a civil proceeding that has involved an injunction against the sale or encumbrance of their property for 16 years."

B.2) Considerations of the Court

153. The Court recalls that the presumed victims or their representatives may cite the violation of rights other than those included in the Commission's Merits Report.[271]

[271] *Cf. Case of the Five Pensioners v. Peru, supra*, para. 155, and *Case of Suárez Peralta v. Ecuador, supra*, para. 19.

154. The principle of legality constitutes one of the central elements of criminal prosecution in a democratic society by establishing that "no one shall be convicted for any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed." This principle guides the actions of all the organs of the State, in their respective jurisdictions, particularly in the case of the exercise of punitive powers.[272] This Court has also indicated that the principle of non-retroactivity means that a person may not be punished for an act that, when it was committed, was not an offense or could not be prosecuted or punished.[273]

155. If, after an offense has been committed, the law provides for the imposition of a lighter punishment, the guilty person must benefit from this. The principle of the retroactivity of the criminal law is established in the last part of Article 9 of the Convention, which indicates that "[i]f, subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."[274] This norm should be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the American Convention, which is the effective protection of the individual,[275] as well as by an evolutive interpretation of the international instruments for the protection of human rights.[276]

156. In this case, Messrs. Mémoli were convicted of the offense of defamation defined in article 110 of the Criminal Code in force at the time. In 2009, this norm was amended so that it excluded statements related to matters of public interest of that were not affirmative from any criminal punishment, and also eliminated the punishment of imprisonment for their perpetration (*supra* para. 91). In this way, the new definition of the offense of defamation removed the criminal nature of statements relating to matters of public interest or statements that were not affirmative, and reduced the criminal sanctions for the offense of defamation.

157. This Court notes that there were two main reasons why the review of the criminal conviction imposed on Messrs. Mémoli was rejected: (i) because the punishment had concluded, in the opinion of the Appellate Chamber and (ii) because no evidence had been provided concerning "the facts that resulted in the conviction, in order to corroborate that they involved a supposed impairment of the right to freedom of expression on issues of significant public interest," or concerning the "existence of a claim for compensation against the appellants," in the opinion of one of the judges of the Supreme Court of Justice of Buenos Aires (*supra* paras. 93 and 94).

158. The Court recalls that, in this case, the domestic judicial authorities concluded that the information contained in the statements made by Messrs. Mémoli was not of public interest (*supra* paras. 145 to 147). Based on this, the decriminalization of statements relating to matters of public interest would not apply to the sentence imposed on Messrs. Mémoli, because the statements were not "related to a matter of public interest," as established in the

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272 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 23, 2012. Series C No. 255, para. 130.

273 *Cf. Case of Ricardo Canese v. Paraguay, supra*, para. 175, and *Case of Mohamed v. Argentina, supra*, para. 131.

274 *Cf. Case of Ricardo Canese v. Paraguay, supra*, para. 178.

275 *Cf. Case of the 19 Tradesmen v. Colombia. Merits, reparations and costs*. Judgment of July 5, 2004. Series C No. 109, para. 137, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 173.

276 *Cf. Case of Ricardo Canese v. Paraguay, supra*, para. 178, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 173.

new article 110 of the Argentine Criminal Code. Furthermore, this Court takes note that, in any case, according to the Appellate Chamber, the criminal sanction imposed on Messrs. Mémoli had been completed, so that application of the new law to the criminal conviction imposed on them would not be appropriate.

159. Based on the above considerations, the Court concludes that the State did not fail to comply with the principle of legality and retroactivity, and therefore did not violate Article 9 of the Convention, in relation to Article 1(1) thereof, to the detriment of Messrs. Mémoli.

160. Finally, the Court observes that the representatives' arguments regarding the supposed violation of political rights are based on the State's supposed responsibility for the violation of the freedom of expression of Messrs. Mémoli, because these arguments refer to the alleged effects of the criminal conviction, as well as the supposed failure to apply the law retroactively. Since the Court has found that the State did not violate Articles 13 and 9 of the American Convention, therefore, the Court considers that it is not in order to analyze the alleged violation of Article 23 of the Convention.

IX
REASONABLE TIME AND RIGHT TO PROPERTY, IN RELATION TO THE OBLIGATION TO RESPECT AND ENSURE RIGHTS

161. In this chapter, the Court will examine the violations alleged by the Commission and the representatives, as well as the corresponding argument of the State, with regard to: (i) the violation of the reasonable time and of the right to property, and (ii) the other violations of due process alleged by the representatives.

A. Violation of reasonable time and the right to property in the civil proceeding for damages

A.1) Arguments of the Commission and of the parties

162. The Commission concluded that there had been a violation of the principle of a reasonable time in the civil proceeding that would also suppose a violation of the right to freedom of expression. In this regard, it noted that "the civil proceeding against Carlos and Pablo Mémoli was filed on December 29, 1997, and as of this date [that of the Merits Report], has not been decided in first instance." The Commission indicated that "even though the long delay in settling the case is partly attributable to the pleadings of the petitioners, the conduct of the judicial authorities has also contributed to this situation." The Commission added that "the existence of a precautionary measure that imposed a severe restriction on the rights of the victims required the judicial authorities to take all necessary measures to complete the case promptly and diligently." In this regard, it indicated that "the application of a general injunction on property in the context of a civil suit that has not been decided within a reasonable time has lost its precautionary nature and become a punishment."

163. The Commission also indicated that "civil proceedings in the area of freedom of expression should be strictly proportionate so as not to have a inhibiting effect on speech, [which] is particularly important in matters relating to issues of public interest." In this regard, it observed that "the civil suit against Carlos and Pablo Mémoli for the sum of 90,000 Argentine pesos, together with the general injunction on property that has been in effect for more than 15 years, has not only given rise to the fear of possible civil sanctions,

but also effectively adversely affected the personal life and life projects of the petitioners." The Commission did not refer to the alleged violation of the right to property.

164. The representatives stressed that the civil suit has been "interminable and, therefore, arbitrary and, at this stage, has no purpose when two of the three plaintiffs have desisted […] and when […] defamation has been decriminalized in […] Argentina." They argued that it was not true that the delays were due to the appeals they had filed, and that they had always responded to notifications without waiting until the time frames were about to expire. They also indicated that "they have no debts; however, the courts endorse [the precautionary measures], nowadays without any justification, affecting their personal and financial activities, curtailing their civil rights and, consequently, causing serious prejudices without any need." In this regard, they indicated that, even though they have not been convicted, the "burden of this penalty [hangs over them, and] throughout [their] life, has caused them anxiety," and has also prevented them from "obtaining credit to buy a printing machine, [so that] they have been unable to improve their financial situation at the speed of a company that does not have this problem," which, they indicated, "also limits freedom of expression." In this regard, they argued that "the injunctions led to a total barrier to any possibility of use and enjoyment" [of their property] and, therefore, constituted a violation of their right to property. Regarding the possibility of substituting the general injunction for an embargo, they indicated that it would be necessary "to have several assets, or at least one, [that was not] the family home, in order to offer it."

165. The State noted that both parties to the civil suit "have contributed decisively, in the context of the personal litigation strategies used in this case, to extend the time taken in the processing of the proceeding." It also indicated that "except for one or other specific request to decide the matter promptly, […] the civil case does not reveal pleadings concerning the unreasonableness of the duration of the proceeding. In this regard, it is evident that this is not a serious concern of the presumed victims in this case." The State also indicated that article 1102 of the Civil Code, applicable to the civil case, establishes that "the existence of the main fact that constitutes the offense cannot be contested in the civil action, and the guilt of the accused cannot be challenged." It underscored that "Pablo Mémoli [had] received a disciplinary sanction of an admonition, after he had ignored previous warnings about the obligation to observe proper decorum in his pleadings […], as a result of referring to the decisions of the judge hearing the case in an insulting manner."

166. The State indicated that "the delay in the time frames [in the] civil proceeding was due to the procedural activity of the parties, so that there was no basis for inferring that the State was responsible for a presumed violation of freedom of thought and expression based on a supposed violation of the reasonableness of the duration of the proceeding." Argentina considered that, even though the relationship between reasonable time and freedom of expression "may be applied to other cases, […] it does not apply to the case of Carlos and Pablo Mémoli because no evidence has been provided to substantiate this." In this regard, it stressed that, during the civil proceeding, the presumed victims never associated freedom of expression "with the delay in the procedural time frames to which they themselves have made a significant contribution." Furthermore, it cannot be concluded that there has been a violation of freedom of expression based on the mere existence of a precautionary measure, "that has continued in force over time for reasons that have involved the petitioners." In relation to the alleged violation of the right to property, the State noted that the representatives had "not explained [why] they did not offer other assets to be embargoed in order to obtain the lifting of the injunction, since this is permitted by Argentine law."

A.2) Considerations of the Court

167. The Court recalls that, in this case, in December 1997, a civil suit for damages was filed against Messrs. Mémoli, in which, after more than 15 years, the first instance decision has not yet been delivered (*supra* paras. 95 to 108). Furthermore, prior to the opening of this proceeding, a precautionary measure of an injunction against the sale or encumbrance of property had been decreed against Messrs. Mémoli in order to ensure any eventual payment that might result from the civil proceeding, so that this measure has been in force for over 17 years (*supra* paras. 109 to 112).

168. Based on these facts and on the arguments of the parties and of the Commission, in this case the Court will analyze whether the civil proceeding for damages filed against the presumed victims met the requirement of a reasonable time in accordance with Article 8(1) of the Convention, and whether the general injunction on property decreed in relation to that proceeding constituted a violation of the right to property recognized in Article 21 of the Convention.

169. Regarding the right to property, the Court reiterates that the representatives may cite the violation of rights other than those alleged by the Commission (*supra* para. 153).

170. The Court also recalls that, in its case law, it has developed a broad concept of property, which covers, among other matters, the use and enjoyment of property defined as goods that can be acquired, as well as any right that may form part of an individual's capital wealth. This concept includes all movable and immovable property, corporal and incorporeal elements, and any other immaterial object that may have a value.[277] In addition, it is necessary to repeat that the right to property is not absolute and, in this sense, it may be subject to restrictions and limitations,[278] provided that these are carried out using the appropriate legal mechanisms and in accordance with the parameters established in the said Article 21.[279] This Court has established that, when examining a possible violation of the right to property, it should not restrict itself to merely examining whether a formal expropriation or dispossession occurred, but also verify, over and above appearances, the real situation behind the situation denounced.[280]

171. Regarding the alleged violation of a reasonable time in the civil proceeding, the Court has indicated that all the organs that exercise functions of a jurisdictional nature, whether criminal or not, have the obligation to take decisions based on full respect for the guarantees of due process established in Article 8 of the American Convention.[281] Furthermore, the Court emphasizes that, in this case, contrary to others analyzed by the Court, the State is not a party to the judicial proceedings and the presumed victims are the respondents and not the complainants in it; consequently in this chapter, the Court will examine the actions of the State in the exercise of its jurisdictional function within a reasonable time, in the context of the dispute between two individuals that was submitted to its consideration. In this regard, in its case law, the Court has established that the right of access to justice must ensure the determination of the rights of the individual within a reasonable time. In principle, the

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277 *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*. Judgment of February 6, 2001. Series C No. 74, para. 122, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 269.

278 *Cf. Case of Ivcher Bronstein v. Peru*, *supra*, para.128, and *Case of Furlan and family members v. Argentina, supra*, para. 220.

279 *Cf. Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, para. 54, and *Case of Furlan and family members v. Argentina, supra*, para. 220.

280 *Cf. Case of Ivcher Bronstein v. Peru, supra*, para. 124.

281 *Cf. Case of Ivcher Bronstein v. Peru, supra*, para. 104, and Case of *López Mendoza v. Venezuela, supra*, para. 111.

absence of reasonableness in the time frame constitutes, in itself, a violation of judicial guarantees.[282] Moreover, this Court has indicated that the "reasonable time" referred to in Article 8(1) of the Convention must be assessed in relation to the total duration of the proceedings undertaken until the final judgment is handed down.[283]

172. The Court has usually considered the following elements to determine whether the duration of the judicial proceedings is reasonable: (a) complexity of the matter; (b) procedural activity of the interested party; (c) conduct of the judicial authorities,[284] and (d) the impact on the legal situation of the individual involved in the proceeding.[285] However, in this case, the Court has verified that more than 15 years have passed since an action for damages was filed against Messrs. Mémoli on December 29, 1997, and, currently, the proceeding is still pending a decision in first instance (*supra* paras. 95, 96 and 108). This Court recognizes that the number of appeals attempted by the parties could have hampered the work of the judicial authorities hearing the case. However, the Court considers that the nature of the civil proceeding in this case does not entail legal or probative aspects or discussions that would suggest that it is *per se* complex. Indeed, according to article 320 of the Code of Civil and Commercial Procedure of the province of Buenos Aires, "disputes relating to damages arising from offenses or quasi offenses [...]" are processed by a summary hearing, and this was decided by the judge of the case on March 27, 2001.[286] In other words, the proceeding under which Messrs. Mémoli's case is being processed is a simplified civil proceeding, so that, in principle, it has no special characteristic and requires no special procedure that would make it particularly complex.

173. Despite the foregoing, the Court underlines that the delays caused by the acts or omissions of either of the two parties must be taken into account when analyzing whether the proceeding has been conducted within a reasonable time.[287] In this regard, the State's main argument is that the delay in the civil proceeding is due to the number of judicial remedies filed by the parties to the proceeding. In this regard, this Court notes that, between the two parties, more than 30 remedies were filed[288] and agrees with the State that the remedies filed

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[282] *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of García and family members v. Guatemala, supra*, para. 152.

[283] *Cf. Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of García and family members v. Guatemala, supra*, para. 152.

[284] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, para. 77, and *Case of García and family members v. Guatemala, supra*, para. 153.

[285] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of García and family members v. Guatemala*, *supra*, para. 153.

[286] *Cf.* Decision of March 27, 2001 (file of annexes to the answer, annex 1, folio 2009).

[287] *Cf.* ECHR, *Zimmermann and Steiner v. Switzerland,* no. 8737/79, 13 July 1983, § 24, Series A no. 66*; H. v. the United Kingdom* (Article 50), no. 9580/81, § 71 and 73, 8 July 1987, Series A no. 136-B*; Vernillo v. France*, no. 11889/85, § 34, 20 February 1991, Series A no. 198, and *Stoidis v. Greece,* no. 46407/99, § 19, 17 May 2001.

[288] During the proceeding, the complainant has filed at least five remedies, including appeals for annulment and review with subsidiary appeal, of which at least one was repeated owing to the absence of a response. For their part, Messrs. Mémoli, among other actions, filed at least one objection of *res judicata* and of prescription of the civil action, three requests for prescription of the civil action, three requests for extinction of the action, two appeals for a declaration of nullity, seven challenges to the judges of the case, nine appeals including appeals for annulment and review with subsidiary appeal and one request for dismissal, of which at least one was rejected as time-barred, three were declared inadmissible and another considered inadmissible. In addition, on repeated occasions, both parties requested that the negligence of the opposite party be declared. *Cf.* Brief of February 19, 1998 (file of annexes to the answer, annex 1, folios 1823 to 1825); brief of March 24, 1998 (file of annexes to the answer, annex 1, folios 1884 to 1886); brief of August 3, 1998 (file of annexes to the answer, annex 1, folios 1909 and 1910); brief of October 2011 (file of annexes to the pleadings and motions brief, annex 2, folios 1687 to 1689); brief of June 8, 1999 (file of annexes to the answer, annex 1, folios 1958 to 1960); brief of March 17, 1999 (file of annexes to the answer, annex

by the parties to the civil action have contributed to making the proceeding more complex, and have had an impact on its prolonged duration.[289]

174. Nevertheless, the Court emphasizes that the parties to this proceeding, who include the presumed victims in this case, were making use of appeals recognized by the applicable laws in order to defend their interests in the civil proceeding, which *per se* cannot be used against them.[290] The Court considers that the filing of appeals constitutes an objective factor that should not be attributed to the respondent State and that must be taken into account when determining whether the duration of the proceeding exceeded a reasonable time.[291]

175. On the other hand, the case file before the Court does not reveal that the negligence of either of the two parties was established.[292] Moreover, on at least six occasions, Messrs. Mémoli requested the court to take action on some pending aspect[293] and, on three occasions,

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1, folios 1937 to 1944); brief of February 10, 1998 (file of annexes to the answer, annex 1, folios 1813 to 1818); brief of August 3, 1998 (file of annexes to the answer, annex 1, folio 1912); brief of October 8, 1998 (file of annexes to the answer, annex 1, folio 1927 and 1928); brief of September 16, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1683); brief of April 3, 1998 (file of annexes to the answer, annex 1, folios 1891 to 1893); brief of March 4, 2002 (file of annexes to the answer, annex 1, folios 2148 and 2149); brief of April 3, 2006 (file of annexes to the answer, annex 1, folios 2481 and 2482); brief of April 24, 2006 (file of annexes to the answer, annex 1, folio 2494); brief of June 20, 2006 (file of annexes to the answer, annex 1, folio 2536); brief of August 11, 2006 (file of annexes to the answer, annex 1, folio 2542); brief of February 15, 2012 (file of annexes to the pleadings and motions brief, annex 2, folio 1715); brief of August 22, 2012 (merits file, annex G, folios 491 to 493); brief of September 12, 2012 (merits file, annex G, folios 494 and 495); brief of April 25, 2001 (file of annexes to the answer, annex 1, folios 2047 to 2049); brief of May 23, 2001 (file of annexes to the answer, annex 1, folios 2069 and 2070); brief of May 28, 2001 (file of annexes to the answer, annex 1, folio 2072); brief requesting revocation of a decision (file of annexes to the answer, annex 1, folio 2124); brief of September 16, 2004 (file of annexes to the answer, annex 1, folios 2217 and 2218); brief of November 6, 2009 (file of annexes to the answer, annex 1, folios 2685 and 2686); brief of November 23, 2009 (file of annexes to the answer, annex 1, folios 2701 to 2703); brief of March 23, 2010 (file of annexes to the answer, annex 1, folios 2722 to 2726); brief of September 30, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1685); brief of October 25, 2004 (file of annexes to the answer, annex 1, folios 2238 and 2239); decision of December 20, 2001 (file of annexes to the answer, annex 1, folio 2137); decision of October 6, 2004 (file of annexes to the answer, annex 1, folio 2219); decision of October 22, 2004 (file of annexes to the answer, annex 1, folio 2236); decision of July 27, 2005 (file of annexes to the answer, annex 1, folio 2245); decision of March 20, 2003 (file of annexes to the answer, annex 1, folios 2167 and 2168); brief of March 3, 2006 (file of annexes to the answer, annex 1, folio 2454); brief of June 12, 2008 (file of annexes to the answer, annex 1, folio 2621); brief of October 18, 2006 (file of annexes to the answer, annex 1, folio 2566); brief of December 1, 2006 (file of annexes to the answer, annex 1, folio 2582); brief of October 8, 2010 (file of annexes to the pleadings and motions brief, annex 2, folios 1654 and 1655), and brief of November 19, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1698).

[289] In this regard, see ECHR, *Stoidis v. Greece,* no. 46407/99, § 18, 17 May 2001.

[290] *Mutatis mutandi, Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs, supra*, para. 79. See also, ECHR, *Kolomiyets v. Russia,* no. 76835/01, § 29, 22 February 2007, and *Eckle v.* Germany, no. 8130/78, § 82, 15 July 1982, Series A no. 51.

[291] *Cf.* ECHR, *Eckle v.* Germany, no. 8130/78, § 82, 15 July 1982, Series A no. 51; *Poiss v. Austria,* no. 9816/82, § 57, 23 April 1987, Series A no. 117, and *Wiesinger v. Austria*, no. 11796/8, § 56, 30 October 1991, Series A no. 213.

[292] On one occasion, the negligence of the presumed victims was decided, a decision that was subsequently annulled by the same judge. *Cf.* Decision of September 23, 2009 (file of annexes to the answer, annex 1 folios 2663 and 2664), and decision of February 5, 2010 (file of annexes to the answer, annex 1, folio 2707). On another occasion, the presumed victims received a disciplinary admonition, but that was due to the obligation to observe proper decorum in their pleadings and there is no record that it had any impact on the duration of the proceeding. *Cf.* Decision of April 19, 2006 (file of annexes to the answer, annex 1, folio 2493); decision of February 5, 2010 (file of annexes to the answer, annex 1, folio 2707); brief of April 24, 2006 (file of annexes to the answer, annex 1, folio 2494); decision of April 24, 2006 (file of annexes to the answer, annex 1, folio 2495); brief of April 25, 2006 (file of annexes to the answer, annex 1, folio 2498), and decision of April 28, 2006 (file of annexes to the answer, annex 1, folio 2500).

[293] *Cf.* Brief of April 27, 2005 (file of annexes to the answer, annex 1, folio 2255); brief of June 1, 2005 (file of annexes to the answer, annex 1, folio 2257); brief of November 30, 2007 (file of annexes to the answer, annex 1, folio 2614); brief of March 23, 2010 (file of annexes to the answer, annex 1, folios 2722 to 2726); brief of July

they asked that the court decide the case promptly.[294] Also, on at least three occasions, the plaintiffs reactivated the case following a period of inactivity[295] and, in July 2007, the complainants indicated that "the period for producing evidence had been greatly exceeded."[296] In addition, both parties desisted from evidence, which, in principle, should have contributed to expediting the proceeding.[297]

176. The Court recalls that it is the State, through its judicial authorities, that should lead the proceeding. In this regard, according to the legislation on civil procedure applicable to this case, the judge had the obligation to direct the proceeding, maintaining equality between the parties to the proceeding, ensuring the greatest procedural economy in the processing of the case,[298] and avoiding a standstill in the proceeding.[299] However, the Court notes that there have been several periods of inactivity in the civil proceeding that can be attributed entirely to the judicial authorities.[300] Furthermore, there has been a lack of diligence on the part of the

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16, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1651); decision of August 4, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1652), and brief of May 29, 2012 (merits file, annex G, folio 443).

294 *Cf.* Brief of February 1, 2005 (file of annexes to the answer, annex 1, folio 2243); brief of August 22, 2008 (file of annexes to the answer, annex 1, folio 2636), and brief of March 9, 2006 (file of annexes to the answer, annex 1, folio 2461).

295 *Cf.* Brief of June 16, 2000 (file of annexes to the answer, annex 1, folio 1982); brief of May 19, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1642), and brief of May 29, 2012 (merits file, annex G, folio 443).

296 Brief of July 9, 2007 (file of annexes to the answer, annex 1, folio 2611).

297 See, for example: brief of November 6, 2009 (file of annexes to the answer, annex 1, folio 2685), and undated brief desisting from evidence (file of annexes to the answer, annex 1, folio 2662).

298 Article 34(5) of the Code of Civil and Commercial Procedure of the province of Buenos Aires establishes that the judge must: "[d]irect the proceeding, and must, within the limits expressly established in this Code: (a) merge, insofar as possible, into a single act or hearing all the measures that need to be taken; (b) indicate, before processing any petition, its defects or omissions, ordering that they be rectified within the time frame that he establishes, and order, *ex officio*, any measure necessary to avoid nullities; (c) maintain equality between the parties to the proceeding; (d) prevent and sanction any act contrary to the obligations of loyalty, probity and good faith; (e) ensure that the greatest possible procedural economy is observed when processing the case. Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 34(5) (annexes to the representatives' final written arguments, folio 2889, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

299 Article 36 of the Code of Civil and Commercial Procedure of the province of Buenos Aires regulates the judge's powers to issue orders and instructions, establishing that: "[e]ven in the absence of a request from one of the parties, the judges and courts may: (1) take measures to avoid a standstill in the proceedings. To this end, once a time frame has expired, whether or not the corresponding right has been exercised, the following procedural stage shall be undertaken, ordering *ex officio* the necessary measures." Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 36 (annexes to the representatives' final written arguments, folio 2889, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

300 See, for example: (i) on October 19, 1998, the case file was forwarded to the criminal court, in response to that court's request regarding the processing and status of the civil proceeding, and it was not until four months and fourteen days later that it was returned. The Court stresses that the criminal judge himself explained that the delay was due to the fact that he had not "noticed that the civil case file had been received"; (ii) between June 1999 and April 2000 there was another period of inactivity of 10 months, due to a request for a declaration of nullity and an appeal for reconsideration of the judgment with subsidiary appeal; (iii) on March 19, 2002, an order was issued to refer the case file to the Appellate Chamber so that the latter could decide an appeal, which was only declared to have been granted erroneously one year later, and the Chamber took one more month to return the case file to the first instance court, and it was not until June 5, 2003, that the judge took up the proceeding again; (iv) in October 2004, the Appellate Chamber requested the case file in order to decide a matter related to the interlocutory proceeding on execution of fees; this request was not included in the case file until two months and nine days later, when its whereabouts were located. On February 1, 2005, the presumed victims asked that the requested case file be delivered to the Appellate Chamber. The evidence provided to the Court does not show the date on which the file was sent to the Appellate Chamber. The Appellate Chamber only returned the case file to the first instance court on July 27, 2005, and (v) from October 23, 2008, to August 5, 2009, there was a period of

authorities that cannot be quantified in a specific delay in time, but that evidently contributed to delaying the proceeding.[301] The Court notes that the constant appeals filed by the parties to the proceeding may have given rise to certain confusion in its processing; nevertheless, since the judge is the director of the proceeding, he must ensure its correct processing. In addition, the Court stresses that the proceeding is still pending the production of evidence, even though that procedural stage was opened on September 18, 2003, for twenty days.[302]

177. The delays that can be attributed to the judges responsible for the civil proceeding have also been acknowledged by the Argentine judicial authorities. In this regard, in April 1999, when deciding on a request for extinction of the proceeding, the judge decided that this "could not have occurred, because, the said delay [of approximately six months] could be attributed exclusively to the court, [as matters relating to the absence of a power of attorney

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inactivity following the reception of the documentation requested from other courts that had heard the case. *Cf.* Request of the Judge of Criminal and Correctional Matters of September 10, 1998 (file of annexes to the answer, annex 1, folio 1929); note of February 26, 1999 of the First Judge of Criminal and Correctional Matters of the Judicial Department of Mercedes (file of annexes to the answer, annex 1, folios 1931 and 1932); decision of June 10, 1999 (file of annexes to the answer, annex 1, folio 1961); note forwarding the case file of July 7, 1999 (file of annexes to the answer, annex 1, folio 1966); decision of April 24, 2000 (file of annexes to the answer, annex 1, folio 1968); decision of March 19, 2002 (file of annexes to the answer, annex 1, folio 2160); decision of March 20, 2003 (file of annexes to the answer, annex 1, folio 2167); decision of April 28, 2003 (file of annexes to the answer, annex 1, folio 2171); decision of June 5, 2003 (file of annexes to the answer, annex 1, folio 2173); request of October 21, 2004 (file of annexes to the answer, annex 1, folio 2237); note of December 30, 2004 (file of annexes to the answer, annex 1, folio 2242); brief of February 1, 2005 (file of annexes to the answer, annex 1, folio 2243); brief of April 27, 2005 (file of annexes to the answer, annex 1, folio 2255); decision of July 27 2005 (file of annexes to the answer, annex 1, folio 2245); decision of October 23, 2008 (file of annexes to the answer, annex 1, folio 2650), and decision of August 5, 2009 (file of annexes to the answer, annex 1, folio 2653).

[301] See, for example: (i) the return of the case file during the first stage of the proceeding by the Appellate Chamber for the first instance court to decide other remedies that were pending (*supra* para. 96), and (ii) by considering that the response of March 17, 1999, answered "promptly and appropriately" a request for declaration of nullity of April 3, 1998, which had been notified for five days on July 10, 1998. *Cf.* Brief of April 3, 1998 (file of annexes to the answer, annex 1, folios 1891 to 1893); brief of March 17, 1999 (file of annexes to the answer, annex 1, folios 1937 to 1944), and decision of April 6, 1999 (file of annexes to the answer, annex 1, folios 1945).

[302] In this regard, the Court notes that, according to the case file, on March 30, 1998, twelve cassettes handed over by the presumed victims were "held in reserve" and, on March 30, 2001, another seven cassettes were held in reserve. The changes of court, mainly due to the recusal of the judge hearing the case, led to the cassettes not being kept with the case file. In this regard, on several occasions the presumed victims asked that notes be sent to the court to forward the cassettes to the courts that were hearing the proceeding at that time. In October 2010, the court received seven cassettes; accordingly the presumed victims stressed that some cassettes were still missing and asked that the request be repeated to a judge who had been hearing the case. However, the judge advised that the cassettes requested were not in that secretariat. *Cf.* Decision of March 30, 1998 (file of annexes to the answer, annex 1, folio 1875); decision of March 30, 2001 (file of annexes to the answer, annex 1, folio 2035); brief of August 31, 2009 (file of annexes to the answer, annex 1, folio 2656); decision of August 31, 2009 (file of annexes to the answer, annex 1, folio 2657); brief of July 16, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1651); brief of August 4, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1652); note of October 8, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1656); brief of April 8, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1669), and note of February 11, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1673). In parallel, there were delays in the appointment of an expert to transcribe the cassettes, and the transcription was carried out six years after it had been requested by the presumed victims. In this regard, on October 12, 2006, the judge of the case ordered that a note be sent to the Departmental Chamber "asking if […] it had a record of experts whose expertise consisted in the transcription of audio [cassettes]." On November 28, 2010, "the [Departmental] Expertise Advisory Services [reported that] it did not have an expert with expertise in the transcription of [cassettes]." On May 2, 2011, an expert translator was appointed to make the transcripts. On May 2, 2012, the judge asked the pertinent court to forward "the technical elements to listen to 77 [cassettes] offered as evidence. On May 27, 2012, the complainant Piriz asked for the name of an expert who had been chosen for the case. *Cf.* Undated brief requesting the production of evidence (file of annexes to the answer, annex 1, folio 2560); decision of October 12, 2006 (file of annexes to the answer, annex 1, folio 2561); note of November 28, 2010 (file of annexes to the pleadings and motions brief, annex 2, folio 1659); note of March 4, 2011 (merits file, annex G, folio 442); brief of May 29, 2012 (merits file, annex G, folio 443), and note of May 27, 2011 (file of annexes to the pleadings and motions brief, annex 2, folio 1680).

of one of the plaintiff's lawyers was pending a decision]."[303] In addition, in March 2008, the Supreme Court of Justice of the province of Buenos Aires decided to admonish one of the judges when noting that "there had been a delay in deciding the request to declare the expiry of the evidence stage, because, although the case file was away from the court on two occasion, a considerable delay had still been verified."[304] The Supreme Court also sanctioned another judge for the delay in the interlocutory proceeding relating to fees.

178. The Court finds that this lack of diligence of the authorities is especially relevant when considering that the presumed victims have been subject to a precautionary measure of a general injunction on property for more than 17 years, based on possible civil damages.[305] According to the applicable domestic laws, this type of measure entails a "general prohibition to sell or encumber property" and is not limited to a specific amount.[306] The Court recalls that the adoption of precautionary measures involving private property does not constitute *per se* a violation of the right to property, even when it does represent a limitation of this right, to the extent that it affects an individual's ability to dispose freely of his property.[307]

179. In this case, the Court observes that the two measures imposed on Messrs. Mémoli were ordered based on the Code of Civil and Commercial Procedure of the province of Buenos Aires,[308] thus they were established by law. In addition, according to domestic law, this measure seeks to ensure a right that is in dispute in a civil proceeding,[309] in this case, the right to compensation for the alleged harm caused; consequently, it meets the requirement of a permissible objective under the Convention. Furthermore, it is clear that the general prohibition to sell or encumber property is appropriate to guarantee this objective.

180. Nevertheless, the Court notes that the domestic judicial authorities did not establish the possibility of moderating the impact of the duration of the civil proceeding on the ability of the presumed victims to dispose of their property, nor did they take into account that,

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303 Decision of April 6, 1999 (file of annexes to the answer, annex 1, folio 1946).

304 Judgment of the Supreme Court of Justice of the province of Buenos Aires of March 12, 2008 (file of annexes to the Merits Report, annex 25, folio 313).

305 This measure was initially decided in the context of the criminal proceeding in order to safeguard an eventual lawsuit for damages. In 2001, the measure was lifted during the criminal proceeding and, a month and a half later, new measures were ordered, now in the context of the civil proceeding. The measure has continued in force from that time until today. The said measure has been re-registered on two occasions. The Court has no information on whether the measure ceased to be valid at any time between these re-registrations (*supra* paras. 109 to 112).

306 Article 228 of the Code of Civil and Commercial Procedure of the province of Buenos Aires establishes: "General injunction on property. In all cases in which, although an embargo is in order, this cannot be executed because the debtor's assets are not know, or because these do not cover the amount of the credit claimed, the general injunction on the sale or encumbrance of his property may be requested, which shall be annulled provided that the debtor provides sufficient assets to be embargoed or an adequate guarantee." Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 228 (annexes to the representatives' final written arguments, folio 2911, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

307 *Cf. Case of Chaparro Álvarez et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 171, para. 187.

308 *Cf.* Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 228 (annexes to the representatives' final written arguments, folio 2911, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

309 Article 195 of the Code of Civil and Commercial Procedure of the province of Buenos Aires establishes that: "[p]recautionary measures may be requested before or after the complaint has been concluded, unless the law stipulates that they should be requested previously. The brief shall indicate the right that it is sought to protect, the measure requested, the legal provision on which it is based, and compliance with the specific requirements corresponding to the measure requested." *Cf.* Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 195 (annexes to the representatives' final written arguments, folio 2907, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

according to Argentine law, "[t]he judge, to avoid unnecessary liens and prejudice to the owner of the property, may establish a precautionary measure other than the one requested, or limit it, taking into account the significance of the right that it is sought to protect."[310] Despite this provision, the precautionary measure has been in force for more than 17 years and, according to the information in the case file provided to this Court, was re-ordered in December 2011, which presumes that it will be in effect until December 2016 (*supra* para. 112).[311] In brief, the prolonged duration of the proceeding, in principle of a summary nature, combined with the general injunction on property for more than 17 years, has constituted a disproportionate impairment of the right to property of Messrs. Mémoli and has resulted in the precautionary measures becoming punitive measures.

181. Regarding the State's argument that the presumed victims could have offered "other assets to be embargoed in order to obtain the lifting of the injunction, since this is permitted by Argentine law" (*supra* para. 166), the Court underlines that, even if the presumed victims had been able to offer sufficient assets for the precautionary measure ordered to be substituted by another, this does not mean that the imposition of such measures for more than 17 years in this case would have been proportionate. In this regard, the delay in obtaining a final judgment in the proceeding for damages has extended the duration of the precautionary measure and has infringed the right to property of the presumed victims.

182. The Court also notes that, after their conviction in the criminal jurisdiction, the presumed victims have been subject to the threat of being convicted for the same facts in the civil sphere for more than 15 years and, consequently, to be obliged to pay all, or at least part, of the amount claimed by the plaintiffs for damages (at the time the equivalent of ninety thousand United States dollars), plus the costs of the proceeding.

183. All the foregoing reveals that the responsible judicial authorities did not act with due diligence and the obligation to ensure promptness required by the rights and interests at stake. All things considered, the Court finds that the duration, for more than 15 years, of a civil proceeding for damages of a summary nature, based on a criminal sentence for the offense of defamation, added to the fact that a general injunction to sell or encumber property was in force, exceeds excessively the duration that could be considered reasonable for the State to decide a case of this nature and has had a disproportionate effect on the right to property of Messrs. Mémoli. Based on the foregoing, this Court concludes that the State violated the principle of reasonable time established in Article 8(1) and the right to property recognized in Article 21, both in relation to Article 1(1), all of the American Convention, to the detriment of Pablo and Carlos Mémoli.

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184. In their arguments, the representatives also referred to non-compliance with certain time frames in the criminal proceeding against the presumed victims for defamation.[312]

[310] Decree Law 7425/69, Code of Civil and Commercial Procedure of the province of Buenos Aires, art. 204 (annexes to the representatives' final written arguments, folio 2909, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

[311] In this regard, the pertinent part of Article 207 of the Code of Civil and Commercial Procedure of the province of Buenos Aires establishes that: "[i]njunctions and embargoes shall extinguish five years after their registration in the Property Registry, unless, at the request of the party, they are re-registered before this term has expired by an order of the judge who heard the proceedings." Code of Civil and Commercial Procedure of the province of Buenos Aires. Decree Law 7425/69, art. 207 (annexes to the representatives' final written arguments, folio 2909, available at http://www.gob.gba.gov.ar/legislacion/legislacion/l-7425.html).

[312] In this regard, the representatives indicated that "the criminal judge of first instance took one year to deliver judgment. Exactly the same occurred with the Criminal Chamber, the Provincial Court, and the National Court."

However, they did not make a specific request in this regard. The Court notes that the judgments in first and second instance in the criminal proceeding were delivered two and three years, respectively, after the proceedings were opened, and that the judgment was final in a total of approximately five years.[313] The information provided to the Court does not reveal an infringement of the guarantee of a reasonable time in the said criminal proceeding. Therefore, this Court finds it unnecessary to rule on the duration of the criminal proceeding.

185. Furthermore, in addition to the violations of freedom of expression argued based on the criminal proceeding (*supra* paras. 114 and 115), the Commission and the representatives argued that freedom of expression had been violated owing to the duration of the civil proceeding. In this regard, the Court recalls that, in this case, it has concluded that the criminal conviction against the presumed victims did not constitute a violation of freedom of expression (*supra* para. 149), so that the Court is not required to analyze the arguments concerning a presumed violation of freedom of expression owing to the delay in the civil proceeding.

B. Other violations alleged by the representatives in relation to the judicial proceedings

B.1) Arguments of the Commission and of the parties

186. In its Merits Report, the Commission concluded that the presumed victims had not proved the violation of Article 8 of the Convention in relation to the alleged irregularities in either the criminal proceeding or the civil proceeding.

187. The representatives alleged that there had been a series of irregularities presumably committed in the criminal proceeding and in the civil proceeding against the presumed victims. Regarding the criminal proceeding, they stated that "the Criminal Chamber created and/or established a new hearing so that the complainant could present his arguments a second time," in violation of article 423 of the Code of Criminal Procedure and that, during the said hearing, "a rebuttal was allowed, but no reply to the rebuttal," so that "[t]here was no possibility of exercising the right of defense."[314] They also indicated that they had to pay "2000 dollars at the exchange rate at the time, to the order of the Court on pain of execution," after filing a remedy of complaint before the National Court, which was declared inadmissible. In this regard, they argued that "the system of justice should be free and unrestricted for any individual, whether or not he has the means." In brief, they indicated that these irregularities "reveal the arbitrariness and partiality of the decision that only benefited the complainants." Regarding the civil proceeding, they argued that: the civil case had prescribed when it was initiated; the judge who heard the case misplaced the cassettes, which were "the only evidence that was requested over the years," and the provisions of article 207 of the Civil and Commercial Code regarding the expiry of the precautionary measures were not complied with or the time frame for initiating the civil proceeding. In addition, the representatives indicated that, during this proceeding, Article 25 of the Convention was violated because three "civil judges were sanctioned by the Court Attorney

[313] In particular, the first instance judgment was delivered in approximately two years and seven months; and the judgment in second instance, one year after the first decision. Subsequently, the Chamber took four months to admit an appeal for declaration of nullity and non-applicability, converted into an appeal on unconstitutionality before the Supreme Court of Justice of the province of Buenos Aires, which rejected it in approximately eight months. The special federal appeal that was filed was rejected one month later, and one year later a remedy of complaint and subsidiary appeal was decided (*supra* paras. 74, 75, 86, 89 and 90).

[314] In this regard, they indicated that Carlos Mémoli's lawyer "was notified the previous day and attended, but was not allowed to speak," while "Pablo Mémoli, who was defending himself, was not given the opportunity to be [present]."

[because t]hey violated the law in different ways," and also Article 24 of the Convention, owing to the supposed partiality of the judges who have heard the case in the criminal and civil jurisdictions.

188. The State considered that "the presumed victims ha[d] not provided any arguments additional to those already analyzed by the Commission in its Merits Report that would permit proving the alleged violation of due process [in relation to the establishment of the new hearing in the criminal proceeding]." In addition, it indicated that "the presumed victims did not explain how Article 25 had been violated." In this regard, it indicated that "the disciplinary offenses of the judges who intervened in the civil case were fully decided by the domestic courts and, consequently, since no irregularity in that disciplinary proceeding has been argued, the allegation of Article 25 should be rejected based on the legal doctrine of the "fourth instance." The State also indicated that the arguments of the representatives concerning the supposed violation of Article 24 of the Convention were insufficient and unsubstantiated by any kind of evidence.

B.2) Considerations of the Court

189. The Court notes that the representatives, in addition to the violation of the reasonable time, argued the violation of due process owing to: (i) the establishment of a second hearing in the criminal proceeding; (ii) the payment that the presumed victims supposedly had to make following the inadmissibility of the remedy of complaint; (iii) the alleged prescription of the civil action; (iv) the loss of evidence in the civil proceeding, and (v) the alleged violations of Articles 24 and 25 of the Convention. The Court will examine each of these arguments in this section and in this order.

190. First, the Court reiterates that the representatives of the presumed victims may cite the violation of rights other than those alleged by the Commission (*supra* para. 153). In this regard, it deems it pertinent to recall that in cases such as this one, in which actions in the context of judicial proceedings are questioned, the organs of the inter-American human rights system do not act as a court of appeal or for review of the judgments handed down in the domestic proceedings,[315] nor does it act as a criminal court in which the criminal responsibilities of the individual can be analyzed.[316] Its function is to determine the compatibility of the actions carried out in the said proceedings with the American Convention[317] and, in particular, to examine the acts and omissions of the domestic judicial organs in light of the guarantees protected in Article 8 of this instrument.[318] Hence, the Court is not a higher court or a court of appeal to decide the disagreements between the parties concerning specific implications of the application of domestic law on aspects that are not directly related to compliance with international human rights obligations. On this basis, this Court has maintained that, in principle, "it is for the State's courts to examine the facts and evidence presented in each specific case."[319]

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315 *Cf. Case of Fermín Ramírez v. Guatemala, supra. Merits, reparations and costs*. Judgment of June 20, 2005. Series C No. 126, para. 62, and *Case of Mohamed v. Argentina, supra*, para. 81.

316 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 134, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 162.

317 *Cf. Case of Castillo Petruzzi et al. v. Peru. Preliminary objections.* Judgment of September 4, 1998. Series C No. 41, para. 83, and *Case of Mohamed v. Argentina, supra*, paras. 79 and 81.

318 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 220, and *Case of Mohamed v. Argentina, supra*, para. 81.

319 *Case of Nogueira de Carvalho et al. v. Brazil, supra*, para. 80, and *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 65.

191. It should also be indicated that the Court, when referring to the judicial guarantees protected in Article 8 of the Convention, also known as procedural guarantees, has established that, to ensure that these guarantees really exist in the proceedings, pursuant to the provisions of Article 8 of the Convention, all the requirements must be observed that "serve to protect, ensure or assert the ownership or the exercise of a right";[320] in other words, the "conditions that must be met to ensure the adequate defense of those who rights or obligations are being considered by the courts."[321] This article of the Convention establishes a system of guarantees that condition the exercise of the State's *ius puniendi* and that seek to ensure that the individual who has been accused or convicted is not subjected to arbitrary decisions, because "due guarantees" must be observed that ensure, according to the proceeding in question, the right to due process of law.[322] Furthermore, this Court has indicated that "any persons subject to a proceeding of any nature before an organ of the State shall be ensured the guarantee that the said organ [...] acts in keeping with the procedure established by law to hear and decide the case submitted to it."[323]

192. The Court observes that, after the hearing on November 28, 1995, a second hearing was held on December 5, 1995 (*supra* para. 85). The Court notes that the lawyer representing the presumed victims was notified of this hearing and attended it.[324] In this regard, the Court emphasizes that the case file shows that both Pablo and Carlos Mémoli had given a general power of attorney to two lawyers, including the lawyer who represented them at the hearing on December 5, 1995, who was also the one who received notifications from the domestic court.[325] In addition, regarding the alleged inadmissibility of this second hearing, as well as the lack of active participation of the presumed victims' lawyer during this hearing, the Court underscores that this argument was considered inadmissible by the Second Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes (*supra* para. 86). Furthermore, the Supreme Court of the province of Buenos Aires considered that this decision did not show that the Chamber had been arbitrary.[326] Following this decision, the presumed victims filed a remedy of complaint before the Supreme Court of Justice of the Nation, which was rejected (*supra* paras. 89 and 90). Bearing in mind that the domestic courts are best able to interpret the norms of their domestic law, the Court finds that it has not been provided with sufficient elements to differ from the interpretation made by the

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320 *Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 The American Convention on Human Rights)*. Advisory opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 25, and *Case of Mohamed v. Argentina, supra*, para. 80.

321 *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 The American Convention on Human Rights)*. Advisory opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 28, and *Case of Mohamed v. Argentina, supra*, para. 80.

322 *Cf. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, The American Convention on Human Rights)*. Advisory opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 28, and *Case of Mohamed v. Argentina, supra*, para. 80.

323 *Case of the Constitutional Court v. Peru, supra*, para. 77, and *Case of Mohamed v. Argentina, supra*, para. 80.

324 *Cf.* Certified notification of hearing of December 5, 1995 (file of annexes to the Merits Report, annex 30, folio 334), and record of the hearing of December 5, 1995 (file of proceedings before the Commission, tome III, folios 945 to 951).

325 *Cf.* General power of attorney granted by Carlos and Pablo Mémoli presented before the court on September 14, 1992 (file of annexes to the State's final written arguments, folios 4540 to 4543), and notification of the first instance judgment (file of annexes to the State's final written arguments, folios 5154 to 5156).

326 The Supreme Court of Justice of Buenos Aires was deciding a special federal appeal, where the presumed victims, proposed, among other arguments, the annulment of the said hearing. The Supreme Court considered that "the grievances expressed on the issue, only reveal the appellant's personal disagreement with the Court's interpretation," so that they did not prove arbitrariness (*supra* para. 90).

Argentine courts regarding the alleged violation of due process allegedly entailed by holding a second hearing in the appeals proceeding against the first instance criminal judgment.

193. Regarding the payment that the presumed victims allegedly had to make following the inadmissibility of the remedy of complaint, the Court notes that the representatives based their arguments on the fact that access to justice should not be subject to a charge (*supra* para. 187). In this regard, the Court has indicated that the right of access to justice is not absolute and, consequently, may be subject to some discretional limitations by the State, which should ensure correspondence between the means used and the objective pursued and, in short, cannot suppose the negation of this right.[327] In this regard, the Court considers that charging a sum of money for the rejection of the remedy of complaint before the Supreme Court of Justice of the Nation does not constitute *per se* an obstruction of access to justice. To the contrary, the representatives would have to show that this charge was unreasonable or represented a serious prejudice to their financial capacity, which they have not done in this case.

194. With regard to the alleged prescription of the civil action and the expiry of the re-registration of the precautionary measure, this Court considers that the representatives have not argued how these presumed non-compliances with domestic law are directly related to the international human rights obligations included in the Convention. Consequently, the Court will not analyze these arguments.

195. Also, in relation to the loss of the cassettes that the presumed victims had submitted as evidence in the civil proceeding, as well as the alleged violation of Article 25, this Court considers that the substance of these arguments has already been examined in the section of this chapter analyzing the reasonable time of the proceeding for damages (*supra* paras. 167 to 183). Nevertheless, the Court finds it appropriate to recall that the absence of a response that is favorable to the interests of the claimant does not necessarily signify the ineffectiveness of the remedy filed, or that the presumed victims did not have access to an effective remedy.[328]

196. Lastly, the Court notes that the representatives argued the violation of Article 24 of the Convention, because "in both the criminal and the civil jurisdiction, the judges always behaved with partiality in favor of the plaintiffs." This Court recalls that Article 24 establishes the right to be protected against any discrimination arising from unequal protection under domestic law.[329] In this case, the Court considers that the representatives have not submitted any justification or probative support revealing discrimination or unequal treatment of this kind.

X
REPARATIONS
(Application of Article 63(1) of the American Convention)

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[327] *Cf. Case of Cantos v. Argentina. Merits, reparations and costs*. Judgment of November 28, 2002. Series C No. 97, para. 54. Similarly, ECHR, *Osman v. the United Kingdom,* no. 23452/94 [Grand Chamber], § 147, 148 and 152, 28 October 1998, Report of Judgments and Decisions 1998-VIII.

[328] *Cf. Case of Fermín Ramírez v. Guatemala, supra*, para. 83, and *Case of Raxcacó Reyes v. Guatemala. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 133, para. 112.

[329] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 209, and *Case of Atala Riffo and Daughters v. Chile, supra*, para. 82.

197. Based on the provisions of Article 63(1) of the American Convention,[330] the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation,[331] and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[332]

198. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-instatement of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to ensure the rights that have been violated and to repair the consequences of the violations.[333] Therefore, the Court has considered the need to award different measures of reparation in order to redress the harm integrally, so that in addition to pecuniary compensation, measures of restitution and satisfaction and guarantees of non-repetition have special relevance to the harm caused.[334]

199. This Court has established that the reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to repair the respective harm. Consequently, the Court must observe the co-existence of these elements in order to rule appropriately and in accordance with the law.[335]

200. Based on the violations declared in the preceding chapters, the Court will proceed to examine the claims submitted by the Commission and the representatives, together with the arguments of the State, in light of the criteria established in the Court's case law concerning the nature and scope of the obligation to make reparation, in order to establish measures addressed at redressing the harm caused to the victims.[336]

A. Injured party

201. The Court reiterates that, under Article 63(1) of the Convention, the injured party is considered to be whoever has been declared a victim of the violation of a right recognized in the Convention.[337] Therefore, the Court considers the "injured party" to be Carlos Mémoli and

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330 Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

331 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Suárez Peralta v. Ecuador, supra*, para. 161.

332 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 40, and *Case of Suárez Peralta v. Ecuador, supra*, para. 161.

333 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 26, and *Case of Mendoza et al. v. Argentina. Preliminary objections, Merits and Reparations.* Judgment of May 14, 2013. Series C No. 260, para. 378.

334 *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Suárez Peralta v. Ecuador, supra*, para. 164.

335 *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Mendoza et al. v. Argentina, supra*, para. 306.

336 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 to 27, and *Case of Suárez Peralta v. Ecuador, supra*, para. 162.

337 *Cf. Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of Suárez Peralta v. Ecuador, supra*, para. 165.

Pablo Mémoli and, as victims of the violations declared in Chapter IX, they will be the beneficiaries of the measures that this Court now orders.

B. Measures of restitution and satisfaction and guarantee of non-repetition

202. International case law, and in particular that of the Court, has established that the judgment constitutes *per se* a form of reparation.[338] Nevertheless, considering the circumstances of this case and the effects on the victims arising from the violation of Articles 8 and 21 of the American Convention, in relation to Article 1(1) of this instrument, declared to their detriment, the Court deems it pertinent to determine the following measures of reparation.

B.1) Measure of restitution

B.1.2) Annulment of the criminal conviction

203. The Commission asked the Court to order the State "[t]o annul the criminal convictions imposed on Carlos Mémoli and Pablo Carlos Mémoli and all their consequences." The representatives asked that "[t]he effects of the criminal judgment be annulled and, consequently, the civil proceeding." For its part, the State indicated that "although the appeal on unconstitutionality filed by the presumed victims before the Supreme Court of Justice of the province of Buenos Aires [in February 2010 regarding the request to annul the criminal convictions] had not been successful" "their special federal appeal before the Supreme Court of Justice of the Nation is still pending a decision."

204. The Court concluded that the criminal conviction against Carlos and Pablo Mémoli did not constitute an undue limitation of their freedom of expression (*supra* para. 149). Therefore, the Court finds that it is not required to order a measure of reparation in this regard.

B.1.3) Adoption of the necessary measures to decide the civil case and to lift the general injunction on property

205. The Commission asked that "[t]he general injunction on the property of Carlos Mémoli and Pablo Carlos Mémoli be lifted immediately." It also asked that "all necessary measures be taken to resolve the civil case against Carlos Mémoli and Pablo Carlos Mémoli expeditiously and impartially, safeguarding the rights enshrined in the American Convention." The representatives asked that "the civil rights that had been curtailed be reinstated" and that the civil proceeding be annulled. For its part, the State argued that "these recommendations stem from an erroneous assessment of the judicial procedure established in Argentina's legal system that [...] regulates the proceeding for damages on the basis of the dispositive principle and offers the necessary legal instruments to control and limit the scope of a measure that establishes the general injunction on property, all of which depends, exclusively, on the action of the party against whom the injunction has been ordered."

206. In the instant case, this Court declared the international responsibility of Argentina for failing to comply with its obligation to decide, within a reasonable time, the civil proceeding for damages filed against Messrs. Mémoli. Therefore, the Court considers that the State must adopt the necessary measures so that, taking into account the provisions of this Judgment (*supra* paras. 167 to 183), the said civil proceeding is decided as promptly as possible. In

[338] *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Suárez Peralta v. Ecuador, supra*, para. 177.

addition, based on the conclusions of Chapter IX of this Judgment, the Court establishes that the State should immediately revoke the precautionary measure of injunction against the sale or encumbrance of property imposed on Messrs. Mémoli. The State must provide a report on compliance with this measure within three months of notification of this Judgment.

B.2) Measure of satisfaction: publication and dissemination of the Judgment

207. Even though the publication of this Judgment has not been requested, as it has decided in other cases,[339] this Court establishes that the State must publish, within six months of notification of this Judgment: (a) the official summary of the Judgment prepared by the Court, once, in the official gazette, and (b) the Judgment in its entirety, available for one year, on an official website.

B.3) Guarantee of non-repetition

208. The Commission asked that "the necessary measures [be adopted] to prevent the repetition of similar situations with regard to the disproportionate duration of civil proceedings and injunctive measures under the conditions noted." The representatives asked that the State "find ways to ensure that due process of law is respected in the different jurisdictions, which will guarantee fairness and equality between the parties in a [proceeding, which should be decided within] a reasonable time." The State indicated that the Commission's recommendations with regard to the civil case "stem from an erroneous assessment of the judicial procedure established by Argentina's legal system," and argued that "its request regarding the 'necessary measures' to decide the case and prevent the repetition of similar situations is very imprecise." In addition, it indicated that the Argentine legal system "regulates the proceeding for damages based on the dispositive principle," and that the legal "instruments [to control and limit the scope of a precautionary measure] have been used incorrectly by the presumed victims."

209. This Court emphasizes that neither the Commission nor the representatives provided arguments or information revealing that the regulation of the civil proceeding applied in this case had normative shortcomings as regards the disputes in this case. Consequently, it is not necessary to order a measure of reparation in this regard.

C. Compensation

C.1) Pecuniary damage

210. The Commission asked the Court to compensate Messrs. Mémoli "for all pecuniary and non-pecuniary losses suffered by Carlos and Pablo Carlos Mémoli as a result of the violations established [in this case]."

211. The representatives asked that the Court order the State "to provide compensation for the material losses suffered." In this regard, they asked that the State be ordered to pay Pablo Mémoli, as consequential damage, the sum of US$44,362.00 (forty-four thousand three hundred and sixty-two United States dollars) "for the expenses incurred before the domestic and the inter-American systems to date," as well as for specific amounts paid as part of the sentence or to have access to justice, in the domestic proceedings. In addition, they asked that the State be ordered to pay Pablo Mémoli the sum of US$50,000.00 (fifty thousand

[339] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Suárez Peralta v. Ecuador*, *supra*, para. 189.

United States dollars) for loss of earnings "owing to the harm caused to his professional activity as a lawyer," as well as the impossibility of having a radio license, owing to the criminal conviction and because the general injunction on property made it "impossible to sell radio spots to different Government agencies that required the corresponding documentation." With regard to Carlos Mémoli, they requested, as consequential damages, the sum of US$30,000.00 (thirty thousand United States dollars), "for the financial effort involved in taking on this litigation [and] for the smear campaign that he suffered"; while, for loss of earnings, they requested the sum of US$30,000.00 (thirty thousand United States dollars), for the restrictions on the use and enjoyment of his property.

212. The State asked that "this Court take into account the international standards and the parameters established in its consistent case law and reject these excessive pecuniary claims." In addition, it indicated that "the presumed victims have not presented sufficient evidence to justify the elevated amounts requested as compensation for pecuniary damage, but merely made general affirmations." Regarding the arguments concerning loss of earnings, the State argued that "it is totally inexact that Mr. Mémoli did not exercise the profession [of lawyer] and that he is unable to exercise his profession as a journalist under equal legal conditions" and, if the representatives' assertion is accepted, it would lead to the conclusion that "lawyers who are exercising their profession cannot handle more than one case."

213. In its case law, the Court has developed the concept of pecuniary damage and has established that it supposes "the loss of or detriment to the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."[340] In the instant case, the representatives' arguments concerning pecuniary damage can be classified as the loss of earnings of Messrs. Mémoli and the losses that the general injunction on property caused to Carlos Mémoli. The other arguments mentioned will be analyzed in the sections relating to non-pecuniary damage or to costs and expenses, as appropriate.

214. The criterion of equity has been used in this Court's case law to quantify non-pecuniary damage[341] and pecuniary damage.[342] Nevertheless, this Court draws attention to the fact that the use of this criterion does not mean that the Court can act discretionally when establishing compensatory amounts.[343] It is for the parties to provide clear evidence of the losses suffered, as well as the specific relationship of the pecuniary claim to the facts of the case and the alleged violations.[344]

215. Regarding loss of earning, the Court observes that the representatives merely argued that Pablo Mémoli's income had been harmed by the impact that managing the case had had on his career as a lawyer, as well as owing to the supposed impediments that this represented to obtaining a radio license. This Court considers that the representatives did not provide evidence that would allow it to verify the alleged losses.

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340 *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Suárez Peralta v. Ecuador*, *supra*, para. 212.

341 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 27, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 352.

342 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs, supra,* para. 50, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 352.

343 *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs*. Judgment of September 10, 1993. Series C No. 15, para. 87, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 352.

344 *Cf. Case of Atala Riffo and Daughters v. Chile, supra*, para. 291, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 352.

216. Meanwhile, with regard to the losses presumably caused by the general injunction on property, the Court recalls that it has found that this injunction constituted a disproportionate restriction of Messrs. Mémoli's right to property (*supra* para. 180 and 183); hence, the Court understands that this restriction could have caused pecuniary damage, or specifically a loss of opportunity for the victims of this case. However, in order to redress this loss of opportunity, it would be necessary to show and prove, in pecuniary terms, the opportunity lost, as well as its causal relationship to the violation declared, because it is not enough to affirm it in the abstract. In this regard, the Court considers that it has insufficient elements to find that the general injunction on property caused verifiable pecuniary damage to the victims in this case.

217. In addition, regarding the reimbursement of the sums paid by Messrs. Mémoli in the context of the criminal proceeding, the Court recalls that it has concluded that Messrs. Mémoli's freedom of expression was not violated by the criminal convictions imposed on them. Therefore, it is not appropriate to order the reimbursement of the amounts paid by Messrs. Mémoli as a result of the said criminal convictions (*supra* para. 149).

C.2) Non-pecuniary damage

218. In its case law, the Court has developed the concept of non-pecuniary damage and the assumptions under which it should be compensated. In this regard, the Court has established that non-pecuniary damage may include both the suffering and difficulties caused to the direct victims and their next of kin, and also the impairment of values that are very significant for the individual, as well as the changes of a non-pecuniary nature in the living conditions of the victims or their family.[345]

219. The Commission asked the Court "to compensate Carlos and Pablo Carlos Mémoli for the […] non-pecuniary damage caused by the violations established [in this case]." The representatives indicated that, in the case of Pablo Mémoli, "[t]he court rulings convicting him […] called into question the truth of the information and the prestige of the journalist and his newspaper, which resulted in a serious threat to the stability of his employment and, thus, that of his family." They also argued that, he also suffered harm as a lawyer, because "he was condemned by society and discredited when he lost the litigation," and owing to the "permanent personal and family anguish." Based on the foregoing, they requested the sum of US$50,000.00 (fifty thousand United States dollars) as non-pecuniary damage for Pablo Mémoli. Regarding Carlos Mémoli, they requested, "based on the same grounds as Pablo Mémoli, added to the disrepute arising from the general injunctions on property," the sum of US$ 60,000.00 (sixty thousand United States dollars) for non-pecuniary damage.

220. The State indicated that, "when determining the compensation for non-pecuniary damage," the judgment may constitute *per se* a form of reparation. In addition, it referred to the case of *Fontevecchia and D'Amico*, in which the Court did not award compensation for non-pecuniary damage, but "indicated measures of reparation such as the publication of the Judgment and its dissemination by different media."

221. Taking into account the violations declared in this case and the effects that these caused to the victims, the Court finds it pertinent to establish an amount, in equity, as compensation for non-pecuniary damage. In this regard, based on the violation of judicial guarantees and property of the victims, the Court considers it pertinent to establish, in equity,

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345 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Suárez Peralta v. Ecuador, supra*, para. 212.

the sum of US$15,000.00 (fifteen thousand United States dollars) for Carlos Mémoli and US$15,000.00 (fifteen thousand United States dollars) for Pablo Mémoli.

D. Costs and expenses

222. As the Court has indicated on previous occasions, costs and expenses are included in the concept of reparation established in Article 63(1) of the American Convention,[346] because the activities carried out by the victims in order to obtain justice, at both the national and the international level, entail disbursements that must be compensated when the international responsibility of the State has been declared in a judgment convicting it.

223. The representatives asked that the Court order "payment of the costs and expenses that have been proved [or] that are easily inferred from the circumstances of this case."[347] For its part, the State requested that, "in the hypothesis that they are not rejected in this case," the costs and expenses "be established […] based on equity." Regarding the trips made by the victims to Washington D.C. to present briefs relating to their petition, the State indicated that "the presumed victims made these trips on their own responsibility, not in the context of a working meeting or hearing convened by the Commission. The said briefs could have been presented […] without the need to appear in person."

224. This Court has indicated that the claims of the victims or their representatives for costs and expenses, and the evidence to support them, must be presented to the Court at the first procedural moment granted to them; that is, in the pleadings and motions brief, without prejudice to these claims being updated subsequently, in keeping with the new costs and expenses incurred owing to the proceedings before this Court.[348] Moreover, the Court reiterates that it not sufficient merely to forward probative documents, but rather the parties must submit arguments that relate the evidence to the fact that it is considered to represent, and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[349]

225. In this case, this Court observes that the representatives forwarded some evidence on the expenses presumably incurred by Messrs. Mémoli during the processing of the litigation at

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346 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs, supra*, para. 79, and *Case of Suárez Peralta v. Ecuador, supra*, para. 217.

347 In this regard, the representatives indicated that the "consequential damage" caused to Pablo Mémoli owing to "the expenditure incurred before the domestic and inter-American systems" amounted to US$44,362.00 (forty-four thousand three hundred and sixty-two United States dollars). They specified that, for the criminal proceeding, he had incurred expenses amounting to US$7,362.00 (seven thousand three hundred and sixty-two United States dollars), which included the cost of hiring a lawyer, "fuel, depreciation of vehicle, toll costs, and meals" arising from travel by Pablo Mémoli to the Provincial Court in La Plata and subsequently to Buenos Aires, the fees of the complainants' lawyer, and the expenses of the proceeding before the "National Court," and the State's lawyer. In addition, they indicated that the expenses arising "from exercising the right to defense in the criminal proceeding, […] and in the civil proceeding," including "photocopies, court fees, bonds, and travel to Mercedes, La Plata and Buenos Aires," the amount calculated "over [twenty] years of continuous and interrupted proceedings," was a further $25,000.00 (twenty-five thousand [United States]) dollars." Regarding the expenses incurred in the proceedings before the inter-American system, they indicated that they had incurred expenses of approximately US$12,000.00 (twelve thousand United States dollars), as a result of "five trips to Washington [by Pablo Mémoli] to provide documents and to hold direct conversations with those who were in charge of the case," as well as expenditure on "telephone calls, photocopies, and mail for [ten] years" before the Inter-American Commission. The representatives did not specify the expenses possibly incurred by Carlos Mémoli.

348 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez*, *supra*, para. 275, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 380.

349 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez*, *supra*, para. 277, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 380.

the domestic and the inter-American levels. However, the Court notes that: (a) one voucher presents an expenditure that is not clearly and precisely connected to this case,[350] and (b) four receipts for the air travel of Messrs. Mémoli to Washington D.C., as the State objected, do not reflect necessary expenses in the litigation of this case before the Inter-American Commission. Consequently, in fairness, these items have been deducted from the calculation made by this Court.

226. Furthermore, the Court observes that the representatives have proved expenses of approximately US$300.00 for photocopies and delivery by international courier service.[351] Notwithstanding this, as it has in other cases, the Court can infer that the representatives incurred in additional expenses in the processing of the case before the inter-American human rights system derived from the litigation and from the presence of two representatives at the Court's public hearing. Taking this into account and, in view of the absence of vouchers for these expenses, the Court establishes, in equity, that the State must reimburse a total of US$8,000.00 (eight thousand United States dollars) or the equivalent in Argentine currency for costs and expenses in the litigation of this case. The Court points out that the representatives did not indicate to whom the costs and expenses should be reimbursed; however, the Court determines that the State must deliver this amount to Pablo Mémoli. The Court also indicates that, during the proceeding on monitoring compliance with this Judgment, it may decide that the State should reimburse the victims or their representatives any reasonable expenses they incur during that procedural stage.

E. Method of complying with the payments ordered

227. The State must make the payment of the compensation for non-pecuniary damage and to reimburse costs and expenses established in this Judgment directly to the victims, within one year of notification of this Judgment.

228. The compensation established in this case corresponds to Carlos and Pablo Mémoli or their heirs, pursuant to the applicable domestic laws.

229. The State must comply with the pecuniary obligation by payment in United States dollars or the equivalent in national currency, using the rate in force on the New York, United States, stock exchange the day before the payment to calculate the exchange rate.

230. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the time frame indicated, the State shall deposit the said amounts in their favor in an account or certificate of deposit in a solvent Argentine financial institution, in United States dollars, and in the most favorable financial conditions allowed by banking law and practice. If, after 10 years the corresponding compensation has not been claimed, the amounts shall be returned to the State with the interest accrued.

231. The amounts allocated in this Judgment as compensation for non-pecuniary damage and to reimburse costs and expenses must be delivered to the persons indicated integrally, as established in this Judgment, without any deductions arising from possible taxes or charges.

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350 *Cf.* Voucher from the lawyers (file of annexes to the pleadings and motions brief, folio 1759).

351 Although the representatives provided vouchers for the payments made by Messrs. Mémoli in the context of the criminal proceeding, the Court refers back to its considerations in paragraph 217.

232. If the State should fall into arrears, it must pay interest on the amount owed corresponding to bank interest on arrears in Argentina.

XI
OPERATIVE PARAGRAPHS

233. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the preliminary objections filed by the State concerning the alleged violation of due process in the proceedings before the Inter-American Commission, and the alleged failure to exhaust domestic remedies, in the terms of paragraphs 25 to 42 and 46 to 51 of the Judgment.

DECLARES,

by four votes in favor and three against, that:

2. The State is not responsible for the violation of the right to freedom of expression recognized in Article 13 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Carlos and Pablo Mémoli, in accordance with paragraphs 117 to 149 and 185 of this Judgment.

Dissenting: Judges Ventura Robles, Vio Grossi, and Ferrer Mac-Gregor Poisot

by four votes in favor and three against, that:

3. The State is not responsible for the violation of the principle of legality and retroactivity recognized in Article 9 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Carlos and Pablo Mémoli, in the terms of paragraphs 153 to 159 of this Judgment.

Dissenting: Judges Ventura Robles, Vio Grossi, and Ferrer Mac-Gregor Poisot

unanimously that:

4. The State is responsible for the violation of the rights to judicial guarantees, because it exceeded the reasonable time, and of property, recognized in Articles 8(1) and 21 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Carlos and Pablo Mémoli, in accordance with paragraphs 167 to 183 and 189 to 194 of this Judgment.

unanimously that:

5. It is not in order to rule on the alleged violations of Articles 23, 24 and 25 of the American Convention on Human Rights, in the terms of paragraphs 160, 195 and 196 of this Judgment.

AND DECIDES

unanimously that:

6. This Judgment constitutes *per se* a form of reparation.

7. The State must adopt the necessary measures to decide as promptly as possible the civil action filed against Messrs. Mémoli, taking into account the contents of paragraph 206 of this Judgment.

8. The State must revoke immediately the precautionary measure of a general injunction on property ordered against Carlos and Pablo Mémoli, and present a report on compliance with this measure within three months of notification of the Judgment, in the terms of paragraph 206 hereof.

9. The State must make the publications indicated in paragraph 207 of this Judgment within six months of notification of the Judgment.

10. The State must pay the amounts established in paragraphs 221 and 226 of this Judgment, as compensation for non-pecuniary damage and to reimburse costs and expenses, in the terms of the said paragraphs of the Judgment.

11. The State must, within one year of notification of this Judgment, provide the Court with a report on the measures adopted to comply with it, without prejudice to the decision included in the eighth operative paragraph.

12. The Court will monitor full compliance with this Judgment, in exercise of its attributes and pursuant to its obligations under the American Convention on Human Rights, and will consider this case concluded when the State has complied with the decisions made in it completely.

Judges Ventura Robles, Vio Grossi, and Ferrer Mac-Gregor Poisot advised the Court of their joint partially dissenting opinion, which accompanies this Judgment. Also, Judges García-Sayán and Pérez Pérez informed the Court of their concurring opinions, which also accompany this Judgment.

Done, at San José, Costa Rica, on August 22, 2013, in the Spanish and English languages, the Spanish version being authentic.

Diego García-Sayán
President

Manuel E. Ventura Robles

Alberto Pérez Pérez

Eduardo Vio Grossi

Roberto de F. Caldas

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

JOINT PARTIALLY DISSENTING OPINION OF
JUDGES MANUEL E. VENTURA ROBLES, EDUARDO VIO GROSSI
AND EDUARDO FERRER MAC-GREGOR POISOT

INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF MÉMOLI *v.* ARGENTINA
JUDGMENT OF AUGUST 22, 2013
(Preliminary objections, merits, reparations and costs)

INTRODUCTION

This dissenting opinion is emitted because, for the reasons set out below, the signatories disagree with the second and third operative paragraphs of the Judgment of August 22, 2013, *Preliminary objections, merits, reparations and costs, Case of Mémoli v. Argentina* (hereinafter "the Judgment"), delivered by the Inter-American Court of Human Rights (hereinafter "the Court"), declaring that the State is not responsible for the violation of the right to freedom of expression, recognized in Article 13 of the American Convention on Human Rights (hereinafter "the Convention"), or for the violation of the principle of legality and of retroactivity recognized in Article 9 of this instrument.[352]

a. The competence of the Court

The Court is required to determine whether the State has complied with its commitment[353] to respect and to ensure to all persons subject to its jurisdiction the rights and freedoms recognized in the Convention.[354] To this end, the Court must interpret and apply the provisions of the Convention[355] and, if it concludes that a right protected by the Convention has been violated, it must establish that the victim be ensured the enjoyment of that right,[356] a decision that the State party to the case in question must comply with.[357] In

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[352] Article 66(2) of the American Convention on Human Rights indicates that: "[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment," and Article 65(2) of the Court's Rules of Procedure establishes that: "[a]ny Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

[353] Article 33 of the Convention establishes that: "[t]he following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: (a) the Inter-American Commission on Human Rights, referred to as "the Commission"; and (b) the Inter-American Court of Human Rights, referred to as "the Court."

[354] Article 1(1) of the Convention indicates that: "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[355] Article 62(3) of the Convention stipulates that: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

[356] Article 63(1) of the Convention indicates that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

brief, in this case, what the Court had competence to decide was whether or not the State had incurred international responsibility for having violated an international obligation. Thus, what must now be clarified are the actions of the State, whether acts or omissions, that could result in its international responsibility[358] in this regard.

b. The action of the State to be considered in this case

According to the case file, this action by the State is the judgment in second instance of December 28, 1995, of the Second Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, province of Buenos Aires, confirming the judgment of December 29, 1994, of Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes which was not annulled by the subsequent decisions on the appeals on unconstitutionality and for clarification, and the special appeal on unconstitutionality.[359]

This second instance judgment confirmed the sentence against Messrs. Mémoli for having committed the offense of defamation because, in newspaper articles and on radio programs, they made statements categorized as such concerning both the sale of burial niches in the Municipal Cemetery of San Andrés de Giles by the *Asociación Italiana de Socorros Mutuos, Cultural and Creativa "Porvenir de Italia,"* and the complaint they had filed before the National Mutual Action Institute requesting that it investigate the said Association and some of its directors for accounting and administrative irregularities within the Association.[360] The statements considered to be defamatory consisted in considering that those directors were authors or accessories to the offense of presumed fraud, or criminals; that the sale involved corruption, and that they had acted with wilful intent and with "subterfuges (*tretas*) and deceit (*manganetas*)."[361]

The *litis* in this case related to the violation of the provisions of Articles 13, 9, 8(1), 21, 23, 24 and 25, the first in relation to Articles 1(1) and 2, and the others in relation to Article 1(1), all of the Convention.[362]

c. Determination of the possible internationally wrongful act of the State

Having defined the above-mentioned act that can be attributed to the State, it is now necessary to relate it to the provisions of Articles 13 and 9 of the Convention, so as to be able to determine its legitimacy or, to the contrary, its international wrongfulness and, consequently, the responsibility of the State, all of this considering that it is with regard to

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357 Article 68(1) of the Convention establishes that: "[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

358 Draft articles on Responsibility of States for internationally wrongful acts, prepared by the International Law Commission of the United Nations, attached to Resolution 56/83, approved by the General Assembly (based on the report of the Sixth Committee (A/56/589 and Corr.1)]. Responsibility of States for internationally wrongful acts, eighty-fifth plenary session, 12 December 2001, Official Documents of the General Assembly, fifty-sixth session, Supplement No. 10 and corrections (A/56/10 and Corr.1 and 2). 2 Ibid., paras. 72 and 73.

359 Paras. 92 to 94 of the Judgment.

360 Even though paragraphs 66 and 67 consider that the fact relating to the appointment of the wife and son of the Vice President of the said Association in teaching positions within it has been proved, to the detriment of the wife of Carlos Mémoli, this does not form part of the instant case because Messrs. Mémoli were not convicted for statements concerning their complaints based on these supposed irregularities.

361 Paras. 75 to 84 of the Judgment.

362 Operative paragraphs 2 to 5 of the Judgment.

the interpretation and application of these provisions in this case that the discrepancy arises in relation to the findings of the Judgment.

I. FREEDOM OF THOUGHT AND EXPRESSION

A. Article 13 of the Convention

In relation to freedom of thought and expression, Article 13 of the Convention,[363] the object and purpose of which is to ensure freedom of thought and expression, establishes that everyone has the right to this and, consequently, there can be no prior censorship to the exercise of this right, and it cannot be restricted indirectly for any reason whatsoever. Nevertheless, it is permitted that the exercise of this right be subject to the subsequent imposition of liability, which shall be expressly established by law and be necessary to ensure respect for the rights or reputation of others, or the protection of national security, public order, or public health or morals.

The Court has developed the foregoing in its case law. Indeed, it is therefore appropriate to stress the words of the Judgment itself indicating[364] "*that this article protects the right to seek, receive and impart ideas and information of all kinds, as well as to receive and be aware of the information and ideas imparted by others*[365]*";"* and that *"[f]or the ordinary citizen, the awareness of the opinions of others or the information that others possess is as important as the right to impart his own opinions and information."*[366]

In addition, the Court has indicated in another of its judgments, that *"[f]reedom of expression is a cornerstone of the very existence of a democratic society,"* that *"[i]s indispensable for the formation of public opinion,"* that "*[i]s also a condition sine qua non for political parties, trade unions, scientific and cultural associations and, in general, those who wish to influence the collectivity to be able to evolve fully,"* and that *"[i]t is, in brief, a condition for the community, when making its choices, to be sufficiently informed."*[367]

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[363] Article 13 of the Convention indicates that: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

[364] Paras. 119 and 123 of the Judgment.

[365] Para. 119 of the Judgment, citing: *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. Series A No. 5, paras. 32 and 83, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 137.

[366] Para. 119 of the Judgment, citing: *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), supra*, para. 32, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 138.

[367] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra*, para. 70; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs.* Judgment of February 5, 2001. Series C No. 73, paras. 64 to 68, and *Case*

The Court also indicated in the Judgment[368] that "*[f]reedom of expression is not an absolute right,"* that *"[t]his freedom may be subject to conditions and even limitations,*[369] *in particular when it interferes with other rights guaranteed by the Convention"*[370] and, in another ruling, it stated that *"[t]hese limitations are exceptional in nature and should not prevent, beyond what is strictly necessary, the full exercise of freedom of expression and become a direct or indirect means of prior censorship."*[371]

These assertions in the Court's case law signify that, in relation to the instant case, it should be understood that Article 13 of the Convention admits that the exercise of the right to freedom of thought and expression is subject to the subsequent imposition of liability, provided that this is necessary and, consequently, exceptional, to ensure respect for the rights or reputation of others and does not constitute, in reality, an instrument of direct or indirect censorship of the exercise of the said right.

B. Purpose of this case

The foregoing reveals that this case does not consist in determining whether or not the right to the protection of honor and dignity was violated,[372] a right recognized in Article 11 of the Convention,[373] but rather whether there was a violation of Article 13 of this instrument. First, because the specific object and purpose of each of these articles is different, as regards this case. Thus, while the specific object and purpose of Article 11 is to ensure the right to the protection of the law against unlawful attacks on the honor or reputation of the individual, that of Article 13 is not only that the liability mentioned must be explicitly established by law, but also that it is necessary to ensure respect for the rights or the reputation of others.

Consequently, in the instant case, the right of the complainants to sue Messrs. Mémoli in the proceeding held in the domestic sphere was acknowledged. However, in the proceedings before the Court it was not discussed whether the statements made by Messrs. Mémoli constituted an unlawful attack on the complainants according to the said Article 11, nor was it requested that a violation of this article be declared and, evidently, no ruling was made to this effect. Hence, in this litigation it was not a question of deciding a conflict between the right established in the said Article 11 and the right contemplated in Article 13 of the Convention.[374]

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of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of November 30, 2009. Series C No. 207*, para.* 47.

368 Para. 123 of the Judgment.

369 Para. 123 of the Judgment, citing: *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra*, para. 36, and *Case of Fontevecchia and D`Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 43.

370 Para. 123 of the Judgment.

371 Para. 123 of the Judgment, citing: *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of 2, 2004. Series C No. 107, para. 120, and *Case of Fontevecchia and D`Amico v. Argentina, supra, para.* 43.

372 Paras. 124 to 126 of the Judgment.

373 Article 11 of the Convention establishes that: "1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks."

374 Para. 118 of the Judgment.

And, based on the provisions of the latter article, neither was the purpose of this case to determine whether the competent domestic courts could subsequently impose liability or penalties on Messrs. Mémoli for their exercise of the right to freedom of thought and expression,[375] but rather if this were necessary, in the Court's opinion and in keeping with the Convention, in order to ensure respect for the rights or reputation of the complainants. In other words, the purpose of these proceedings was not to determine whether the subsequent imposition of liability for the exercise of the right to freedom of thought and expression was established in the law of the State – this does not form part of the *litis*, it was not disputed; but rather whether the liability or penalties established by the State's system of justice in this case was necessary to ensure respect for the rights or the reputation of the complainants in the domestic proceeding.

If this case is not envisaged in this way, it would be sufficient that the subsequent imposition of liability for the exercise of freedom of thought and expression was explicitly established by law and that the right to the protection of the law was exercised against unlawful attacks on honor and reputation established in Article 11 of the Convention, for the Court to have to declare that the provisions of Article 13 of the Convention had not been violated, even if the need for liability decreed by the State's courts in the pertinent proceeding, as established by this article, had not been proved which, doubtless, would be absurd.

For the same reason, in these proceedings, the Court is not acting as a fourth instance in this regard,[376] by either ratifying or substituting or annulling the corresponding decision of the domestic courts.[377] Its responsibility was to determine whether that decision was in keeping with the provisions of the Convention or, to the contrary, violated its provisions - thus having no international legal effects – and, in that eventuality, it was for the Court to establish that the State should adopt the pertinent measures that it indicated in order to cease incurring international responsibility.

C. Weighing up of the need for the liability or sanctions imposed by the domestic court

1. Failure to weigh up

In the instant case, the Court itself, pursuant to the Convention, should have weighed up, or made an proportionality assessment between, the said exercise of the right to freedom of thought and expression and the need for the subsequent imposition of liability or sanctions decided by the domestic judge owing to the statements made under the protection of this right. But, this course of action was not taken in the Judgment. To the contrary, the Court opted for the view that it was the State's domestic jurisdiction that had competence to examine the corresponding facts; that this jurisdiction was "*in a better position to assess which rights had been harmed most"* and, hence, the decision adopted by the State's jurisdiction that the said statements constituted defamation was assessed and accepted as valid.[378] Consequently, the Court found that the analysis made by the State's domestic jurisdiction was a "*reasonable and sufficient weighing up of the two rights in conflict.*"[379]

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375 Paras. 114 to 116 of the Judgment.

376 Para. 140 of the Judgment.

377 Idem.

378 Paras. 141 to 144 of the Judgment.

379 Para. 143 of the Judgment.

However, this assessment was not made in accordance with the provisions of Article 13 of the Convention, but evidently pursuant to the State's domestic law. In this regard, it should be reiterated that the matter to be decided in the instant case is whether the domestic criminal judge, when hearing and deciding the matter, carried out a correct control of conformity with the Convention as regards the need for liability to ensure respect for the rights or reputations of others; in other words, not whether the criminal sanction under the State's domestic law was applied correctly, but whether it was applied in accordance with the provisions of Article 13 of the Convention, and this did not happen.

It should also be added that, in reality, the domestic judge did not even make a reasonable and sufficient weighing up between the complainants' right to honor and reputation and the freedom of expression of Messrs. Mémoli, but merely considered *that "freedom of the press […] cannot protect, […] those who cite it and, through their actions, harm the rights of third parties that also deserve protection,"*[380] and gave prevalence to the former over the latter without examining the particular circumstances of the case or providing the reasoning for the option chosen.

This runs counter to what, in short and applicable to this case, is meant by weighing up; namely; counterbalancing, offsetting[381] the rights established in the Convention that are at stake in the case concerned, so that they are all respected or exercised and not that the prevalence of one over the others means that the latter cannot be truly exercised and prove impracticable.

2. Criminal proceeding

Now, the assessment of proportionality or weighing up mentioned above entails evaluating, among other matters, the circumstances in which the said statements that were found to be defamatory were expressed, and there is no record in the case file that this occurred. Indeed, it was not taken into account that the statements were made when, or at almost the same time as, the criminal proceeding filed by the authors against some members of the Management Committee of the *Asociación Italiana de Socorros Mutuos, Cultural and Creativa "Porvenir de Italia"* for the sale of burial niches in the Municipal Cemetery was being processed and decided, and their simultaneous request was made to the National Mutual Action Institute (INAM) to investigate supposed irregularities in the administration of the said Association.

Thus, it is relevant that, while this criminal proceeding was underway from April 11 to June 13, 1990, the said statements were made between April 28, 1990 and May 10 of that year. It should also be noted that the recently mentioned request [to INAM] was made at the same time as the complaint filed on the first of the dates mentioned, which was decided on June 19, 1991.

In addition, it is also significant that Carlos Mémoli was convicted for using the adjective "unscrupulous" in the document presented with the said request to the National Mutual Action Institute to conduct an administrative investigation; in other words, in the context of an administrative and, consequently, unpublished, proceeding.

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380 Para. 83 of the Judgment.

381 *Cf. Diccionario de la Real Academia Española*, 22nd edition (*Ponderar: contrapesar, equilibrar*). To weigh also means to determine the weight of something, and to examine carefully.

It should also be noted that the State's system of justice considered the statements defamatory without distinguishing whether they were factual affirmations, the truth or inaccuracy of which would thus be verifiable, or mere opinions which, to the contrary, cannot be verified.

From the foregoing, it is possible to understand, on the one hand, that the statements in question were made at the time of the said criminal proceeding or related to the same facts that were disputed in this proceeding and referred to facts or circumstances that fall within what the Court's case law has referred to in terms of *"[f]or the ordinary citizen awareness of the opinions of others or the information they may have is as important as the right to disseminate his or her own opinion."*[382]

3. Plausible motive

Likewise, as part of the context and in order to determine the need for the said sanctions decided by the domestic jurisdiction, it is necessary to consider (which was not done in these proceedings either) the fact that, in the judicial decision of June 6, 1990, confirmed in second instance on June 13, 1990, and which dismissed the said proceeding for lack of sufficient merits, it was established that the above-mentioned sales contract for the burial niches had an "impossible purpose" and was, therefore, "invalid," so that the domestic court itself recorded "*that, in future, by mutual agreement, the deal should be structured legally.*"[383]

In other words, this reveals that, despite the dismissal decided in the domestic proceeding, there was a plausible motive for filing the complaint that originated this and that, consequently, it truly constituted the exercise of a right and even compliance with a duty and, in any case, did not violate the provisions of Article 11 of the Convention.

D. Public interest

1. According to case law

However, the weighing up referred to above must include also and in a relevant way, especially in cases such as this, what is understood by public interest, because the Court itself has indicated this.

Indeed, the Court has stated that *"the legality of the restrictions to freedom of expression based on Article 13(2) will depend on them being designed to satisfy an essential public interest";* that "*[a]mong the different options to achieve this objective, the one that restricts the protected right the least must be chosen,"* and that "*the restriction must be proportionate to the interest that justifies it and be closely adapted to the achievement of this legitimate objective."*[384]

The Judgment adds that "*the Court has considered of public interest opinions or information on matters in which the Association had a legitimate interest to keep itself informed, to know what had an impact on the functioning of the State, or affected general rights or interests, or*

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382 *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*. Judgment of February 6, 2001. Series C No. 74, para. 148, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 138.

383 Para. 70 of the Judgment.

384 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra*; *Case of Herrera Ulloa v. Costa Rica, supra, para.* 123, and *Case of Usón Ramírez v. Venezuela, supra, para.* 79.

had significant consequences for it";[385] *"that Article 13 of the Convention protects statements, ideas or information 'of all kinds,' whether or not they are of public interest"; that "[n]evertheless, when such statements refer to issues of public interest, the judge must assess the need to limit freedom of expression with special care*,"[386] and that the different threshold for protection of honor and reputation of public officials "*is not based on the condition of the individual, but on the public interest in the actions he performs."*[387]

2. In this case

However and despite the preceding considerations, the Judgment concludes that the information contained in the statements made by Messrs. Mémoli were not of public interest, on the basis that they did not involve public officials or figures,[388] and did not relate to the functioning of the State's institutions;[389] that they had been made in the context of a dispute between private individuals on matters that, possibly, would only affect the members of a private mutual association; that they were not of significant interest to the rest of the inhabitants of San Andrés de Giles; that the domestic courts had rejected the argument concerning public interest; that the Court was not a fourth instance and that, therefore, it did not find it justified in a case such as this to substitute or to annul the decision of the domestic courts in this regard.[390]

3. Context: place where the statements were made

Regarding the decision taken in the instant case, first, it must be reiterated that these proceedings should not have been limited to validating the assessment made by the State's system of justice as to whether the matter of the burial niches was of public interest[391] – which was obviously in accordance with its domestic law – but rather, to the contrary, should have been aimed at determining whether it was in keeping with the provisions of the Convention.

Second, it should be indicated that, in order to determine whether this case involves a matter of public interest, it is essential to consider, not whether the domestic litigation was between private individuals, because almost all litigations are, but rather the context in which the said statements were made and, above all, the place where they were made; namely, San Andrés de Giles, because, when they were made, the town had a population of around

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385 Para. 146 of the Judgment, citing: *Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009. Series C No. 193, para. 121, and *Case of Fontevecchia and D`Amico v. Argentina, supra*, para. 61.

386 Para. 145 of the Judgment.

387 *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 86; *Case of Tristán Donoso v. Panama, supra*, para. 115; *Case of Usón Ramírez v. Venezuela, supra, para.* 83, and *Case of Fontevecchia and D`Amico v. Argentina, supra*, para. 47. Also, *Cf. Case of Herrera Ulloa v. Costa Rica, supra, paras.* 128 and 129; *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 103, and *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, para. 84.

388 Such as in the cases of: *Herrera Ulloa v. Costa Rica, supra, para.* 124; *Ricardo Canese v. Paraguay, supra, paras.* 91 to 94; *Kimel v. Argentina, supra*, para. 51; *Tristán Donoso v. Panama, supra,* paras. 93 and 115*, and Fontevecchia and D`Amico v. Argentina, supra, para.* 62.

389 Such as the Foreign Investment Committee in the *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs.* Judgment of September 19, 2006. Series C No. 151, para. 73, or the Armed Forces in the *Case of Vélez Restrepo and family members v. Colombia, supra, para.* 145.

390 Paras. 145 to 149 of the Judgment.

391 Para. 147 of the Judgment.

18,000 inhabitants[392] and approximately 300 of them were members of the said Italian Association.[393] In addition, it was necessary to take into consideration that the said facts referred to the illegal contracts for burial niches in the town's Municipal Cemetery.
Therefore, logically, it can be concluded that it is evident that a significant proportion of the population to whom the said publications were addressed had a legitimate interest in knowing the information they contained, because not only did it concern them, but also it referred to public or community property, in itself very relevant for their history and their cultural identity.

Consequently, there is no doubt that this information transcended the said Association and, hence, was of patent or significant public interest,[394] particularly as it also represented personal information disseminated by the journalist Pablo Mémoli; in other words, that concerned him.

On the same basis, in the instant case, the considerations of the Court in another case are fully applicable, to the effect that "*[i]n the domain of political debate on issues of great public interest, not only is the expression of statements which are well received by public opinion and those which are deemed to be harmless protected, but also the expression of statements which shock, irritate or disturb public officials or any sector of society.*[395] *In a democratic society, the press must inform extensively on issues of public interest which affect social rights*, … ."[396]

II. PRINCIPLE OF LEGALITY AND OF RETROACTIVITY

A. The dissent

Now, in this opinion there is also a discrepancy with the decision adopted in the Judgment that, in this case, the principle of legality and retroactivity established in Article 9 of the Convention[397] has not been violated.

This decision was based, on the one hand, on the fact that, having found that Messrs. Mémoli's statements did not refer to matters of public interest, the decriminalization of this type of expression established in the amendment to the definition of the offense of defamation would not apply to them[398] and, on the other hand, that, in the opinion of the competent Appellate and Criminal Guarantees Chamber, the criminal conviction imposed on

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392 In 1991, San Andrés de Giles had 18,260 in habitants. *Cf.* Giles census data, *La Libertad*, May 28, 1991 (file of annexes to the Stat's final arguments, folio 3860).

393 According to the National Mutual Action Institute, the Italian Association had 292 members at May 11, 1990. *Cf.* Report of the National Mutual Action Institute in relation to case file No. 160/90 (file of annexes to the Stat's final arguments, folio 3901).

394 Para. 146 of the Judgment.

395 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile, supra,* para. 69; *Case of Ivcher Bronstein v. Peru*, *supra*, para. 152, and *Case of Ricardo Canese v. Paraguay*, *supra*, para. 83.

396 *Case of Kimel v. Argentina, supra, para.* 88.

397 Article 9 of the Convention stipulates that: "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

398 Paras. 91 and 92 of the Judgment.

them had concluded so that, for this reason also, it was not appropriate to apply the new law to their criminal conviction.[399]

B. The act of the State to be considered in relation to the principle of legality and retroactivity

It has already been indicated that the act of the State to be considered in these proceedings is the second instance judgment of December 28, 1995, of the Second Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, province of Buenos Aires, which confirmed the judgment of December 29, 1994, of Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes.

Regarding the principle of legality and retroactivity, it must be added that, regarding this second instance judgment, Messrs. Mémoli filed an appeal on unconstitutionality before the Appellate and Criminal Guarantees Chamber because Law No. 26,551, promulgated on November 26, 2009, decriminalized defamation and libel; however, this appeal was rejected, because what they really sought, in the chamber's opinion, was the review of the judgment, which was considered inadmissible for the reasons described *supra.*[400]

C. Case law

In this matter, it is necessary to consider, first, that the Court has stated that "*the most favorable law should be interpreted as both the one that establishes a lesser punishment for the offenses, and also the laws that decriminalize a conduct that was previously considered an offense, or create a new cause for justification, innocence, or impediment to the execution of a punishment, among others";* that *"[t]hese presumptions do not constitute a complete inventory of the cases that deserve the application of the principle of the retroactivity of the most favorable criminal law";* and that *"[i]t should be emphasized that the principle of retroactivity is applicable in relation to laws that were enacted before the judgment was handed down, as well as during its execution, because the Convention does not establish any limit in this regard."*[401]

Moreover, the Court has added that[402] *"[u]nder Article 29(b) of the Convention, if any law of the State Party or any other international treaty to which this State is a party grants greater protection or regulates more broadly the enjoyment and exercise of any right or freedom, the State Party must apply the most favorable norm for the protection of human rights."*[403]

And, lastly, the Court has indicated that *"[i]t is necessary to recall that […] on different occasions the principle of the most favorable law has been applied in order to interpret the American Convention, so that the most favorable alternative for the protection of the rights safeguarded by the said treaty is always chosen,"*[404] and that *"[a]s this Court has*

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399 Para. 158 of the Judgment.

400 Para. 93 of the Judgment.

401 *Case of Ricardo Canese v. Paraguay, supra, para.* 179.

402 Idem, para. 180.

403 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra*, para. 52.

404 *Cf. Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights). Advisory opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 50*; Case of Baena Ricardo et al. Preliminary objections.* Judgment of November 18, 1999. Series C No. 61,

established, if two different norms are applicable to a situation, the one most favorable to the individual should prevail."[405]

D. The decriminalization of defamation and the conclusion of the punishment

In the instant case, Messrs. Mémoli were convicted of the offense of defamation defined in article 110 of the Criminal Code in force at the time, which was later annulled by Law No. 26,551, promulgated on November 26, 2009, which amended the definition of defamation as a crime, based on which the presumed victims in this case were convicted.[406]

Consequently, consistent with the preceding considerations on public interest and on the case law of the Court itself, the new definition of the offense of defamation should have been applied to Messrs. Mémoli, inasmuch as statements related to matters of public interest and also those that are not affirmative – in other words, opinions – were decriminalized. Hence, on both counts, the new definition of the offense of defamation was applicable to the sentence imposed on Messrs. Mémoli.

Furthermore, with regard to the supposed conclusion of the punishment, it is important to underscore, on the one hand, that currently a civil action for damages is ongoing against Messrs. Mémoli, which is based precisely on the criminal convictions imposed on them[407] and, on the other hand, that the State itself has indicated that "*the civil action* [in which a complaint has been filed against Messrs. Mémoli] *is a direct consequence of the criminal proceeding*" and that, in the civil action, it is not possible to litigate "*matters that have already been decided in the criminal proceeding.*"[408] Therefore, even though the criminal sanctions of one and five months' imprisonment imposed on Carlos and Pablo Mémoli, respectively, could now be concluded, this conviction continues to have legal effects for them.

In this regard, it is also pertinent to emphasize the decision of the National Criminal Cassation Chamber of the Supreme Court of Justice of the Nation when deciding the appeal for review of the sentence imposed on Mr. Kimel. In this decision, the National Criminal Cassation Chamber expressly established that "*the conclusion of the sentence does not prevent the review of a conviction, because in order to safeguard the honor and patrimony of the individual convicted, the law enables his or her spouse, siblings, children and […] parents to file an action.*"[409] The State itself provided this decision to the file of this case. In the *Kimel* case, when reviewing the criminal conviction imposed on the victim, it was found that it had been concluded and no decisions were pending in any civil proceeding related to the said criminal conviction. Despite this, based merely on the stigmatization associated with criminal sanctions and the protection of the victim's honor and reputation, the Supreme

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para. 37; *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 189, and *Case of Herrera Ulloa v. Costa Rica, supra, para.* 184.

405 *Case of Ricardo Canese v. Paraguay, supra, para.* 181.

406 The new article 110 of the Argentine Criminal Code establishes that: *"[a]nyone who intentionally dishonors or discredits a particular individual shall be punished by a fine of one thousand five hundred pesos ($ 1,500) to twenty thousand pesos ($ 20,000). In no instance shall expressions referring to matters of public interest or those that are not affirmative constitute the offense of defamation. Nor shall words harmful to honor constitute the offense of defamation when they are relevant to a matter of public interest."*

407 Paras. 95 and *ff*. of the Judgment.

408 Answering brief (merits file, folio 231).

409 Judgment of the National Criminal Cassation Chamber of November 10, 2011, deciding the appeal for review in the *Kimel* case (file of annexes to the answering brief, annex III, folio 2870).

Court of Justice of the State considered the review and resulting annulment of the sentence imposed on Mr. Kimel admissible, in compliance with the measure of reparation ordered by this Court in that case.

E. Continuation of the consequences of the criminal proceeding

The foregoing is particularly relevant when it is observed that, as a result of the criminal conviction imposed on them, in order to guarantee the eventual result of the above-mentioned civil action for damage, Messrs. Mémoli have been subject to a general injunction against the sale or encumbrance of property for more than 17 years,[410] which, moreover, was considered to have violated Articles 8(1) and 21 of the Convention, in relation to Article 1(1) of this instrument, in the fourth operative paragraph of the Judgment.

Obviously, and contrary to the position adopted in the Judgment, which expressly refused to consider that the duration of the civil action constituted a violation of freedom of expression,[411] since the said general injunction is founded on what happened in the criminal proceeding, it can be understood as a measure with the evident result, among others, of inhibiting Messrs. Mémoli from expressing themselves in the press on the matter considered in the criminal proceeding; in other words, as censorship, or at least indirect censorship, of the right to freedom of thought and expression of these individuals.

In this regard, it should be recalled that the Court has stated that *"[t]he effect of [a] requirement resulting from a judgment may result in a restriction incompatible with Article 13 of the American Convention, if it produces a dissuasive, intimidating and inhibiting effect on all those who exercise the profession of journalism, which, in turn, obstructs the public debate on issues of interest to society."*[412]

The Court has also indicated that *"freedom of expression may be restricted unlawfully owing to conditions de facto that, directly or indirectly, endanger or increase the vulnerability of those who exercise it"* and, thus, *"the State must abstain from acting in a way that encourages, stimulates, favors or increases that vulnerability and must adopt, when pertinent, necessary and reasonable measures to prevent violations and to protect the rights of those who find themselves in that situation."*[413]

Taking into account the preceding considerations, the State should have applied to Messrs. Mémoli, as a result of the action they filed on unconstitutionality, converted in appeal for review,[414] the new definition of the offense of defamation. The retroactive application of a more favorable criminal law is a right that the State must guarantee, even when the substantive effects of the criminal conviction have concluded. This is not due merely to the stigmatizing effect of criminal sanctions, but also because the civil consequences of the said sanctions are still being processed.

In brief, the failure to apply the most favorable law in this case and, consequently, to annul the said sanctions and, thus, acquit Messrs. Mémoli entails a violation of Article 9 of the Convention and means that the State incurred international responsibility.

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410 Paras. 109 and *ff.* of the Judgment.

411 Para. 185 of the Judgment.

412 *Case of Herrera Ulloa v. Costa Rica, supra, para.* 133.

413 *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 172.

414 Paras. 92 to 94 of the Judgment.

CONCLUSION

This opinion is emitted, therefore, because the signatories disagree with what was decided in the Judgment, as regards both the purpose of the dispute referred to, and the weighing up that the deliberation of the purpose required. And this relates not only to the interpretation and application to the case of Articles 13 of the Convention, but also of Article 9 of this instrument.

In sum, in this opinion, we are not maintaining that the Convention does not establish the possibility of imposing sanctions in cases such as this one, but rather that it also includes the alternative of considering such sanctions excessive or disproportionate and, even, inadmissible, which is the opinion we affirm.

And, when issuing this dissenting opinion, particular note is taken of the fact that the Court affirmed in another case, *"that the first time it referred to the right to freedom of expression, it underscored that 'the profession of journalism […] involves, precisely, seeking, receiving and distributing information,'"* that *"[t]hus, the exercise of journalism requires an individual to become involved in activities that are defined by or encompassed in the freedom of expression guarantee in the Convention,"* that *"contrary to other professions, the professional exercise of journalism is an activity specifically guaranteed by the Convention and 'cannot be differentiated from freedom of expression; to the contrary, both elements are evidently interrelated, because the professional journalist is not, and cannot be, anything else than a person who has decided to exercise freedom of expression continuously, steadfastly, and for remuneration.'"*[415]

In that case two journalists claimed the protection of Article 13 and also, closely related to this, of Article 9, both of the Convention. In this case, a journalist and his father are involved, the former being also the Managing Director of *La Libertad*, a twice-monthly newspaper of San Andrés de Giles, founded in 1945. Thus, the case does not concern only the right to freedom of thought and expression of two individuals, but also the situation of a local and regional newspaper.

Manuel E. Ventura Robles
Judge

Eduardo Vio Grossi
Judge

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

[415] *Case of Fontevecchia and D`Amico v. Argentina, supra, para.* 46, citing *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra*, paras. 72 to 74, and *Case of Vélez Restrepo and family members v. Colombia, supra, para.* 140.

CONCURRING OPINION OF JUDGE DIEGO GARCIA-SAYÁN
IN THE CASE OF MÉMOLI *v.* ARGENTINA

1. In this Judgment the Inter-American Court reaffirms and develops its consistent case law on freedom of expression under which the Court has repeatedly emphasized the significance and the broad content of this fundamental right. Thus, the Court recalled (para. 119), among other aspects, that the right to freedom of thought and expression recognized in Article 13 of the Convention has, among other elements, both an individual and a social dimension, and that both must be protected simultaneously. To this end, the State must ensure that no one may be arbitrarily prevented from expressing his thoughts and, also, the collective right to receive information and be aware of the expression of the opinions of others.

2. In its consistent case law the Court has reaffirmed that freedom of expression is a fundamental rights in a democratic society. Among other reasons because, as established in the Inter-American Democratic Charter, freedom of expression and of the press are essential components of the exercise of democracy (art. 4). In this regard, without ceasing to be an end in itself, freedom of expression is, in essence, instrumental for the democratic development of a society, assuming that it relates to the exchange of opinions and access to information, and is an instrument for the citizen's participation in public affairs.

3. In this perspective, the Inter-American Court has established, in cases such as that of *Herrera Ulloa v. Costa Rica*, that there is "[…] agreement between the different regional systems for the protection of human rights and the universal system about the essential role played by freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, fully implemented, democracy evaporates, pluralism and tolerance begin to deteriorate, the mechanisms that allow citizens to exercise control and file complaints start to become ineffectual and, in short, a fertile environment is created for an authoritarian system to become rooted in society" (para. 116).

4. The information distributed, specifically, in the mass media has singular relevance and importance. In principle, the mass media should allow information and opinions to be made available to the population that help each individual form his or her own personal opinion so as to be able to exercise the right to participate in public affairs, with more information on which to form an opinion. In addition, in many cases, investigative journalism plays an important role in learning about facts that, otherwise, could have remained hidden or been overlooked.

5. For example, investigative journalism may provide important information and background data to the population and to institutions about gross human rights violations. This is what happened in the case of the serious facts described in the case of *Kimel v. Argentina* (judgment of May 2, 2008), that occurred during the military dictatorship in that country, in which investigative journalism was of particular importance in reporting and disseminating them. It is in cases such as that one that the true dimension and transcendence of the right to freedom of expression can be appreciated, as well as the importance that the State guarantee its exercise. As established in the Inter-American Court's judgment in that case, Mr. Kimel had not used excessive language and the criticism

he published did not contain insults or references to the personal life of the judge who prosecuted him, but rather was restricted to the analysis of this judge's work in the judicial case he was hearing. Indeed, in the said judgment, the Court placed on record that "Mr. Kimel reconstructed the judicial investigation of the massacre and, on this basis, issued a value judgment on the performance of the Judiciary during the last military dictatorship in Argentina" and that "Mr. Kimel did not use excessive language and based his opinion on the events verified by the journalist himself" (para. 92).

6. In this Judgment in the case of *Mémoli v. Argentina*, the Inter-American Court has had to examine a case with very different characteristics to the *Kimel* case as regards the dimension of the rights in conflict; despite this, it underscores, once again, the interrelation of the exercise of journalism with the exercise of freedom of expression (para. 120). Nevertheless, it is clear to the Court that freedom of expression is a right that corresponds to everyone and not only to journalists, so that it is not correct to assimilate – or restrict – the right to freedom of expression to the rights of journalists or the exercise of the profession of journalism, because everyone has this right, not only journalists or those who express themselves through the mass media.

7. Indeed, everyone has the right to freedom of expression, not only journalists or the mass media. In the exercise of this right, consequently, not only journalists are bound by the Convention to ensure respect for the rights or the reputation of others, respecting the right to honor, but so does everyone who makes use of this right to freedom of expression. Despite this, based on the facts of the case, in this Judgment the Court places emphasis on the duty of the journalist to verify the events on which he bases his opinions, acting with "fairness and diligence in crosschecking sources and seeking information" (para. 122). And this is why, in the same paragraph, the Court recalls that journalists must exercise their work respecting the principles of "responsible journalism."

8. The provisions that protect the right to freedom of expression are components of a vast system of juridical and human rights. In this context, the complementary and dialectic relationship between each right may eventually lead to collisions and conflicts that must be processed and decided by law, as appropriate, so that the exercise of these rights does not lead to excesses in some rights that eventually affect the exercise of others. This gives rise to an essential component of rights, which is that, in general, they are not and cannot be considered "absolute," insofar as there are other rights with which they must co-exist and coordinate.

9. Thus, in its consistent case law, the Inter-American Court has reiterated that, since it is not absolute, the right to freedom of expression established in Article 13 of the Convention, right may be subject to the subsequent imposition of liability (subparagraph 2) or to restrictions (subparagraphs 4 and 5). This principle is repeated in the Judgment (para. 123), which, in its findings, never refers to "restrictions" but, specifically, to the "subsequent imposition of liability," which is not a synonymous concept. Indeed, as emphasized in Article 13(2) of the Convention, if the exercise of freedom of expression interferes with other rights guaranteed by the Convention, the subsequent imposition of liability may be claimed for the abusive exercise of this right. If this was not possible, the Convention would be proposing the "absolute" nature of this right which is legally and conceptually unsustainable. This is precisely the specific area of this Judgment in which the Court has taken great care not to equate "the subsequent imposition of liability" and "restrictions," because they are different concepts. The core of this Judgment is a situation in which what is in question is, specifically, the subsequent liability in relation to an alleged infringement of "respect for the rights or reputations of others" subparagraph (a) of Article 13(2)).

10. In this case, the consideration that the Court gives to the right to protection of honor and the recognition of dignity as a right clearly stipulated in the Convention and that the State, consequently, must ensure, is a crucial element (paras. 124 and *ff*.). As in the case of other rights (such as freedom of expression), the protection of the right to honor entails an evident obligation of guarantee by the State. From that viewpoint, the fact that the exercise of the right to freedom of expression, as of any other right, is limited by other fundamental rights acquires special relevance. In this specific case, the right to honor is the main essential legal reference point to assess the limits, because it is expressly protected by the Convention in the same Article 13 ("respect for the rights or reputations of others") and in Article 11 ("right to have his honor respected and his dignity recognized").

11. The protection of honor established in Article 11 of the Convention, as is recognized, prohibits any arbitrary or abusive interference in the private life of the individual or unlawful attacks on his honor or reputation. This makes it legitimate for whoever considers that his honor has been harmed to have recourse to the judicial mechanisms that the State has established. Insofar as it is a human right protected by the Convention, the State has an analogous obligation to ensure it, so that the State is bound to ensure that the right to honor can be protected fully, making available to the individual the appropriate means to this end. In the context of this general protection of honor, so-called "objective honor" merits consideration, which is, essentially, the value that the others assign to the individual in question when the good reputation or standing he enjoys in his social environment is affected.

12. The important point is that, in the process of protecting and ensuring the right to honor, any dispute or contention arising from what could be considered an abusive exercise of the right to freedom of expression must be resolved in a way that leaves both rights adequately protected by an appropriate weighing up exercise. As is evident, in case of dispute, it corresponds and will correspond to the judicature to process this and decide it in the search for harmony between freedom of expression and other fundamental rights. In this weighing up exercise, it is possible to process and decide adequately disputes between rights such as the rights in cases such as this one. This means, essentially, that the circumstances of the case in dispute are assessed, not to conclude in the "preference" for one right over another, but rather to decide on specific aspects of the right or rights cited in order to delimit them appropriately in the specific case and so that they may both be protected.

13. Regarding the judicial mechanisms for the protection of honor that are legitimate according to the Convention, this Judgment merely reiterates the Inter-American Court's consistent case law to the effect that "[b]oth the civil and the criminal jurisdiction are legitimate, under certain circumstances, and insofar as they meet the requirements of necessity and proportionality, as a means for the subsequent imposition of liability for the expression of information or opinions that affect honor or reputation" (para. 126). Thus, the Court reaffirms here that the protection of the honor and reputation of every individual is – in general and also in this case – a legitimate objective for the subsequent imposition of liability and that the criminal jurisdiction may be appropriate to safeguard the legal right that it is desired to protect, to the extent that it is able to contribute to achieving this objective.

14. In other cases decided previously by the Inter-American Court the facts submitted to the Court's consideration consisted, among other elements, of phrases or opinions that allegedly harmed the right to honor of public officials. In those cases, based on the status as such of the individuals allegedly harmed and of the particular context in which they were issued (such as electoral processes or investigations into gross human rights violations), the Court determined that the State was internationally responsible because it had unduly impaired freedom of expression. Save for the differences between each case, this is a

similar component in the cases of *Ricardo Canese v. Paraguay* (judgment of August 31, 2004), *Palamara Iribarne v. Chile* (judgment of November 22, 2005) and *Kimel v. Argentina* (judgment of May 2, 2008).

15. In the case of *Ricardo Canese v. Paraguay,* the Court stipulated that "it is legitimate for anyone who feels that his honor has been harmed to have recourse to the judicial mechanisms established by the State to protect it" (para. 101), referring back to the case law of the European Court of Human Rights, since the latter "has maintained consistently that, with regard to the permissible limitations to freedom of expression, it is necessary to distinguish between the restrictions that are applicable when the statement refers to a private individual and, on the other hand, when it refers to a public persons such as a politician" (para. 102). Taking these elements into account, in the *Canese* case, the Inter-American Court determined that "in the case of public officials, of individuals who perform functions of a public nature, and of politicians, a different threshold of protection should be applied, which is not based on the condition of the person in question, but on the public interest of the activities or actions of a certain individual (para. 103).

16. The same reasoning and analysis was used in the case of *Palamara Iribarne v. Chile*, which concerned a book written by Mr. Palamara Iribarne on aspects of the military institution in which he worked. In the opinion of the Inter-American Court the distribution of the book could not be obstructed, because the victim could not be prevented from exercising his freedom of expression, and he should have been able to distribute the book using any appropriate method to ensure that his ideas and opinions reached the largest audience, and that this audience could receive this information" (para. 73). The Court reiterated its case law in the sense that, with regard to public officials, the scope of protection of their right to honor is different. Thus, the Court established that "statements concerning public officials or other persons who perform functions of a public nature enjoy, in the terms of Article 13(2) of the Convention, greater protection that provides an opening for a broad discussion, essential for the functioning of a truly democratic system. These criteria apply in this case with regard to the critical opinions or statements of public interest expressed by Mr. Palamara Iribarne in relation to the actions of the Magallanes Naval Prosecutor during the criminal proceedings against him in the military jurisdiction for the offenses of disobedience and failure to comply with military obligations" (para. 82).

17. The case of *Kimel v. Argentina* also involved a "conflict between the right to freedom of expression regarding issues of public interest and right of public officials to have their honor protected" (para. 51). Developing the concept of the weighing up exercise, in this case the Court established that "it is imperative to ensure the exercise of both rights. In this regard, the prevalence of either of them in a particular case will depend on the considerations made as to proportionality. The solution to the conflict arising between some rights requires examining each case in accordance with its specific characteristics and circumstances, considering the existence and extent of the elements that substantiate the considerations regarding proportionality" (para. 51).

18. In this Judgment, the Court has been obliged to recall some aspects of the content and meaning of the decision adopted in the *Kimel* case because, during the processing of this case, there were those who maintained that, in the *Kimel* judgment, the Inter-American Court had determined that defining defamation and libel as offenses was incompatible with the Convention. The Inter-American Court has never established this. In the present Judgment, the Court sets out its consistent case law on this matter (para. 133) emphasizing that it is not appropriate to attribute to the Court that, in the *Kimel* or any other case, it established that defining defamation and libel as offenses could be, *per se,* contrary to the Convention.

19. First, because, in general, the Court does not find that "punishment for the expression of information or opinions is not considered contrary to the Convention" (para. 133). Second, because the meaning of the Court's judgment in the *Kimel* case, was specifically and exclusively, that the State rectify "the lack of sufficient precision in the criminal laws that penalize libel and defamation" (para. 133). It was based on the rectification of this lack of precision, and not on the elimination of these offenses (which subsist), that the Inter-American Court established subsequently that the State had complied fully with its obligation to adapt its domestic law.

20. The facts of the *Mémoli* case differ from those of previous cases mentioned here, because the persons whose honor has supposedly been harmed were not public officials and did not perform public functions. The complainants, Antonio Guarracino, Humberto Romanello and Juan Bernardo Piriz, members of the Management Committee of a private entity, the *Asociación Italiana de Socorros Mutuos, Cultural y Creativa "Porvenir de Italia,"* filed a complaint for libel and defamation against Pablo Mémoli and Carlos Mémoli based on "their statements in around twenty documents or interventions, in newspaper articles, 'letters documents' and communique's (*solicitadas*), as well as interventions in radio programs, where the presumed victims had referred to the administration of the Italian Association and the case of the burial vaults" (para. 74). Regarding the supposed "public interest" of the facts, in this case, the Court has determined that the facts "occurred in the context of a dispute between private individuals concerning matters that, possibly, would only affect the members of a private mutual association, without any indication that the content of this information would have any relevance or impact that would go beyond the Association and be of significant interest to the rest of the population of San Andrés de Giles" (para. 146).

21. In the instant case, the Court has not found any grounds to consider that having recourse to a judicial action to process the alleged harm to honor attributed to Messrs. Mémoli constitutes or constituted a violation of the Convention. Nor has it considered that there was any evidence to characterize as disproportionate the decisions adopted by the Argentine judicial authorities. As stated in this Judgment (para. 137), in this case, the facts are very different from those of the *Kimel* case, because it was foreseeable that expressions such as "criminals" "unscrupulous," "corrupt" or acting "using subterfuges (*tretas*) and deceit (*manganetas*)," could result in a judicial action for the alleged harm to the complainants' honor or reputation.

22. The Argentine judicial authorities in the criminal proceeding considered that there was sufficient evidence for a trial and a punishment. The Inter-American Court determined that it had been able to verify, in light of the available information and evidence, that "the statements of Messrs. Mémoli were examined in detail by the domestic judicial authorities when deciding the criminal conviction against them" (para. 141).

23. In this regard, the Court noted that Carlos y Pablo Mémoli "were convicted in the criminal jurisdiction to a suspended sentence of one and five months' imprisonment, respectively, for the offense of defamation owing to statements made in seven interventions that both the first instance court and the chamber of second instance considered to have denigrated or discredited the honor or the reputation of the complainants. At the same time, Messrs. Mémoli were acquitted of the offense of defamation for the other interventions they had been accused of, as well as for the offense of libel for all the interventions for which they had been criminally prosecuted" (para. 131). This reflects, among other elements, that in this examination, the domestic judicial authorities had weighed the different factual elements submitted to their consideration throughout the domestic proceeding. Thus, there is sufficient

evidence for the Court to have found that there were no grounds to determine that that the State was internationally responsible for the punishment imposed.

24. In summary, the central conceptual element of the Inter-American Court's case law is reaffirmed by this Judgment in the perspective of protecting all rights simultaneously and in a coordinated manner, in the understanding that each fundamental right should be exercised respecting and safeguarding the other fundamental rights. In the processing and harmonization of disputes between rights, the State and, in particular, the administration of justice, play a central role, in weighing them up appropriately. Any disputes that arise can and must be processed by law, and in cases such as this one, the extremes are freedom of expression and the right to honor.

Diego García-Sayán
Judge

Pablo Saavedra Alessandri
Secretary

SEPARATE CONCURRING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ
IN THE CASE OF MÉMOLI *v.* ARGENTINA

I agree fully with all aspects of the judgment delivered by the Court; hence, the purpose of this separate opinion is to emphasize some points that I consider particularly important.

I. General principles established in the case law of the Court

1. This case, as several others decided previously by the Court,[1] raises the issue of the relationship between the right to honor and dignity, or private life, and freedom of thought and expression. Both are rights recognized by the American Convention on Human Rights, in Articles 11 and 13, regarding which the Court has established a series of important general principles in its case law that are reaffirmed in this Judgment.

Two fundamental rights that must be harmonized

2. As the Court has established, it is necessary to harmonize the two fundamental rights that, in certain cases, are in conflict.

3. When analyzing this exercise of harmonization, it is interesting to recall some aspects of the drafting of the Convention. Articles 8 and 10 of the draft prepared by the Inter-American Council of Jurists were similar to Articles 11 and 13 of the final text, but contained some significant differences to the latter, particularly in the case of the right to honor and dignity. Several of the changes approved finally by the Inter-American Specialized Conference on Human Rights held in November 1969 in San José, Costa Rica, arose from proposals made previously when the OAS Member States and the Inter-American Commission on Human Rights commented on the original draft.

4. At that stage, the 1959 Symposium held at the Faculty of Law and Social Sciences of Montevideo,[2] with the participation of the Faculty's foremost professors of constitutional law, administrative law, and international law, had particular significance. During the deliberations, special attention was paid to Articles 8 and 10 of the draft and several amendments were proposed that, at the end of the day, became part of the text of the Convention.

5. With regard to Article 10 of the draft (then entitled "Freedom of expression of thought and of information), an extremely important suggestion was made concerning paragraph 4, which allowed prior censorship of public entertainments "for the sole purpose of safeguarding national morals, prestige or security." Professor Eduardo Jiménez de Aréchaga recalled that the Uruguayan delegation had proposed the prohibition of prior censorship and that, following an indication that it was necessary in order to ensure "the protection of children and

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1 *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107; *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111*; Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177; *Case of Tristán Donoso v. Panama.* Preliminary objection, merits, reparations and costs. Judgment of January 27, 2009 Series C No. 193, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238.

2 *Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile,* Biblioteca de Publicaciones Oficiales de la Facultad de Derecho and Ciencias Sociales de la Universidad de la República Oriental del Uruguay, Montevideo, 1959.

adolescents," had proposed that it was "exclusively for the moral protection of childhood and adolescence." At the proposal of Professor Aníbal Luis Barbagelata and the Dean, Juan Carlos Patrón, the Symposium recommended the text of paragraph 4 that was the one finally included in the Convention according to which prior censorship of public entertainments was allowed "for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."[3]

6. Article 8 of the draft was entitled "Right to the inviolability of the home and to honor," and the text was as follows: "Everyone has the right to the protection of the law against arbitrary or unlawful interference with his private life, his family, his home, or his correspondence or of attacks on his honor or reputation." Several of the participants in the Symposium referred to the matter, and Professor Barbagelata suggested that "instead of referring indirectly to the right to honor or reputation, the right to honor could be affirmed directly," in the following terms: "Everyone has the right to honor and recognition of his dignity." Finally the following text was approved:

> *1. Everyone has the right to honor and recognition of his dignity.*
> *2. No one may be the object of arbitrary or illegal interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.*
> *3. Everyone has the right to the protection of the law against such interference or attacks.*[4]

7. The text approved in the Symposium finally became Article 11 of the Convention, with only some amendments to the wording ("his honor respected" instead of "honor" in paragraph 1; substitution of the word "illegal" by the word "abusive" to describe the interference prohibited; characterization of attacks on honor and dignity as illegal). The change is important, because it entails the direct, rather than the indirect, recognition of the right to honor and dignity, and recognizes the right to protection against interference or attacks.

8. Thus, from both the direct examination of the Convention and the analysis of the process that led to the final adoption of Articles 11 and 13, it can be inferred that freedom of thought and expression, and the right to respect for honor and reputation and the recognition of the dignity of every person are fundamental rights of every human being, on an equal footing, and without *a priori* being able to assign priority or prevalence to either of them. In each case, the two rights must be weighed, taking all the pertinent facts into consideration.

Limitations to rights

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[3] *Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile, supra,* pp. 84 and 85. In the final text of the Convention the words "Notwithstanding the provisions of paragraph 2 above" were added to paragraph 4. Also, paragraph 5 was added, which contains the prohibition of any propaganda for war and any advocacy of national, racial, or religious hatred. In the instant case, this aspect has no significance; hence, it is not developed in the main text. However, in this footnote, it is worth pointing out that Professor Barbagelata said that he found the part of the text of the draft that referred to the safeguard "of national prestige and security" totally unsatisfactory, as it could be "an indirect way of limiting artistic freedom and freedom of thought." He could not conceive of "a situation in which public amusements could affect national prestige and security." Other important proposals were also made that were subsequently included in the Convention; among the most significant was the addition of paragraph (a) to Article 32 (inspired by article 72 of the Uruguayan Constitution and proposed by Professor Alberto Ramón Real), the text of which was as follows: "The enumeration of rights and guarantees included in this Convention does not preclude others that are inherent in the human personality or derived from the republican and democratic form of government" (*Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile, supra,* pp. 164 and 165 and 227). This proposal led to what would finally be paragraph (c) of Article 29 of the Convention.

[4] *Simposio sobre el proyecto de Convención de Derechos Humanos de Santiago de Chile*, supra, pp. 80 and 81.

9. Article 29(d) of the Convention establishes that "No provision of this Convention shall be interpreted as […] excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." Consequently, Article XXVIII of the Declaration is applicable, according to which "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."

10. Specifically, in relation to freedom of thought and expression, Article 13(2) of the Convention establishes the following:

> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a) respect for the rights or reputations of others; or
> b) the protection of national security, public order, or public health or morals.

In other words, in the case of freedom of thought and expression there are specific limits that – respecting the requirements that it is "subject to *subsequent* imposition of liability" "expressly established by law" – explicitly establish the need to ensure "respect for the rights or reputations of others." Meanwhile, the Convention does not include any provision that establishes specific limits to the right to honor or reputation and to dignity. Moreover, it would be very difficult, if not impossible, to imagine a situation in which the exercise or enjoyment of this right could affect another right, in a way that would entail the application of the general limitation indicated in paragraph 8.

11. Nevertheless, in its previous judgments, the Court has understood that in certain precisely defined cases, the right to honor must cede to freedom of thought and expression, owing to the importance of the latter for a democratic society. In the following paragraphs, the elements that, in specific circumstances (which, as will be seen, are not present in the instant case) entail the prevalence of one right over the other are analyzed.

The weighing up between the two rights

12. The Court initiated its reasoning by proclaiming the equivalence of the two rights and the need to weigh them and to harmonize them. For example, in one case it stated the following:

> The Court recognizes that both freedom of thought and expression and the right to have one's honor respected, as enshrined by the Convention, are fundamental rights. It is, therefore, imperative to ensure the exercise of both. In this regard, the prevalence of either of them in a particular case will depend on the considerations made as to proportionality. The solution to the conflict arising between some rights requires examining each case in accordance with its specific characteristics and circumstances, considering the existence of elements and the extent thereof on which the considerations regarding proportionality are to be based.[5]

And, further on in the same judgment, it stipulated:

> The need to protect the right to have one's honor respected and one's dignity recognized, as well as other rights which might be affected by the abusive exercise of freedom of thought and expression, requires due compliance with the limitations imposed by the

[5] *Case of Kimel v. Argentina*, *supra*, para. 51.

> Convention in this regard. These limitations must be in accordance with strict proportionality criteria.[6]

In another case (in which the dispute arose between the right to privacy and freedom of expression), the Court stated:

> In this context, the Court must find a balance between privacy and freedom of expression that, without being absolute, are two fundamental rights guaranteed in the American Convention and of great importance in a democratic society. The Court recalls that each fundamental right must be exercised respecting and safeguarding the other fundamental rights. In this process of harmonization, the State plays a central role seeking to establish the necessary responsibilities and penalties to achieve this end. The need to protect the right that could be harmed by an abusive exercise of freedom of expression calls for due observance of the limits established in this regard by the Convention itself.[7]

13. In the cases submitted to the Court to date, the decision adopted has favored freedom of expression, based on a reasoning that, on the one hand, underlines the particular importance of this freedom for the functioning of a democratic society and, on the other hand, reduces the importance of the protection of honor in the case of public officials or public figures, provided that matters of public interest are involved.

Particular importance of freedom of expression

14. The Court has emphasized the particular importance of freedom of expression in a democratic society in the following terms, which I share:

> In its case law the Court has established that the social media play an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society and, for this reason, it is indispensable that they reflect the most diverse information and opinions. The said media, as essential instruments of freedom of thought and expression, must exercise their social function with responsibility.
>
> Given the importance of freedom of expression in a democratic society and the elevated responsibility that this entails for professionals involved in the area of social communication, the State must not only reduce to a minimum the restrictions on the circulation of information, but must also ensure, insofar as possible, the balanced participation of diverse information in the public debate, encouraging the pluralism of information. Consequently, the flow of information must be regulated by equity. It is in these terms that the protection of the human rights of the individual in the face of the power of the media, and the attempt to ensure structural conditions that allow the equitable expression of ideas can be explained.[8]

Lessening the importance of the protection of honor

15. In addition, the Court – in case law that I endorse – has indicated repeatedly that, when public officials or public figures are involved and the statements to which the case refers relates to matters of public interest, the intensity of the protection of honor is lessened. In particular, in the Kimel case, it stated:

> Regarding the right to have one's honor respected, the opinions regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection, so that debate in a democratic system is

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6 *Case of Kimel v. Argentina*, *supra*, para. 56.

7 *Case of Fontevecchia and D'Amico v. Argentina*, *supra*, para. 50.

8 *Case of Fontevecchia and D'Amico v. Argentina, supra*, paras. 44 and 45.

> encouraged. The Court has pointed out that in a democratic society political and public personalities are more exposed to scrutiny and the criticism of the public. This different threshold of protection is due to the fact that they have voluntarily exposed themselves to a stricter scrutiny. Their activities go beyond the private sphere to enter the realm of public debate. This threshold is not based on the nature of the individual, but on the public interest inherent in the actions he performs, as when a judge conducts an investigation into a massacre committed in the context of a military dictatorship, as in the instant case.
>
> The democratic control exercised through public opinion encourages the transparency of State actions and promotes the responsibility of public officials in the performance of their duties. Hence, the greater tolerance for the statements and opinions expressed by individuals in the exercise of such democratic powers. These are the requirements of the pluralism inherent in a democratic society, which requires the greatest possible flow of information and opinions on issues of public interest.
>
> In the domain of political debate on issues of great public interest, not only is the expression of statements that are well received by public opinion and those that are deemed to be harmless protected, but also the expression of statements that shock, irritate or disturb public officials or any sector of society. In a democratic society, the press must inform extensively on issues of public interest which affect social rights, and public officials must be accountable for the performance of their duties.[9]

II. Application of the general principles to the instant case

16. It is precisely the application of the general principles established by the Court in its case law that led, in this case, to the decision in favor of the right to honor and reputation of the persons to whom Messrs. Mémoli referred in the statements on which the Argentine system of justice based itself to convict them. To reach this decision, the Court took into account, in particular, the circumstance that the Argentine judicial authorities examined the contested statements in detail and, regarding most of them, reached the conclusion that they did not constitute an offense. In other words, it was considered that the said statements did not constitute an abusive exercise of freedom of expression.

17. I emphasize, in particular, the importance of what is stated in paragraph 141 of the Judgment (with the clarifications contained in footnotes 262 to 264):

> [T]he statements of Messrs. Mémoli were examined in detail by the domestic judicial authorities when deciding the criminal conviction against them. When reviewing the need to establish criminal sanctions against Messrs. Mémoli, the courts of both first and second instance examined thoroughly the characteristics of the statements made by Messrs. Mémoli based on which the complaint had been filed against them. In this regard, the Court notes that:
>
> (i) the convictions for defamation were the result of a detailed analysis of each of the interventions, exempting Messrs. Mémoli of responsibility for statements considered "opinions that did not disparage the complainants" and holding them responsible for statements included in the said interventions that, in the understanding of the domestic judicial authorities, had exceeded a simple opinion or analysis of the news, with the purpose of disparaging or defaming one or several of the complainants or, for example, constituted "a voluntary digression to insult them," without being "necessary or essential for the claim made";
>
> (ii) the domestic courts verified the existence of *animus injuriandi* or malice as regards the statements for which they were convicted;
>
> (iii) they acquitted the presumed victims for most of the interventions based on which the complaint was filed, as well as for the offense of libel, and

[9] *Case of Kimel v. Argentina, supra*, paras. 86 to 88.

(iv) when acquitting them for these statements, the domestic courts distinguished that some of these statements constituted opinions or were of a hypothetical nature in order to exempt them from criminal liability for the offense of libel and defamation, or constituted "accounts of facts or "newspaper stories."

18. It is important to underline that following the judgment in first instance (subsequently confirmed on appeal) that had rejected the existence of wilful intent in the case of the burial vaults, Pablo Mémoli published an article entitled "*Caso Nichos: el Juez dijo que los boletos de compraventa son de objeto imposible e inválidos*" [Burial vaults case: the judge said that the object of sales contracts is impossible and invalid], which included the following passage: "This newspaper, *under the responsibility of its director*, considered the act to be presumed fraud, *and we continue to maintain this, because the case file reveals the fraud from the evidence provided by the accused who did not hesitate to be (mendacious) and (fallacious), before the courts themselves*" (judgment, para. 81 and footnote 113).

19. In addition, it is clear that this case does not include any of the circumstances on which the prevalence attributed to freedom of expression was accorded in previous cases:

a) The persons to whom the offensive statements referred were not public officials or public figures. The previous cases involved: a diplomat who represented Costa Rica before the International Atomic Energy Agency (IAEA) (Herrera Ulloa),[10] the former Attorney General of Panama (Tristán Donoso),[11] a candidate for the Presidency of Paraguay (Ricardo Canese),[12] the judge who intervened in the case of the murder of the Pallotine Fathers or the San Patricio massacre during the Argentine dictatorship (Kimel)[13] or the President of Argentina (Fontevecchia and D'Amico).[14]

b) The matters to which the incriminating statements referred were not of public interest, as they were in the preceding cases: supposed illegal activities (Herrera Ulloa);[15] revelation to third parties of a private telephone conversation and presumed unauthorized recording by the Attorney General (Tristán Donoso);[16] questioning of the integrity and suitability of a candidate for the Presidency by the Republic (Ricardo Canese, who was also a candidate for the Presidency),[17] failure by a judge to consider decisive evidence to elucidate the murder of several priests (Kimel),[18] or dissemination of photographs that presumably proved that the President of the Nation had a child from an extramarital relationship as a way of calling attention to the providing of large sums of money and expensive presents, and possibly other favors, by the then President to those who appeared in the photographs that were published (Fontevecchia and D'Amico).[19]

c) "Excessive language" was used, contrary to the preceding cases, in particular in the *Kimel* case, in which the Court stated that "Mr. Kimel did not use excessive language and

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10 *Cf. Case of Herrera Ulloa v. Costa Rica, supra,* para. 95.d).

11 *Cf. Case of Tristán Donoso v. Panama, supra,* para. 95.

12 *Cf. Case of Ricardo Canese v. Paraguay, supra*, para. 69.1.

13 *Cf. Case of Kimel v. Argentina, supra*, para. 89.

14 *Cf. Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 60

15 *Cf. Case of Herrera Ulloa v. Costa Rica*, supra, para. 113.

16 *Cf. Case of Tristán Donoso v. Panama*, supra, para.76.

17 *Cf. Case of Ricardo Canese v. Paraguay,* supra, para. 94.

18 *Cf. Case of Kimel v. Argentina, supra,* para. 89.

19 *Cf. Case of Fontevecchia and D`Amico v. Argentina, supra,* paras. 62 to 64.

based his opinion on the events verified by the journalist himself."[20] To the contrary, one or other of the Messrs. Mémoli, or both, accused the complainants as possible authors or accessories to the offense of fraud, referred to them as "criminals," "unscrupulous," "corrupt" and said that "they used subterfuges (*tretas*) and deceit (*manganetas*)."

III. Conclusion

20. Based on all the above, I ratify my full endorsement of the judgment and issue this separate opinion in which I have emphasized some particularly important aspects.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary

[20] *Case of Kimel v. Argentina, supra*, para. 92.