INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF TZOMPAXTLE TECPILE ET AL. V. MEXICO

JUDGMENT OF NOVEMBER 7, 2022

(Preliminary Objection, Merits, Reparations and Costs)

In the Case of *Tzompaxtle Tecpile et al. v. Mexico,*

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

Ricardo C. Pérez Manrique, President
Humberto A. Sierra Porto, Vice President
Nancy Hernández López
Verónica Gómez
Patricia Pérez Goldberg
Rodrigo Mudrovitsch

also present,

Pablo Saavedra Alessandri, Registrar, and
Romina I. Sijniensky, Deputy Registrar,

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, 65 and 67 of the Court's Rules of Procedure (hereinafter "the Rules"), delivers this judgment, structured as follows:

[*] Judge Eduardo Ferrer Mac-Gregor Poisot, a Mexican national, did not participate in the processing of this case nor in the deliberation and signing of this judgment, in accordance with the provisions of Article 19(1) and 19(2) of the Rules.

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I
INTRODUCTION OF THE CASE AND THE CAUSE OF ACTION

1. *The case submitted to the Court.* – On May 1, 2021, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Court the case of "Jorge Marcial Tzompaxtle Tecpile et al. with respect to the United Mexican States." The Commission pointed out that the case concerned the alleged international responsibility of the United Mexican States (hereinafter "Mexico" or "the State") for the alleged unlawful and arbitrary detention on January 12, 2006 of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López by agents of the Federal Police when the three alleged victims were on the side of the road between the city of Veracruz and Mexico City. The Commission indicated that they were detained and searched by the agents without a judicial order and without being caught *en flagrante*. The Commission considered that the detention was unlawful and arbitrary. It added that the subsequent search of the vehicle was an infringement of the right to privacy and that the alleged victims had not been informed of the grounds for their detention nor were they taken promptly before a judicial authority. It also claimed that the application of the institution of *arraigo* [an investigative or pre-trial detention] was a punitive, and not a precautionary, measure that also affected their right to the presumption of innocence. In addition, it claimed that the *arraigo* (*infra* paras. 36 to 41) contravened the Convention and it considered that the application of preventive detention subsequent to the *arraigo* was arbitrary. Based on these considerations, the Commission concluded that the State was responsible for violating Articles 5(1) (right to personal integrity); 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) (right to personal liberty); 8(1), 8(2), 8(2)(b), 8(2)(d) and 8(2)(e) (right to a fair trial); 11(2) (right to privacy) and 25(1) (right to judicial protection) of the American Convention, read in conjunction with the obligations established in Articles 1(1) and 2 thereof, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

2. *Proceedings before the Commission.*

a. Petition. – On February 22, 2007, the Commission received the initial petition, which was presented by the Solidarity Network for the Decade Against Impunity.

b. Reports on Admissibility and the Merits. – On October 27, 2015 and December 7, 2018, respectively, the Commission adopted its Report on Admissibility No. 67/15, in which it concluded that the petition was admissible, and its Report on the Merits No. 158/18 (hereinafter also "the Merits Report"), in which it arrived at certain conclusions and in which it formulated recommendations to the State.

c. Notification to the State. – The Commission notified the Merits Report to the State by communication of January 31, 2019 and placed itself at the disposal of the parties to reach a friendly settlement, granting the period in its norms to present their observations. After the expiration of that period, the Commission granted nine extensions to provide the State with additional time to comply with the recommendations and to advance in the implementation of the measures adopted to repair the consequences of the human rights violations established in the Report on the Merits.

d. Friendly settlement proceedings. – During those extensions, on February 20, 2020 the parties signed a Memorandum of Understanding (hereinafter also "the Memorandum") for an eventual Agreement of Compliance with the Merits Report. During the discussions, the State took specific steps to comply with some of the recommendations; in particular, those concerning financial compensation. However, the Commission considered that, despite the goodwill expressed by the State, various recommendations had not been complied with more than two years after notification of the Merits Report.

3. *Submission to the Court.* – On May 1, 2021, the Commission submitted the case to the Court with all the facts and human rights violations described in its Merits Report, indicating the recommendations that had not yet been complied with, the need to obtain justice for the victims and the goodwill expressed by the petitioner.

4. *Requests of the Commission.* – The Commission requested that the Court conclude and declare the international responsibility of the State for the violations contained in its Merits Report and order the State to implement the measures of reparation included in that report. The Court notes, with great concern, that some 14 years had elapsed between the lodging of the initial petition to the Commission and the submission of the case to the Court.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representatives.*[1] – The submission of the case was notified to the State and to the representatives by communications of August 24, 2021.

6. *Brief of pleadings, motions and evidence.* – On October 25, 2021, the representatives presented their brief of pleadings, motions and evidence (hereinafter "the pleadings and motions brief"), under the terms of Articles 25 and 40 of the Rules. The representatives agreed with the Commission's claims, made additions to its arguments and proposed specific reparations.

7. *Answering brief.*[2] – On January 5, 2022, the State presented its answering brief on the submission of the case and its observations on the pleadings and motions brief, pursuant to the terms of Articles 25 and 41 of the Rules. The State formulated four preliminary objections and refuted the alleged violations and the measures of reparation proposed by the Commission and the representatives.

8. *Public hearing.* – On May 24, 2022,[3] the President of the Court called the parties and the Commission to a public hearing that was held at its seat in San José, Costa Rica on June 23, 2022, during the Court's 149th Regular Session.[4]

9. *Partial acknowledgement of responsibility*. – During the public hearing and in its final written arguments (*infra* para. 11), the State withdrew its preliminary objections on the failure to exhaust domestic remedies, on *lis pendens*, on international *res judicata* and on the "lack of a legal issue." It also partially acknowledged its responsibility.

10. *Amici curiae.* – The Court received *amicus curiae* briefs from: 1) the Human Rights Legal Clinic of the Institute of Advanced University Studies U-IIRESODH[5]; 2) the Human Rights Commission in

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1 The representation of the alleged victim is the Solidarity Network for the Decade Against Impunity.

2 As agents, the State named Martha Delgado Peralta, Under Secretary for Multilateral Affairs and Human Rights; Alejandro Celorio Alcántara, legal advisor; Marcos Moreno Báez, Coordinator of International Human Rights Matters; Cristopher Ballinas Valdés, Director General of Human Rights and Democracy; María Fernanda Pérez Galindo, in charge of the General Department of International Cooperation; Carolina Hernández Nieto, in charge of the Coordination of International Resolutions; Salvador Tinajero Esquivel, Coordinator of International Law; Alfredo Uriel Pérez Manríquez, Director of International Rights IV; Tisbe Cázares Mejía, Director of International Affairs on Human Rights; Lucero de Fátima Hinojosa Romero, Director of International Litigation and Diana Valle Rodríguez, Under Secretary of the Secretariat of Foreign Affairs, Mexico, D. F., Mexico.

3 *Cf. Tzompaxtle Tecpile et al. v. Mexico.* Call to a public hearing. Order of the President of May 24, 2022.

4 Appearing at the public hearing were: a) for the Inter-American Commission: Erick Acuña Pereda and Paula Rangel, advisors of the Commission; b) for the representatives: María Magdalena López Paulino; Ernesto Rodríguez Cabrera; Armando Venegas Martínez; Julián Ruzalta Aguirre; Sandra Salcedo González; Carlos Karim Zazueta Vargas and Ie Tze Rodríguez López, and c) for the State: Roselia Margarita Barajas y Olea, Ambassador of Mexico to Costa Rica; Alejandro Celorio Alcántara, legal advisor; Nancy Desiderio Noyola, Director of Follow-up of the Cases before the Inter-American System; Alfredo Uriel Pérez Manríquez, Director of International Law IV; Diana Elena Ramírez Urbina, Agent of the Public Prosecutor's Office attached to the UEITA and Braulio Robles Zúñiga, Agent of the Public Prosecutor's Office attached to the UEITA.

5 The brief signed by Víctor Manuel Rodriguez Rescia; Bertha Carolina López Pérez; Rogelio Flores Pantoja; María de los Ángeles Corte Ríos; Silvia Alexandra Esquivel Díaz; Giselle Meza Martell and Martha Elba Dávila Pérez, dealing with: a) the context in Mexico regarding *arraigo* and its "non-conventionality"; b) the test of proportionality of *arraigo* as an express restriction in the Mexican Constitution and c) *arraigo* and international human rights norms.

Mexico City;[6] 3) Antonio Salcedo Flores;[7] 4) the Criminal Defense Clinic of the Ibero-American University;[8] 5) the Permanent Human Rights Seminar of the Acatlán Faculty of Higher Studies of the National Autonomous University of Mexico;[9] the organizations 6) "Otro Tiempo México" and 7) the Latin American Center for Peace, Cooperation and Development[10] and 8) Roberto Borges Zurita.[11]

11. *Final written arguments and observations*. – On July 26, 2022, the Commission presented its final written observations and the State and the representatives submitted their respective final written arguments. On August 4, 2022, the State remitted its observations to the annexes presented with the final written arguments of the representatives.

12. *Deliberations on this case*. – The Court deliberated this judgment on October 10 and 11, 2022 at its 153rd Regular Session, held in Montevideo, Uruguay, and on November 7, 2022 at its 154th Regular Session.

III
JURISDICTION

13. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention, inasmuch as Mexico is a State Party to the American Convention as of March 24, 1981 and it recognized the Court's contentious jurisdiction on December 16, 1998.

IV
ACKNOWLEDGEMENT OF RESPONSIBILITY

A. Arguments of the parties and of the Commission

14. At the public hearing and in its final written arguments (*supra* para. 11), the ***State*** made a partial acknowledgement of responsibility. It indicated that "by means of the signing, by the Ministry of the Interior, the Ministry of Foreign Affairs and the representatives of the victims, of the Memorandum of Understanding […], in February 2020, the State reiterates its partial acknowledgement of most of the claims made by the representation of the victims, specifically with respect to the specific violations committed against Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López." It added that "it acknowledges its international responsibility for violating Articles 7, 11, 8 and 25 of the American Convention […], read in conjunction with Article 1(1) thereof, regarding the rights to personal liberty, to a fair trial, to privacy and to judicial protection, as a result of the detention, the vehicle search, the lack of information on the

[6] The brief signed by Nashieli Ramírez Hernández, dealing with the conventional nature of the institution of *arraigo*.

[7] The brief signed by Antonio Salcedo Flores, dealing with pre-trial detention *sua sponte* in Mexico.

[8] The brief signed by Thurenna Navarro Parra and Víctor Manuela Parada Picos, dealing with *arraigo* and pre-trial detention *sua sponte* in Mexico.

[9] The brief signed by Miguel Acosta García, Maleny Díaz Brito and Sandra Espinosa Rizo, dealing with: a) *arraigo* in the Mexican legal order; b) *arraigo* from a doctrinal viewpoint; c) *arraigo* from the viewpoint of the Universal System of Human Rights; d) the non-conventional interpretation of *arraigo* by the Supreme Court of Mexico and e) the National Human Rights Commission and *arraigo*.

[10] The brief signed by Laura Mendoza Molina, Ángeles Corte Ríos, Ricardo Soto Ramírez and Macarena Corte Ríos, partly dealing with the responsibility of the Congress and of the local legislatures regarding the adoption of the constitutional modification under analysis and partly with the "responsibility of the Supreme Court for failing to apply and for violating the American Convention by refusing to find admissible the State's obligation to comply with the American Convention regarding the constitutional restriction on *arraigo*, in spite of being inadmissible for the implications on violating the human rights consecrated in the constitutional block, which includes the American Convention."

[11] The brief signed by Roberto Borges Zurita, dealing with: a) *arraigo* and pre-trial detention *sua sponte* in Mexico; b) some State conduct related to those institutions and c) the rights that were violated by Mexico in the case of Tzompaxtle Tecpile et al. v. Mexico.

grounds of the detention, the failure to present the accused promptly before a judge, the lack of prior and detailed notice of the charges, the lack of a legal defense during the first days following detention, which led to a wrongful application of *arraigo* and of pre-trial detention *sua sponte*, following the procedures that were appropriate when the events occurred." It also indicated that "it acknowledges its international responsibility for violating Article 5, read in conjunction with Article 1(1), regarding the personal integrity of the victims, for being held isolated and incommunicado during their detention."

15. With respect to reparations, the State informed that it had complied with various of the items in the Memorandum regarding reparations and, therefore, it requested that the Court take that into consideration when ordering measures of reparation.

16. The ***Commission*** "took note" of the State's partial acknowledgement of international responsibility in the public hearing and found that it contributed to dignifying the victims and to obtaining justice and reparations." It stressed, however, that the State's acknowledgement included "the conclusions on the facts, but not all the conclusions of law set forth in the Merits Report." The Commission especially emphasized that the State "did not acknowledge the violation of Article 2 on the duty to adopt provisions of domestic law, as well as the measure of reparation regarding legislative modifications."

17. The ***representatives*** "took note of the statement made by the State during the public hearing in which it made a partial acknowledgement of most of the claims of the representatives."

B. Considerations of the Court

18. Pursuant to Articles 62 and 64 of the Rules and in exercise of its powers with regard to the international judicial protection of human rights, a matter of international public order, it is incumbent on the Court to ensure that an acknowledgment of responsibility is in keeping with the objectives that the inter-American system seeks to achieve.[12] The Court will now analyze the specific situation presented in this case.

B.1 On the facts

19. The State made a partial acknowledgement of responsibility for violating various articles of the Convention to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, which involved "the detention, the vehicle search, the lack of information on the grounds of the detention, the failure to present them promptly before a judge, the lack of prior and detailed notice of the charges, the lack of a legal defense during the first days following detention." It added the violation of Article 5, read in conjunction with Article 1(1), regarding the personal integrity of the victims, for being held isolated and incommunicado during their detention. In view of the above, the Court understands that the acknowledgement implies the acceptance of the facts as set forth in the Report on the Merits.

20. Therefore, the Court considers that there is no longer a controversy on the factual basis of this case; in other words, on the following facts: a) the detention and the search of the vehicle in which Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López were traveling; b) the lack of information on the grounds for detaining the alleged victims; c) the failure to present the victims promptly before a judge; d) the lack of prior and detailed notification of the charges against the alleged victims; e) the lack of a legal defense during the first days following detention and f) the conditions of isolation and incommuncado to which they were subjected during their detention.

21. A controversy remains with respect to the searches on March 31, 2006 of the home of the mother

[12] *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 2, 2008. Series C No. 177, para. 24 and *Case of Deras García et al. v. Honduras. Merits, Reparations and Costs*. Judgment of August 25, 2022. Series C No. 462, para. 21.

of the brothers Tzompaxtle Tecpile and that of the shop that housed the family business.

B.2 On the claims of law

22. In view of the violations acknowledged by the State, as well as the observations of the representatives and of the Commission, the Court considers that there is no longer a controversy regarding violations of the following rights of the Convention:

a) Personal liberty (Article 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6), read in conjunction with Article 1(1), to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms set out in the Report on the Merits.

b) Privacy (Article 11), read in conjunction with Article 1(1), to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms set out in the Report on the Merits.

c) Personal integrity (Article 5), read in conjunction with Article 1(1), to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms set out in the Report on the Merits.

d) Fair trial and judicial protection (Articles 8(2), 8(2)(b), 8(2)(d), 8(2)(e), 8(2)(g) and 25(1)), read in conjunction with Article 1(1), to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms set out in the Report on the Merits.

23. A controversy remains on the alleged State responsibility for violating the duty to adopt provisions of domestic law (Article 2) due to the existence of *arraigo* and pre-trial detention to which the victims were subjected. There also remains a controversy on the alleged infringement of the right of privacy (Article 11(2)) due to the searches of the home of the mother of the brothers Tzompaxtle Tecpile and that of the shop that housed the family business on March 31, 2006, which was only alleged by the representatives.

B.3 On reparations

24. With respect to measures of reparation, the Court notes that the State and the representatives have agreed on certain reparations, although there are others requested by the representatives on which there has not been an agreement. Therefore, there remains a partial controversy on this aspect, an issue that will be analyzed in Chapter IX of this judgment.

B.4 Conclusions: assessment of the partial acknowledgement of responsibility

25. The State's acknowledgement is an acceptance of the facts and a partial acknowledgement of the alleged violations. This acknowledgement has full legal effect, pursuant to Articles 62 and 64 of the Rules. The Court welcomes the State's goodwill in partially acknowledging its international responsibility for its importance in the inter-American system of the protection of human rights and that the parties have raised the possibility of an agreement on reparations. The Court also notes that the acknowledgement of the specific facts and violations may have consequences on its analysis of other alleged acts and violations since they all are part of the same set of circumstances.[13]

26. In view of the gravity of the facts and alleged violations, the Court will now proceed to a broad and detailed determination of what occurred as it will contribute to the reparation of the victims, to the non-repetition of similar events and, in short, to satisfy the purposes of the inter-American human

[13] *Cf. Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 14, 2014. Series C No. 287, para. 27 and *Case of Digna Ochoa et al. v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 25, 2021. Series C No. 447, para. 24.

rights jurisdiction.[14] It will then analyze the source and scope of the violations that remain part of the controversy. In order to better understand the international responsibility of a state and the causal link between the violations found and the reparations ordered, the Court deems it pertinent to describe some of the human rights violations that occurred in the present case and that the State has acknowledged.[15] Finally, the Court will rule on the remaining controversy on the reparations requested by the Commission and the representatives. The Court, in the chapters on the merits, will analyze the compatibility of *arraigo* and pre-trial detention, governed by the Mexican normative, with the American Convention, as well as the rights to personal integrity and to privacy of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

27. The Court, however, does not consider it pertinent to rule, at this time, on the violations to the rights to a fair trial and to judicial protection since they were expressly accepted by the State in its acknowledgement of international responsibility and since they have already been broadly developed in the Court's case law.

V
PRIOR CONSIDERATIONS

28. In the case *sub judice,* the ***State*** presented a preliminary objection on "the failure to present an argument at the proper procedural opportunity with respect to the alleged violation of the duty to adopt provisions of domestic law."[16] It argued that the Commission had not claimed that the State had violated this obligation "with respect to pre-trial detention *sua sponte*" in its Merits Report, although the representatives did so in their pleadings and motions brief.

29. On this point, the ***Court*** notes, in the first place, that this is not a preliminary objection since its analysis cannot determine the inadmissibility of the case nor the lack of the Court's jurisdiction to hear it. The Court recalls that alleged victims and their representatives may assert the violation of rights other than those included in a Merits Report, provided that they are set forth in the Commission's factual framework.[17] In this case, that framework includes facts on the application of pre-trial detention to the detriment of the alleged victims and, therefore, the State's argument is out of order.

30. The State withdrew its preliminary objections on *lis pendens* and *res judicata* (*supra* para. 9).[18]

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[14] *Cf. Case of Tiu Tojín v. Guatemala. Merits, Reparations and Costs*. Judgment of November 26, 2008. Series C No. 190, para. 26 and *Case of Deras García et al. v. Honduras*, *supra*, para. 27.

[15] *Cf. Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 28, 2018. Series C No. 371, para. 42 and *Case of Digna Ochoa et al. v. Mexico, supra*, para. 25.

[16] During the public hearing and in its final written arguments, the State withdrew three preliminary objections that it had formulated in its answering brief, which concerned: a) international *res judicata*; b) the failure to exhaust domestic remedies and c) the alleged absence of a *litis*.

[17] *Cf. Case of the Pacheco Tineo family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 25, 2013. Series C No. 272, para. 22 and *Case of Sales Pimenta v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 30, 2022. Series C No. 454, para. 35.

[18] The State remitted a general consideration in which it presented its disagreement with the Court's jurisprudence on the preliminary objections of *litis pendens* and *res judicata*. It especially recalled that, in the past, the Court "has discarded the preliminary objection of *res judicata* because the nature of the observations and recommendations of the human rights committees and mechanisms of international treaties is different than the Court's judgments." It argued that Article 47(d) of the American Convention, which refers to this preliminary objection, "does not indicate the legal nature that the decisions that international bodies that have examined a petition should have and that, to the contrary, the *travaux préparatoires* of the American Convention indicate that this ground of inadmissibility was added in order to avoid conflicts of jurisdiction between the universal and regional international organizations charged with the protection of human rights" and that same article expressly refers to a petition already examined by the Inter-American Commission on Human Rights, the recommendations of which are not legally binding.

VI
EVIDENCE

31. The Court admits those documents submitted at the proper procedural opportunity by the parties and by the Commission (Article 57 of the Rules), the admissibility of which was not disputed nor objected to and the authenticity of which was not placed in doubt.[19] The Court also deems it pertinent to admit the statements made in the public hearing[20] and by affidavit,[21] provided that they conform to the object defined by the President in the resolutions that ordered that they be received.[22] The Court also accepts the documentation presented by the representatives annexed to their final written arguments and the receipts for costs and expenses related to the litigation of the case before the Court.[23]

VII
FACTS

32. In this chapter, the Court will establish the facts to be proved in the present case, taking into consideration the body of evidence that has been admitted, the factual framework set forth in the Merits Report and the State's acknowledgement of international responsibility. It will also include the information presented by the parties that would explain, clarify or reject that factual framework. The facts will be presented as follows: a) the pertinent normative framework; b) the detention, the deprivation of liberty and the criminal proceedings against Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López; c) the writs of amparo filed; d) the decisions of local and international bodies and e) the threats against a lawyer of the victims and the death of Gustavo Robles López.

A. On the pertinent normative framework

33. This case deals with the analysis of two institutions that have been established in the legal norms of Mexico: *arraigo* and pre-trial detention.

34. The institution of *arraigo* was included in the Federal Code of Criminal Procedure of 1999 (hereinafter also "Federal Code of 1999") and in the Federal Law against Organized Crime of 1996 (hereinafter also "Federal Law of 1996"), as they were in force when the events in this case occurred. The norm on *arraigo* was amended and, beginning in 2008, it was incorporated into the Federal Constitution, which was also subsequently amended.

35. When the events in this case occurred, pre-trial detention, which was applied to the victims in this case, was governed by the Federal Code of 1999, which was subsequently amended, and pre-trial

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[19] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140 and *Case of the Julien Grisonas family v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 23, 2021. Series C No. 437, para. 48.

[20] Jorge Marcial Tzompaxtle Tecpile, Luis Raúl González Pérez, Carlos María Pelayo Moller and Esteban Gilberto Arcos offered their statements.

[21] Gerardo Tzompaxtle Tecpile, Stephanie Erin Brewer, José Antonio Guevara Bermúdez, Erika Bardales Lazcano and Jorge Ulises Carmona Tinoco presented their affidavits.

[22] The object of the statements were established in the Order of the President of the Court of May 24, 2022. In its final written arguments, the State affirmed that it had not received the statements of: a) Luis Raúl González Pérez; b) Carlos María Pelayo Moller; c) Stephanie Erin Brewer and d) José Antonio Guevara Bermúdez and requested that "those statements of experts not be taken into consideration." The Court sent the receipts that prove that they were sent and also resent the documents and granted the State an additional period to present its observations on the statements, thus guaranteeing its right of defense.

[23] They presented the following documents: 1) a summary of expenses; 2) copies of invoices of airline tickets; 3) copies of taxi receipts and 4) copies of receipts for meals (evidence file, ff. 31450 to 31507).

detention *sua sponte* was incorporated into the Constitution in 2011. The Federal Law of 1996 contains provisions on pre-trial detention that are not germane to this case. There follow the domestic norms to which reference has been made.

A.1. On arraigo

a) The legal norms in force at the time of the occurrence of the events in the present case

36. Article 133 bis of the Federal Code of 1999 established that:

> The judicial authority may, at the petition of the Public Prosecutor's Office, decree house *arraigo* or impose a prohibition to leave a determined geographical area without its authorization, for a person against whom a criminal action is being prepared, when there exists the risk of evading the action of justice. The Public Prosecutor's Office and its aides have the responsibility to monitor that the mandate of the judicial authority is duly complied with.
>
> House *arraigo* or the prohibition to leave a determined geographical area may be extended for the period strictly necessary, but may not exceed thirty calendar days in the case of *arraigo* and sixty days in the case of the prohibition to leave a determined geographical area.
>
> When the person in question requests that the *arraigo* or the prohibition to leave a determined geographical area no longer be in effect, the judicial authority may decide, after consulting the Public Prosecutor's Office and the person in question, whether it be maintained.

37. The Federal Law of 1999 established in its Article 12 that:

> The judge may, at the request of the Public Prosecutor's Office of the Federation and taking into account the nature of the alleged event and the personal circumstances of the accused, decree *arraigo* against the accused in the place, form and means of implementation set out in the request, under the surveillance of the authority, which is to be exercised by the Public Prosecutor's Office and its aides and which may be extended for the period strictly necessary for processing the preliminary investigation**,** but not to exceed ninety days, so that the person in question may participate in clarifying the events imputed to him, which might reduce the period of *arraigo*.

b) The norms amended or adopted after the occurrence of the events in this case

38. Article 16 of the Constitution of Mexico was amended in 2008 and 2019 and currently reads as follows:

> The judicial authority may, at the request of the Public Prosecutor's Office and in the case of offenses involving organized crime, decree the *arraigo* of an accused person, with the modalities of place and time specified by law, which may not exceed forty days, provided that it is necessary for the success of the investigation, the protection of persons or legal goods, or when there is a well-founded risk that the accused will evade the action of justice. This period may be extended when the Public Prosecutor's Office proves that the causes that gave rise to it still exist. In no case may the *arraigo* exceed a total of eighty days.

39. The current version of Article 133 bis of the Federal Code of 1996 establishes that: "The judicial authority may, at the petition of the Public Prosecutor's Office, decree house arraigo of the accused in the case of serious offenses when it is necessary for the success of the investigation, the protection of persons or legal goods or when there exists a well-founded risk that the accused might evade the action of justice. The Public Prosecutor's Office and its aides have the responsibility to monitor that the mandate of the judicial authority is duly complied with."

40. The current version of Article 12 of the Federal Law of 1999 establishes that:

> The judge of control may, at the request of the Public Prosecutor's Office, decree *arraigo* when it involves offenses under this Law, when necessary for the success of the investigation, for the protection of persons, of legal goods or when there is a well-founded risk that the accused will evade the action of justice.

The *arraigo* may not exceed forty days and will be monitored under the authority of the official of the Public Prosecutor's Office and the Police who is under their control and immediate orders in the investigation.

The *arraigo* may be extended as long as the Public Prosecutor's Office proves that the causes that gave rise to it still exist. In no case, may it exceed a total of eighty days.

41. Similarly, the 2016 reform of this law added the following after Article 12:

Article 12 Bis.- The petition of *arraigo* or its extension must be resolved immediately by the judicial authority by any means that would ensure its authenticity, or in a prior hearing with only the official of the Public Prosecutor's Office of the Federation present, within a period that does not exceed six hours after its receipt.

The modalities of space, time, form, as well as the authorities that will execute it, shall be stated in the request.

Article 12 Ter.- The judicial resolution that orders *arraigo* shall contain at a minimum:

I. The name and office of the judge of control who authorizes the *arraigo* and the identification of the proceedings in which it is ordered;

II. Information on the identification of the person subject to the measure of *arraigo*;

III. Situations that the law indicates as offenses, for which an investigation is being conducted;

IV. The rationale for the *arraigo*, specifying whether it is necessary for the success of the investigation, for the protection of persons, for legal goods, or whether there exists a well-founded risk that the accused will evade the action of justice;

V. The day, hour and place of the execution of the measure of *arraigo*, and

VI. The authorities that will execute the measure of *arraigo*;

If the resolution is issued or registered by means other than written, the operating points of the order of *arraigo* must be transcribed and given to the official of the Public Prosecutor's Office;

Article 12 Quater.- In the event that the judge of control denies an order of *arraigo* or its extension, the official of the Public Prosecutor's Office may correct the deficiencies and again request the order.

Denial of a request of *arraigo* or its extension is subject to appeal, which shall be resolved no later than twelve hours after its filing.

A.2. On pre-trial detention

a) The norms in force when the events of the present case occurred

42. The Constitution of Mexico, in force when the events of the present case occurred, established that:

Article 16.- No person shall be in his private affairs, or his house invaded, without a written order from a competent authority, duly explaining the legal cause of the proceeding.

Only a judicial authority can issue an arrest warrant. Such arrest warrant shall always be preceded by a formal accusation or charge of misconduct considered a criminal offense, punishable with imprisonment, provided that there is evidence to prove that a crime has been committed and that the defendant is criminally liable.

The authority issuing an arrest warrant shall bring the accused before the judge without any delay and under its sole responsibility. Failure to comply with this provision will be punished under criminal law.

In cases of *flagrante delicto*, any person may detain the offender, turning him over without delay to the nearest authorities, which in turn, shall bring him before the Public Prosecution Service. A record of such arrest must be done immediately.

Only in urgent cases, in the case of a serious crime as defined by law and when there is a well-founded risk that the accused may evade justice, provided that cannot be brought before the judicial authority because of the time, place or circumstances, may the Public Prosecutor's Office, under its responsibility, order his detention, stating the grounds and evidence that justifies its action.

In cases of urgency or flagrancy, the judge before whom the prisoner is presented shall immediately confirm the arrest or order his release, according to the conditions established in the law.

No accused person shall be held by the Public Prosecution Service for more than forty-eight hours. After this period, his release shall be ordered or he shall be brought before a judicial authority. Such term may be duplicated in cases of organized crime. Any abuse shall be punished by criminal law.

All search warrants, which may only be issued by the judicial authority at the request of the Public Prosecutor's Office, shall specify the place to be inspected, the person or persons to be apprehended and the objects to be sought, to which the search must solely be limited, and at the conclusion of the search a detailed report shall be drawn up in the presence of two witnesses proposed by the occupant of the place searched or, in his absence or refusal, by the authority carrying out the search.

43. Article 161 of the Federal Code of Criminal Proceedings of 1999 established that:

An order of formal detention shall be decreed within seventy-two hours of the accused being placed at the disposal of a judge, when the following requisites have been met: I. That the accused has given a preliminary statement in the manner and under the standards established in the preceding chapter or the record shows that he has refused to give a statement; II That it is demonstrated that the alleged offense provides for the deprivation of liberty; III. That, with respect to the prior clause, the probable guilt of the accused is demonstrated and IV. That there is no circumstance that would fully exonerate the accused from responsibility or that would quash the criminal proceedings.

44. Article 168 of the same Code established that:

The Public Prosecutor's Office shall indicate the *corpus delicti* involved and the probable responsibility of the accused as the basis for criminal proceedings. The judicial authority, in turn, shall examine whether both requirements are vouched for in the record. The *corpus delicti* is the combination of objective or external elements that make up the substance of a matter that the law expresses as a crime, as well as the norms, should the classification so require. The probable responsibility of the accused shall be proven when the existing evidence indicates participation in the crime, the intentional or unintentional commission of the crime and the lack of any indication of a legal cause or any reason to exclude his guilt. The *corpus delicti* and the probable responsibility shall be demonstrated by any evidentiary means set out in the law.

b) The norms amended or adopted after the occurrence of the events in this case

45. Article 19 of the Constitution of Mexico was amended in 2011 and 2019 and now reads as follows:

Detentions before a judicial authority in excess of seventy-two hours, counted from the moment the accused is presented before the authority, are prohibited unless formal charges are presented indicating the place, time and circumstances of such crime, as well as the evidence that an event has occurred that the law classifies as a crime and that there exists the probability that the accused has committed or has participated in its commission.

The Public Prosecutor's Office may only request that the judge order pre-trial detention when other precautionary measures are not sufficient to ensure the presence of the accused at his trial, the development of the investigation, the protection of the victim, witnesses or the community, as well as when the accused is on trial or has been previously convicted for having committed a crime with intent. The judge may order preventive detention, by his own motion, in cases of sexual abuse or violence against minors, organized crime, intentional homicide, feminicide, rape, kidnapping, human trafficking, home robberies, use of social programs for electoral purposes, corruption through unlawful enrichment and abuse of office, robbery of trucks in any of their forms, crimes in the area of hydrocarbons, petroleum products or petrochemicals, the forced disappearance of persons and disappearances committed by persons, crimes committed by violent means, such as firearms and explosives designed for the exclusive use of the Army, Navy and Air Force, as well as serious crimes determined by law against the security of the nation, the free development of the personality and health.

46. Article 3 of the current Federal Law against Organized Crime, amended in 2016, establishes that the crime of organized crime, as well as those mentioned in Articles 2, 2 Bis and 2 Ter of that law, provides for "pre-trial detention *sua sponte*."[24]

[24] Articles 2, 2 Bis and 2 Ter of that law establishes the following:

"Article 2.- When three or more persons join to carry out, permanently or repeatedly, conduct that, by themselves or joined by others, has as a purpose or result the commission of one or more of the following crimes, shall be punished for that sole fact, as members of a criminal organization:

> I. Terrorism, set out in Articles 139 to 139 al 139 Ter, the financing of terrorism set out in Articles 139 Quater and 139 Quinquies and international terrorism, set out in Articles 148 Bis to 148 Quater; against health, set out in Articles 194, 195(1) and 196 Ter; counterfeiting, knowingly using counterfeit money and altering money, set out in Articles 234, 236 and 237; operations with materials of unlawful origin, set out in Article 400 Bis; and in the area of copyrights, set out in Article 424 Bis, all in the Federal Criminal Code;
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> II. Stockpiling of and trafficking of arms, set out in Articles 83 Bis, 84, 84 Bis(I), 85 and 85 Bis, of the Federal Law on Firearms and Explosives;
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> III. Human trafficking, set out in Article 159 of the Law on Migration; Amended clause;
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> IV. Organ trafficking, set out in Articles 461, 462 and 462 Bis, and crimes against health in the form of drug dealing, set out in Articles 475 and 476, all in the General Law on Health;
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> V. Corruption of persons under the age of 18 and persons who are not capable of understanding how to resist it, set out in Article 201; Pornography of persons under the age of 18 or persons who are not capable of understanding the significance of it or persons who are not capable of resisting it, set out in Article 202; Sexual tourism against persons under the age of 18 or persons who are not capable of understanding the significance of it or persons who are not capable of resisting it, set out in Articles 203 and 203 Bis; Procurer of persons under the age of 18 or persons who are not capable of understanding the significance of it or capable of resisting it, set out in Article 204; Assault, set out in Articles 286 and 287; Trafficking of minors or persons who are not capable of understanding the significance of it, set out in Article 366 Ter and the stealing of vehicles, set out in Article 376 Bis and 377 of the Federal Criminal Code or in the provisions in the criminal legislation of the states and the Federal District;
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> VI. Crimes in the area of human trafficking, set out and punished in the First Tome, Second Title of the General Law for the Prevention, Punishment and Eradication of Crimes in the Area of Human Trafficking and for the Protection and Care of the Victims of Those Crimes, except in the case of Articles 32, 33 and 34;
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> VII. The conduct set out in Articles 9, 10, 11, 17 and 18 of the General Law for the Prevention and Punishment of Crimes in the Area of Kidnapping, Article 73(XXI) of the Constitution of the United Mexican States.
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> VIII Bis. Fiscal fraud, set out on Article 108 and actions similar to fiscal fraud, set out in Article 109(I) and 109(IV) of the Fiscal Code, only when the amount is three times more than what is established in Article 108(III);
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> VIII Ter. The conduct listed in Article 113 Bis of the Fiscal Code, only when the numbers, quantity or value of the fiscal receipts that shield inexistent, false or simulated lawful acts are more than three times what is established in Article 108(III) of the Fiscal Code of the Federation;
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> IX. What is established in Article 8(I) and 8(II), as well as in Article 9(I)(II)(III)(d) and the last paragraph of that article, all in the Federal Law to Prevent and Punish the Crimes Committed in the Area of Hydrocarbons.
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> X. Against the environment in Article 420(IV) of the Federal Criminal Code. The infractions referred to in the clauses set out in this article that are committed by a member of organized crime shall be investigated, tried and sanctioned in accordance with the provisions of this Law.

Article 2. Bis.- Up to two-thirds of the sanctions set out in Article 4 of this instrument shall be imposed on those who concert to commit the conducts indicated in Article 2 of this Law and agree on the means to carry out their determination. To prove the conduct indicated in the prior paragraph, the existing confessions and testimonies must be corroborated with other data or means of proof obtained through the instruments contemplated in the Second Title, First, Second, Sixth and Seventh Chapters of the current Law, as well as those indicated in Articles 269, 270, 271, 272, 273, 274, 275, 276 and 289 of the National Code of Criminal Procedure.

Article 2º. Ter.- Whoever knowing of the purpose and general unlawful activity of a criminal organization, intentionally and actively participates in its unlawful activities or others of a distinct nature when the person is aware that his participation contributes to achieving the unlawful purpose, shall be subject to the sanctions contained in Article 4 of this Law.

B. On the detention, the deprivation of liberty and the criminal proceedings against Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López

B.1. On Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López

47. It is an undisputed fact that Jorge Marcial and Gerardo Tzompaxtle Tecpile are members of the Nahuatl indigenous people and lived in the Municipality of Astacinga, State of Veracruz. At the time of the events, they had a grocery store and were a mason, respectively. Gustavo Robles López was a friend of Jorge Marcial and was a mason.

B.2. On the detention of Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

48. On January 12, 2006 at about 10:30 a.m., Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López, accompanied by two other individuals, were traveling near the Buena Vista pedestrian bridge on the Mexico-Veracruz road, when their vehicle had a mechanical problem. The occupants were fixing the problem when two agents of the Federal Preventive Police (hereinafter also "the "PFP"), who were in a patrol car, arrived. The driver informed the police that the vehicle had broken down because of a mechanical problem. The officials helped them push the vehicle out of danger. The officials then asked them where they were going and who were the two persons who accompanied them. The driver stated that he did not know them since they had picked them up along the road. The two unidentified persons indicated that they were going to get some water at a nearby village and did not return.[25]

49. As indicated in the chapter on the acknowledgement of responsibility (*supra* paras. 25 to 27), the State admitted that, without a lawful order or an order from a competent authority, the agents searched the victim's personal belongings and the vehicle in which they were traveling where they found a backpack that contained a notebook with addresses, telephone numbers, email addresses, names of organizations, political viewpoints and activities of the "Popular Revolutionary Command. The Fatherland is First." The agents called for support and other PFP vehicles and agents arrived, a second search of the vehicle was made and Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López were detained without informing them of the grounds for the detention.[26]

50. They were taken at 11:30 a.m. to the police station in Río Blanco, State of Veracruz. The agents called the Regional Sub-Delegation of the Center for Investigation and National Security in the State of Guerrero to request its support in the investigation since the confiscated notebook contained the telephone numbers of various persons and activities in that state. The authorities of Guerrero informed that Gerardo and Jorge Tzompaxtle are brothers of the individual known as "Rafael," an activist in the Popular Revolutionary Army (EPR).[27]

51. The victims had to pay the fees of a private doctor who examined them and who noted that they were in good health. Around 7:00 p.m. they were taken to the Public Prosecutor's Office (hereinafter also 'the OPP") of the then Office of the Prosecutor General of the Republic (hereinafter also "PGR"), located in Orizaba, Veracruz. The PGR initiated the preliminary investigation PGR/VER/ORI/04/2006 for the crime of bribery *en flagrante*. They were held there incommunicado and were not informed of

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[25] *Cf*. Secretariat of Public Security. Federal Preventive Police, Police station of Sector 135-XXXI "Orizaba." Information Services Bulletin No. 043/2006, January 12, 2006 (evidence file, ff. 1 to 5).

[26] *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal regarding the formal pre-trial detention of April 22, 2006, February 16, 2007 (evidence file, f. 22 et seq.).

[27] *Cf*. Secretariat of Public Services. Federal Preventive Police, Police station of Sector 135-XXXI "Orizaba." Information Services Bulletin No. 043/2006, January 12, 2006 (evidence file, ff. 1 to 5).

the reason for being detained.[28]

52. Two days after the detention, around 3:00 p.m., they were interrogated by police of the OPP.[29] The lawyer *de officio* who represented them did not explain their legal situation, did not give advice on the proceedings, nor did he present any legal motion in their favor. The interrogation dealt principally with their possible belonging to the Partido de la Revolución Democrática, a political party of the opposition.[30] On this point, the Court recalls that the State acknowledged its responsibility for the acts related to the search of the vehicle and the subsequent detention of the victims (*supra* para. 14).

53. On January 15, after noting that presumably material evidence that could be related to organized crime turned up during the detention, it was decided that the victims give their statements to the Assistant Prosecutor General's Office for Special Investigations on Organized Crime (SIEDO) in Mexico City.[31] The term of 48 hours for detentions by the ministerial authority, pursuant to Article 194 bis of the Federal Code of 1999, ended on that day. The Public Prosecutor's Office charged them with an offense of organized crime under the category of kidnapping, which doubled that period.[32] Similarly, the Specialized Unit on Terrorism and the Stockpiling of and Trafficking in Arms (UEITA) began a preliminary investigation against the victims for the crime of terrorism established in the Federal Law of 1996. According to a judicial resolution of February 2007, the investigation was based on diverse newspaper items that indicated that the victims belonged to the EPR.[33]

54. On January 16, an agent of the PGR Office of Social Communication noted that a fax of an item published on the internet page of the newspaper *Milenio*, entitled "PFP detains alleged members of the EPR." The item linked the victims to the aforementioned guerilla group.[34] On the same day, two decisions were taken: a) the UEIS suspended the investigation on kidnapping for lack of proof and released them according to the conditions established in the law in favor of the victims and b) the UEITA issued an order to locate the victims as part of a preliminary investigation for the crime of

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[28] *Cf*. PGR. UEITA. Notebook of evidence of the A.P. PGR, SIEDO/UEITA/004/2006, Volume I (evidence file, f. 26247 et seq.).

[29] *Cf*. PGR. UEITA. Notebook of evidence of the A.P. PGR, SIEDO/UEITA/004/2006, Volume I (evidence file, f. 26247 et seq.).

[30] *Cf*. PGR. UEITA. Statements of Gerardo y Jorge Marcial Tzompaxtle Tecpile of January 14, 2006 (evidence file, ff. 6 to 21).

[31] *Cf*. PRG. UEITA. Notebook of evidence of the A.P. PGR, SIEDO/UEITA/004/2006, Volume I (evidence file, f. 26247 et seq.).

[32] The victims had been linked to an investigation on the kidnapping of Mario Alberto Rafael Zepahua Valencia, a PRI Congressional candidate, which occurred in June 2003 in the State of Veracruz. Mr. Zepahua was held for almost four months and it was thought that the Movimiento Popular Revolucionario was responsible. The aforementioned victims had been linked to that group during the first steps of the investigation. *Cf*. PGR. Special Organized Crime Investigation Branch (evidence file, f. 26247 et seq.).

[33] *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of formal pre-trial detention of April 22, 2006, February 16, 2007 (evidence file, f. 22 et seq.).

[34] That same day, an agent of the Public Prosecutor's Office attached to the UEITA received an anonymous telephone call that claimed the following: "'I'm calling to tell you that Gerardo Tzompaxtle Tecpile, born on June 25, 1976, Jorge Marcial Tzompaxtle Tecpile, born on April 25, 1970, and Gustavo Robles López, born on December 21, 1976, are members of the Comando Popular Revolucionario "La Patria es Primero," who were detained on Friday, January 12, 2006, by agents of the Federal Preventive Police along the road in the State of Veracruz and who were engaged in logistical operations with the purpose of carrying out acts against national security [...]. That this group has declared itself against the acts of the government and have taken credit, among others, for the death on July 6, 2005 in Acapulco [...] of José Rubén Robles [...] who was Minister of Interior of the State of Guerrero in 1997. You know that, if you do nothing, these persons are dangerous, on that day they were with two leaders of the group, who fled.' Assuming that the call was over, the caller hung up without providing a name nor any other information, there being nothing else to report." *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of pre-trial detention of April 22, 2006, February 16, 2007 (evidence file, f. 22 et seq.).

terrorism, established in the Federal Law of 1996.[35]

55. That same day, the victims were released by the UEIS.[36] While they were leaving the building of that unit, officials of the Federal Investigation Agency approached and detained them once again in the UEITA, where they were deprived of liberty without being informed of the grounds of their detention nor of their rights.[37]

B.3. On the investigation and proceedings against Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López

56. On January 17, 2006, while being interrogated by UEITA officials, the victims refused to answer and reiterated that they had already declared before the UEIS. The bottom of the statement indicated that "the treatment that they received from the PGR personnel was proper and all statements were offered without coercion or any violence."[38] In the early hours of the same day, PGR staff informed the victims that they were being detained with regard to a preliminary investigation on the crime of terrorism, established in the Federal Law of 1996.[39]

57. That same day. an agent of the OPP attached to the UEITA requested that the Fourteenth District Court for Federal Criminal Proceedings in the Federal District issue an order of *arraigo* of ninety days against the victims. The following day, the victims were notified that the judge of that Court had ordered the *arraigo* for ninety days so that the investigation against them could continue.[40]

58. The federal authority requested that the arrest warrant against the accused be withdrawn and also the implementation of the criminal action for the crime of terrorism established in the Federal Law against Organized Crime, assigning the preliminary investigation to the Third District Court for

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35 *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of pre-trial detention of April 22, 2007, February 16, 2007 (evidence file, f. 22 et seq.).

36 *Cf*. Special Note No. SIEDO/UEIS/281/2006, which orders liberty according to the conditions established in the law for the accused with regard to the preliminary investigation PGR/SIEDO/UEIS/2003 (evidence file, f. 28563 et seq.).

37 *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of pre-trial detention of April 22, 2007, February 16, 2007 (evidence file, f. 22 et seq.).

38 *Cf*. SEIDO. Statements of Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López before the UEITA of the SIEDO, A. P. PC3R/SIEDO/UEITA/004/2006, January 17, 2006 (evidence file, f. 358 et seq.).

39 *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of pre-trial detention of April 22, 2006, February 16, 2007 (evidence file, 22 et seq.).

40 That court indicated the following: "In this case, the evidentiary data are sufficient, at least for now, to meet the legal requisites to decree the requested *arraigo*. [...] Therefore, with the evidence presented, it is thought that the agent of the Public Prosecutor's Office attached to the UEITA of the SEIDO may have influenced the prosecution and the processing of the preliminary investigation and, thus, the action of justice and the clarification of the unlawful acts being investigated. This is especially true in this case. The offenses attributed to the persons subject to arraigo are considered grave under Article 194 of the Federal Code of 1996 in relation to the Federal Law against Organized Crime, which would increase the probability that, by not acceding to the request, as has been stated, Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles Lopez could evade the action of justice in view of the nature of the matters under investigation and their personal circumstances. In addition to how the evidentiary material is assessed, it is evident that the whereabouts of the accused must be ensured while the authorities take various actions and gather the evidence that would tend to bolster the preliminary investigation in order to ultimately undertake criminal proceedings; thus, justifying the requested precautionary measure." That court also requested the following: "Inform the authority […] that it is obligated to communicate, the first day of each month, to this District Court the actions and the progress that the integration of the aforementioned investigation achieves and that supports the existence of the precautionary measure without it implying that this jurisdictional body decide on the written evidence provided but rather for the sole effect to note that the official of the Public Prosecutor's Office is gathering the evidence alluded to in his request, which gives rise to the lawfulness of this measure. Advise the official of the Federation that, in the event that he does not comply with what is here ordered, it will be understood that there are no grounds to continue and the house *arraigo* will be lifted [...]. Inform the official of the Public Prosecutor's Office […] attached to the UEITA of the SEIDO and the Prosecutor General's Office that the term of ninety days ends on April 17, 2006 [...]." *Cf*. Judicial Branch of the Federation. UEITA of the SEIDO. Order of Arraigo 03/2006, decreed by the Fourteenth District Court for Federal Criminal Proceedings, January 18, 2006 (evidence file, f. 382 et seq.).

Federal Criminal Proceedings of the Federal District.[41] The victims were transferred to a PGR "*arraigo* house" in Mexico City.[42]

59. On February 1, 2006, staff of the National Human Rights Commission (hereinafter also "CNDH') went to that "house" responding to the defense's complaints on the unlawfulness of the detention and the non-conventionality of the institution of *arraigo*. The CNDH's medical examination did not find that "there was evidence of injuries."[43]

60. Jorge Tzompaxtle explained the conditions of *arraigo* during the public hearing in the following terms:

> […o]n entering they threatened me and "you are defenseless because they can take you out and interrogate you at any time, many persons are taken out and return tortured, beaten, some can't even get into their beds, many had to take pills to sleep because they were in a state of anxiety. Then there at that time is when […] the PGR put together the whole process, and at the end they gave the order, that is, the arrest warrant to jail us.[44]

61. On March 31, 2006, the State Police searched the home of the mother of the brothers Tzompaxtle Tecpile and the business of their brother Maximino Tzompaxtle. According to the judicial record, they found *inter alia*: a) an "El Mundo de Orizaba" newspaper of January 14, 2006; b) a photograph of "Che Guevara" with the caption "Hasta la Victoria Siempre"; c) three "Proceso" magazines; d) an identification document of the Partido de la Revolución Democrática in the name of Gerardo Tzompaxtle Tecpile; e) four documents, an original and three copies, entitled "110 años de la Muerte de Marx"; f) newspaper clippings with the following headlines: "Nada impedirá a Cuba seguir con el Socialismo: Castro", "Secuelas de la Guerra en El Salvador", "Sostienen ex guerrilleros la presión hace seguir inclinaciones a la lucha armada", "Testimonios Derechos Humanos para Hussein son letra muerta" and g) three .22 calibre cartridges.[45]

62. On April 10, 2006, the Federal Public Prosecutor's Office brought criminal charges against the victims for the crime of terrorism established in the Federal Law of 1996. It also requested that arrest warrants against the accused be issued,[46] which was approved the next day by the Twelfth District Court of Veracruz.[47] On April 17, the PGR executed the arrest warrants and placed the victims at the disposal of the judge, who at 4 p.m. ordered their detention,[48] which ended the *arraigo* of the victims.

63. On April 22, 2006, the Judge of the Third District Court for Federal Criminal Proceedings of the Federal District handed down a "Formal Order of Detention" (hereinafter "the order of detention") against the accused for allegedly being responsible of having committed the crime of terrorism established in the Federal Law of 1996. The defense appealed the order of detention.[49] The accused

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41 *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of pre-trial detention of April 22, 2006, February 16, 2007 (evidence file, f. 22 et seq.).

42 *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of pre-trial detention of April 22, 2006, February 16, 2007 (evidence file, f. 22 et seq.).

43 *Cf*. National Human Rights Commission. Mexico. Note 002997, file: 2006/44/1/Q, January 31, 2007 (evidence file, f. 391 et seq.).

44 *Cf*. Statement of Jorge Tzompaxtle, offered at the public hearing.

45 *Cf*. Judicial Branch of the Federation. Ruling that resolved the appeal against the order of formal pre-trial detention decreed April 22, 2006, February 16, 2007 (evidence file, f. 66 et seq.).

46 *Cf*. Judicial Branch of the Federation. Twelfth District Court of the State of Veracruz with its seat in Córdoba. File of Criminal Case 61/2006 (accumulated 21/2007) (evidence file, f. 13191 et seq.).

47 *Cf*. Judicial Branch of the Federation. Twelfth District Court of the State of Veracruz with its seat in Córdoba. File of Criminal Case 61/2006 (accumulated 21/2007) (evidence file, f. 14584 et seq.).

48 *Cf*. Judicial Branch of the Federation. Twelfth District Court of the State of Veracruz with its seat in Córdoba. File of Criminal Case 61/2006 (accumulated 21/2007) (evidence file, f. 14811 et seq.).

49 *Cf*. Judicial Branch of the Federation. Twelfth District Court of the State of Veracruz with its seat in Córdoba. File of Criminal Case 61/2006 (accumulated 21/2007), (evidence file, f. 14821 et seq.).

were thus subjected to pre-trial detention and were placed in the North Men's Preventive Prison in Mexico City.

64. The Court notes that various domestic courts claimed that they did have competence to hear the matter until February 22, 2007 when the Second Collegiate Criminal Court of the Seventh Circuit ratified the order of pre-trial detention. That court also held that the suspension of the political rights of the victims was out of order.[50]

65. As part of the criminal proceedings, on June 6, 2007, an expert presented a graphoscopic report on the notebook found in the vehicle of the victims. The report concluded that "the handwriting that appears in the document being questioned was not that of Jorge Marcial Tzompaxtle Tecpile." An expert in psychology concluded that "the language, the personal values and motivating forces of the accused Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López are not reflected in the contents of the notebook nor in those of the Comando Popular Revolucionario 'La Patria es Primero.'"[51]

66. On June 19, 2007, a preliminary interrogation was initiated regarding the alleged attempt to bribe agents of the PFP who participated in the detention of the victims. On the following day, the PGR brought criminal charges against the victims and sent the file to the Twelfth District Court in the State of Veracruz.[52]

67. On July 7, 2007, the victims gave their preliminary statements and received a new formal order of detention.

68. On August 20, 2007, two criminal proceedings were joined (the offense of terrorism and that of bribery) because "the evidence obtained and analyzed in that moment demonstrated that there was a link between the causes."[53]

69. On May 14, 2008, the Judge of the Twelfth District Court found the victims guilty of the following

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[50] That court stated the following in its order: "[...] according to the newspaper clippings that have been placed in evidence, the different police reports certified by their signers and the diverse documents annexed to them; the publications gathered by the Department of Social Communication of the PRG the tenth of October, two thousand five: 1) "Día del Guerrillero Heroico'', 2) "Reaparece grupo armado", 3) "Aparece en San Marcos una columna del presunto grupo armado La Patria es Primero", 4) "Guerrilleros incursionan en San Marcos y Atoyac"; notes on Internet consultations, [...] the anonymous telephone call [...]; all this previously cited evidence, duly analyzed as a whole, [...] is circumstantial evidence [...] relevant for arriving at the truth; in other words, that in this case it is demonstrated that the conduct of the accused, together with that of others, met the description contained in the criminal norm, conduct that placed in danger the protected legal good, which is public security and which encompasses safeguarding the sovereignty and security of the nation, the security of its people, the peace and the social tranquility, generically, but especially the placing in danger of the public peace, above all, when it is a question of undermining the authority of the State, or pressuring the authorities to make a decision, which has a purpose or result the joint conduct among members of the criminal organization, through the utilization of its criminal potential." *Cf*. Judicial Branch of the Federation. First Unitary Court in Criminal Matters of the First Circuit. File (toca penal) 221/2006, by virtue of the appeals filed by the accused Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López (evidence file, f. 28955 et seq.).

[51] *Cf*. Office of the Prosecutor General. Office of Expert Services. Results of the graphoscopies of May 15 and June 6, 2007 (evidence file, f. 395 et seq.).

[52] That court stated the following in its order: "[...] according to the newspaper clippings that have been placed in evidence, the different police reports certified by their signers and the diverse documents annexed to them; the publications gathered by the Department of Social Communication of the PRG the tenth of October, two thousand five: 1) "Día del Guerrillero Heroico'', 2) "Reaparece grupo armado", 3) "Aparece en San Marcos una columna del presunto grupo armado La Patria es Primero", 4) "Guerrilleros incursionan en San Marcos y Atoyac"; notes on Internet consultations, [...] the anonymous telephone call [...]; all this previously cited evidence, duly analyzed as a whole, [...] is circumstantial evidence [...] relevant for arriving at the truth; in other words, that in this case it is demonstrated that the conduct of the accused, together with that of others, met the description contained in the criminal norm, conduct that placed in danger the protected legal good, which is public security and which encompasses safeguarding the sovereignty and security of the nation, the security of its people, the peace and the social tranquility, generically, but especially the placing in danger of the public peace, above all, when it is a question of undermining the authority of the State, or pressuring the authorities to make a decision, which has a purpose or result the joint conduct among members of the criminal organization, through the utilization of its criminal potential."

[53] *Cf*. Judicial Branch of the Federation. Twelfth District Court in the State of Veracruz with its seat in Córdoba. Act of August 20, 2007 (evidence file, f. 21675 et seq.).

crimes: a) violation of the Federal Law against Organized Crime, with the purpose of committing terrorism and b) bribery. The judge sentenced them to a term of four years for the former and three months for the latter.[54]

70. The Court notes that various actions were taken by the Tenth District Court of the State of Veracruz. Between May and August 2007, testimonies were taken and analyzed, studies of the experts in graphoscopy, hand-writing, forensic science, samples of numbers and signatures were compared, as well as photographs of the questioned documents and the changes in the rulings were analyzed, among other procedures.

71. On October 16, 2008, in response to an appeal, the Second Collegiate Criminal Court of the Seventh Circuit, located in Boca del Río, Veracruz, acquitted the victims of the crime of terrorism and confirmed the conviction of bribery. That Court considered that the punishment for bribery had been served and, therefore, ordered their immediate release. That same day, they were released after having been deprived of their liberty for two years, nine months and five days.[55]

C. On the writs of amparo

72. On March 6, 2006, the victim's defense filed a writ of amparo before the Judge of the First District Criminal Court for Amparo in the Federal District, denouncing the deprivation of liberty of the victims under *arraigo*. This recourse was dismissed since the matter had been resolved after the *arraigo* had ended and the detainees were under a judicial order.[56]

73. On March 15, 2006, the victims filed a writ of amparo denouncing their situation, which was dismissed with the argument that "at the moment of resolving it, the detainees had been assigned a trial judge."

74. That same day the victims filed another indirect amparo, this time regarding the alleged obstruction of their right to an adequate defense since the Prosecutor General denied them and their defense access to the investigation. The case was forwarded to the First District Judge for Amparo in Criminal Matters. The writ was dismissed due to a change in the legal situation of the victims.

75. On April 5, 2006, the victims filed a new writ of amparo before the First District Judge of Amparos in Criminal Matters due to their possible transfer to a facility of maximum security. This recourse was rejected because the victims were deprived of their liberty under *arraigo* and they were not in a detention center, which were essential requisites for their transfer to a facility of maximum security. A recourse of review was filed against that rejection, which was heard by the First Collegiate Court in Criminal Matters in the Federal District, which confirmed the decision.[57]

D. On decisions of national and international bodies

76. On November 30, 2006, the National Human Rights Commission offered a proposal of reconciliation to the victims based on the complaints presented by their defense regarding their unlawful and arbitrary detention. On January 17, 2007, the victim's defense accepted the proposal of reconciliation. On January 31, the National Commission issued a bulletin in which it indicated its

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[54] *Cf*. Judicial Branch of the Federation. Twelfth District Court in the State of Veracruz with its seat in Córdoba. Judgment of May 14, 2008 (evidence file, f. 23943 et seq.).

[55] *Cf*. Judicial Branch of the Federation. First Unitary Court for Criminal Matters of the First Circuit. Criminal case 207/2008, for the appeals filed by the defendants Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López (evidence file, f. 29471 et seq.).

[56] *Cf*. Judicial Branch of the Federation. Collegiate Court for Criminal Matters of the First Circuit. File of review of amparo 541-2006, amparo no. 240/2006-VII-B, plaintiffs Gustavo Robles López et al. concerning their order of *arraigo*, detention and transfer (evidence file, f. 28589 et seq.).

[57] *Cf*. Judicial Branch of the Federation. Council of the Federal Judicature. File of review of amparo 741-2006, amparo No. 350/2006-VII-B, plaintiffs Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, regarding their order of detention and transfer (evidence file, f. 28778 et seq.).

commitment to follow-up on the proposal.[58]

77. On April 11, 2007, the UN Working Group on Arbitrary Detentions communicated to the State its Opinion No. 20/2007 on the situation of the victims. In its Opinion, the Working Group concluded that the deprivation of liberty of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López was arbitrary and contravened Articles 9 and 14 of the International Covenant on Civil and Political Rights. The Working Group requested that the State adopt the necessary measures to remedy the situation, in accordance with the norms and principles of the Covenant.[59]

E. On threats against the lawyer of the victims and the death of Gustavo Robles López

78. On January 12, 2007, Ms. E.L.H., a member of the Solidarity Network for the Decade against Impunity and a lawyer of the victims indicated that she had received threats by telephone. She added that these threats were denounced in a timely fashion to the authorities, who had obligated Ms. López Hernández to distance herself from the case and to temporarily change her domicile.[60]

79. It is an undisputed fact that Gustavo Robles López died on November 26, 2015 and that his death was not connected to the facts of the present case.

VIII
MERITS

80. The Court will now analyze the scope of the State's international responsibility for allegedly violating diverse conventional rights involving the detention, the application of *arraigo* and pre-trial detention and the criminal proceedings against Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López. The Court will analyze the arguments on the merits in the following order: a) the rights to personal liberty and to the presumption of innocence in relation to the obligation to adopt provisions of domestic law and b) the rights to personal integrity and to privacy in relation to the obligation to respect the rights. As was indicated (*supra* paras. 14 to 17), the State acknowledged its international responsibility for infringing the rights to personal liberty, to a fair trial, to privacy and to judicial protection (Arts. 7, 8, 11 and 25 of the Convention), read in conjunction with Article 1(1) thereof, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López. The State acknowledged that the above violations were the result of "the detention, the vehicle search, the lack of information on the grounds of the detention, the failure to present the accused promptly before a judge, the lack of prior and detailed notice of the charges, the lack of a legal defense during the first days following detention, which led to the wrongful application of *arraigo* and of pre-trial detention *sua sponte*, following the procedures that were appropriate when the events occurred according to their nature at the time of the events." (*supra* para. 14).

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[58] *Cf*. National Human Rights Commission, Mexico. Note 002997, case: 2006/44/1/Q, January 31, 2007 (evidence file, f. 391 et seq.).

[59] *Cf*. UN Working Group on Arbitrary Detentions. Opinion No. 20/2007 (Mexico), November 22, 2007, A/HRC/10/21/Add.1, pertinent parts (evidence file, f. 6036 et seq.).

[60] *Cf*. Urgent actions of Amnesty International and of the World Organization against Torture for the threats received by Elena López Hernández, March 19, 2007 (evidence file, f. 6030 et seq.).

VIII.1
THE RIGHTS TO PERSONAL LIBERTY[61] AND TO THE PRESUMPTION OF INNOCENCE[62] IN RELATION TO THE OBLIGATION TO RESPECT THE RIGHTS[63] AND THE OBLIGATION TO ADOPT PROVISIONS OF DOMESTIC LAW[64]

A. Arguments of the parties and of the Commission

81. There follows a systematization of the arguments of the parties and of the Commission regarding the responsibility of the State for infringing the rights to personal liberty and to the presumption of innocence.

82. It should be recalled that the State made a partial acknowledgement of responsibility in which it admitted that there had been violations of the rights to personal liberty (Art. 7 of the Convention), to to a fair trial (Art. 8) and to judicial protection (Art. 25), in relation to the duty to respect the rights (Art. 1(1), to the detriment of Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López (*supra* para. 14). Nonetheless, the State argued that there was no infringement regarding the obligations to adopt provisions of domestic law (Art. 2) regarding the existence of *arraigo* and pre-trial detention *sua sponte* (*supra* para. 28). Therefore, the Court will only refer to the arguments concerning the infringements to the Convention that were not acknowledged by the State.

A.1. On the application of arraigo and the subsequent preventive detention

83. The ***Commission*** and the ***representatives*** recalled that at the time of the events the institution of *arraigo* was set out in Article 133 bis of the Federal Code of 1999. That norm provided that in order to detain a person against whom criminal proceedings were being prepared there must exist a well-founded risk of evading the action of justice. They claimed that the victims were detained on January 12, 2006 and had been under *arraigo* until April 22, 2006, the date on which the judge of the Third District of Federal Criminal Procedure handed down a formal order of pre-trial detention, which resulted in their preventive detention. During that period, they were under the control of the OPP and were not taken before a judicial authority so that the lawfulness and the non-arbitrariness and the continued detention for such a period could be reviewed. They added that the State did not present detailed information, neither in the original order nor subsequently, that would justify the application of *arraigo* for three months.

84. They considered that *arraigo* was contrary to the Convention and, in the present case, there was an arbitrary detention since it did not have a legitimate purpose nor did it comply with the requisites of suitability, necessity and proportionality. They also claimed that the duration of the *arraigo* was unreasonable. Finally, they argued that the application of *arraigo* affected the right to the presumption of innocence of the victims. They concluded that the State violated the rights contemplated in Articles 7(1), 7(3), 7(5) and 8(2) of the Convention, read in conjunction with Articles 1(1) and 2 thereof, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

85. With respect to the pre-trial detention, the Commission and the representatives argued that, after the formal order of pre-trial detention of April 22, 2006, the victims continued to be deprived of liberty after the *arraigo* and in pre-trial detention. They maintained that the formal order of pre-trial detention did not include any grounds regarding the procedural purposes that the measure of pre-trial detention sought that would make its application proper and that the victims were not tried and judged while at liberty. Nor were there grounds on the procedural purposes of the decision of February 22,

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61 Article 7 of the Convention.

62 Article 8(2) of the Convention.

63 Article 1(1) of the Convention.

64 Article 2 of the Convention.

2007 on the appeal of the formal order of pre-trial detention. This was sufficient to establish that the pre-trial detention that was applied between April 2006 and May 2008, when they were released after their acquittal, was arbitrary. Therefore, they concluded that the State was responsible for violating Article 7(1) and 7(3), read in conjunction with Article 1(1), to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

86. The ***representatives*** added that the violation of the obligation to adopt provisions of domestic law is internationally an unlawful act of a continuous nature since the State has maintained in its legal order the institutions of pre-trial detention *sua sponte* and *arraigo*, which have not been repealed nor derogated, although their texts have been changed, and they now are included in the Mexican constitution.

87. As to the alleged violation of the duty to adopt provisions of domestic law because of the continued existence of *arraigo* and pre-trial detention *sua sponte*, the ***State*** claimed that those two institutions respond to historical contexts as the country continues to be affected by an increase in the financial and structural capacities and the internationalization of organized crime. Nonetheless, the State manifested that it had implemented actions to balance its obligation to ensure the public security of its people and to combat organized crime with its obligation to respect the human rights of all persons. The State added that the reforms and modifications to *arraigo* have resulted in a drastic decrease in its use nationally and that its exceptional nature that has been sought since its establishment appears to be consolidating.

88. The State affirmed that pre-trial detention is found in the Mexican Constitution, Article 19 of which provides an exhaustive list of the offenses in which it is granted *sua sponte*. It claimed that this measure is not a punishment but rather is a precautionary measure to ensure that justice is imparted properly. The State added that it is a measure that is applied to a limited number of offenses and that it responds to the seriousness of specific conducts, as well as to the need to ensure that the persons allegedly responsible do not evade the action of justice. It added that the circumstances of each case are considered before being ordered, thus allowing judicial control of the institution.

89. The State concluded that it is not responsible for the alleged violation of the duty to adopt provisions of domestic law since *arraigo* with its characteristics when the events occurred no longer exists and that the Court cannot make an analysis in the abstract of a norm that has not been applied to the specific case.

A.2. On the right to be brought before a judge or competent court that would decide on the lawfulness of the arrest or detention

90. The ***Commission*** indicated that, while the victims were subjected to *arraigo*, a writ of amparo was filed on March 6, 2006 alleging that their detention was arbitrary. The First District Judge of Amparos on Criminal Matters of the Federal District dismissed this recourse by holding that, while it was under consideration, the victims were brought before a trial judge. The writ of amparo took at least a month and a half to resolve, which the Commission considered to be excessive, especially taking into account the arbitrary deprivation of the victims' liberty. It also argued that the State did not insist on objective grounds to exercise legal authority since the victims were detained on the basis of a suspicion and that the State considered the grounds given by the agents of the police to be valid, which in the Commission's criteria were not sufficient to justify the deprivation of liberty based on the suspicion of a crime.

91. The ***representatives*** added that the writ of amparo that might have been an appropriate recourse was ineffective since it was dismissed due to the "change in the legal situation," which impeded a ruling on the merits. This justification of inadmissibility implies that the resolution of the writ of amparo was so delayed as to not be able to review the lawfulness, the constitutionality and the conventionality of *arraigo* before the end of the term of the measure. Moreover, the judicial authorities did not analyze the conventionality of pre-trial detention.

92. The Commission and the representatives, thus, considered that the recourse of amparo was not

an effective judicial remedy to control the deprivation of liberty of the victims under the conventional standards. The Commission, thus, considered that the State violated the rights established in Articles 7(6) and 25(1) of the Convention, read in conjunction with Article 1(1) thereof, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

B. Considerations of the Court

93. The Court recalls that the State partially acknowledged its responsibility with respect to the violation of Articles 7, 8(2) and 25 of the Convention, read in conjunction with the obligation to respect the rights contained therein, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López (*supra* paras. 14 and 15). The Court also understood in Chapter IV that there is no longer a controversy on those violations. While respecting the aforementioned, the Court, in view of the nature of this case, finds it necessary to refer to some issues on the right to personal liberty and to analyze the violations of the Convention that were not acknowledged by the State regarding the institutions of *arraigo* and of pre-trial detention that exist in the Mexican legal order. This section will address those points in the following order: 1) general considerations on the rights to personal liberty and to the presumption of innocence during criminal investigations and proceedings; 2) the compatibility of *arraigo* and pre-trial detention with the Convention; 3) the application of *arraigo* and of pre-trial detention in this case, and 4) the conclusion.

94. The Court will also analyze the institutions of *arraigo* and pre-trial detention that were applied to the victims of this case, using the norms in force when the events occurred.

B.1. General considerations on the rights to personal liberty and to the presumption of innocence during criminal investigations and proceedings

95. As a preliminary matter, the Court recalls that the States have the obligation to guarantee security and to maintain public order within their territories and that, to do so, they may employ the necessary means to combat delinquency and organized crime, including methods that imply restrictions to or even deprivations of personal liberty. However, a State's power is not unlimited in achieving those aims, regardless of the gravity of certain acts and the culpability of the alleged perpetrators; in particular, the authorities may not infringe rights set forth in the Convention such as, *inter alia*, the rights to the presumption of innocence, to personal liberty, to due process and the prohibition of carrying out unlawful or arbitrary detentions.[65]

96. With respect to the arbitrary arrests or imprisonments referred to in Article 7(3) of the Convention, the Court has determined that no one may be subjected to arrest or imprisonment for reasons and by methods that, although classified as lawful, may be incompatible with the respect for the fundamental rights of the individual because, *inter alia*, they are unreasonable, unpredictable or disproportionate.[66] Domestic law, the applicable procedures and the corresponding general explicit or tacit general principles must, per se, be compatible with the Convention. Thus, "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and unpredictability.[67] For its part, Article 8(2) refers to the presumption of innocence.

97. The Court has held that, in order to ensure that a precautionary measure that restricts liberty not be arbitrary and that the presumption of innocence is not negatively affected, it is necessary that:

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[65] *Cf. Mutatis mutandis, Case of Velásquez Rodríguez v. Honduras. Merits,* Judgment of July 29, 1988. Series C No. 4, para. 154 and *Case of Cruz Sánchez et al. v. Peru. Preliminary Objections, Merits. Reparations and Costs.* Judgment of April 17, 2015. Series C No. 292, para. 262.

[66] *Cf. Case of Gangaram Panday v. Suriname. Merits, Reparations and Costs.* Judgment of January 21, 1994. Series C No. 16, para. 47 and *Case of Habbal et al. v. Argentina. Preliminary Objections, Merits*. Judgment of August 31, 2022. Series C No. 463, para. 63.

[67] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 21, 2007. Series C No. 170, para. 92 and *Case of Habbal et al. v. Argentina, supra*, para. 63.

a) there are substantive assumptions that there was an unlawful act and that the accused is connected to that act; b) the measure complies with the four elements of the "test of proportionality"; in other words, the purpose of the measure must be legitimate (compatible with the Convention),[68] it is appropriate to comply with the end sought, necessary and strictly proportionate[69] and c) the decision imposing such a measure must contain an adequate rationale to permit an assessment as to whether it meets the aforementioned conditions.[70]

98. In view of the above, the Court recalls that these considerations on the elements that the authorities must take into account when restricting the personal liberty of an individual being investigated for a crime must be contemplated in a State's legal order and must also be applied effectively and in good faith by the operators of justice.

99. There follows details on each of the aforementioned elements.

a) Substantive assumptions that there was an unlawful act and that the accused is connected to that act

100. As to the first point, the Court has indicated that, in order to meet the requisites necessary to restrict the right to personal liberty with a precautionary measure, such as pre-trial detention, there must exist sufficient evidence that would allow a reasonable assumption that an unlawful act occurred and that the person being tried participated in it.[71]

101. On this point, it must be stressed that this assumption is not, per se, a legitimate purpose to order a precautionary measure that restricts liberty nor is it an element susceptible of undermining the right to the presumption of innocence (Article 8(2) of the Convention). On the contrary, in the domestic law of various countries of the region and in the practice of international courts, it is a fundamental assumption that must always be present when restrictions to liberty are imposed when the accused is subject to a criminal proceeding. That basic assumption is in addition to the other requisites related to a legitimate purpose: suitability, necessity and proportionality, as well as the need for a justification of the judicial decision that ordered the restriction of liberty.[72]

102. The foregoing should be understood by considering that, in principle and in general terms, this decision should not have any effect on the responsibility of the accused, since it should be made by a judge or judicial authority other than that which makes the final determination on the merits.[73]

103. With respect to those assumptions, the Court has held that the suspicion or the sufficient evidence that allows the reasonable assumption that the person subjected to the proceedings has participated in the unlawful act being investigated must be well-founded and refer to specific acts; in other words, not on mere conjectures or abstract intuitions. Thus, the State must not detain and then investigate.[74]

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[68] *Cf. Case of Servellón García et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 21, 2006. Series C No. 152, para. 89 and *Case of Habbal et al. v. Argentina, supra*, para. 64.

[69] *Cf. Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, para. 197 and *Case of Habbal et al. v. Argentina, supra*, para. 64.

[70] *Cf. Case of García Asto and Ramírez Rojas v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 25, 2005. Series C No. 137, para. 128 and *Case of Habbal et al. v. Argentina, supra*, para. 64.

[71] *Cf*. *Case of Servellón García et al. v. Honduras*, *supra,* para. 90; *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra,* paras. 101 and 103 and *Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 22, 2019. Series C No. 395, para. 104.

[72] *Cf*. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs.* Judgment of October 15, 2019. Series C No. 391, para. 93.

[73] *Cf*. *Mutatis mutandis, Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 174 and *Case of Romero Feris v. Argentina, supra,* para. 95.

[74] *Cf*. *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations and Costs*. Judgment of May 29, 2014. Series C No. 279, para. 311; *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 103 and *Case of González et al. v. Venezuela. Merits and Reparations*. Judgment of September 20, 2021. Series C No. 436, footnote 110.

b) Test of proportionality

104. With respect to the second point, the Court has affirmed that it is the responsibility of the judicial authority to apply a test of proportionality when ordering the deprivation of liberty. The Court has viewed pre-trial detention as a precautionary and not a punitive measure,[75] which must be applied exceptionally as it is the most severe measure that may be imposed on the accused, who enjoys the right to the presumption of innocence.[76] In turn, the Court has previously held that the deprivation of liberty of a suspect or of a person accused of an offense "cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment."[77] Consequently, the Court has stressed that the general rule should be that the accused is at liberty while his criminal responsibility is being resolved.[78]

105. In view of the above, the judicial authority can only impose measures of this nature when it ensures that: a) the purpose of the measures that deprive or restrict liberty are compatible with the Convention; b) the measures adopted are appropriate to meet the purpose sought; c) they are necessary in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be suitable to achieve the proposed objective and d) they are strictly proportionate so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages that are obtained from this restriction and the achievement of the purpose sought.[79]

106. With respect to the first point, the Court has indicated that the measure may only be imposed when necessary to satisfy a legitimate purpose; in other words, that the accused will not impede the development of the investigation and that he will not evade justice.[80] It has likewise emphasized that the procedural danger must not be presumed, but must be verified in each case, based on the objective and true circumstances of the specific case.[81] The necessity of those purposes is based on Articles 7(3), 7(5) and 8(2) of the Convention.

107. The Court notes that Article 7(5) establishes that "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." The sense of this norm is that the measures that deprive liberty during criminal proceedings must be conventional and must always have a precautionary purpose; in other words, that they are a means to neutralize procedural risks; in particular, the norm refers to the purpose related to appearance in the proceedings.[82]

108. Article 8(2), for its part, sets forth the right to the presumption of innocence, according to which a person is considered innocent until proved guilty. This guarantee ensures that the elements that prove the existence of the legitimate purposes are not based on an assumption, but rather the

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[75] *Cf. Case of López Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141, para. 69 and *Case of Romero Feris v. Argentina, supra,* para. 97.

[76] *Cf. Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 7, 2004. Series C No. 114, para. 106 and *Case of Hernández v. Argentina, supra*, para. 106.

[77] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra,* para. 103 and *Case of Villarroel Merino et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 24, 2021. Series C No. 430*,* para. 83.

[78] *Cf. Case of López Álvarez v. Honduras*, *supra,* para. 67 and *Case of Villarroel Merino et al. v. Ecuador, supra ,* para. 89.

[79] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra,* para. 93 and *Case of González et al. v. Venezuela*, *supra*, footnote 113.

[80] *Cf. Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 77; *Case of Amrhein et al. v. Costa Rica*, *supra,* para. 356 and *Case of González et al. v. Venezuela*, *supra*, para. 98.

[81] *Cf. Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 357; *Case of Barreto Leivav v. Venezuela, supra*, para. 115 and *Case of González et al. v. Venezuela*, *supra*, para. 102.

[82] *Cf. Case of Amrhein et al. v. Costa Rica, supra*, para. 357 and *Case of González et al. v. Venezuela*, *supra*, para. 100.

judge must substantiate his decision on the factual and objective circumstances of the specific case,[83] which is for the prosecutor to prove and not the accused,[84] who must also be afforded the possibility of the right to an adversarial procedure and to be duly assisted by a lawyer. The Court has also held that the gravity of the offense is not, per se, a sufficient justification for pre-trial detention.[85]

109. Finally, the Court has already indicated, with respect to the manner in which the elements that make up the legitimate purposes must be proved, that "the risk of flight cannot solely be measured taking into consideration only the gravity of the offence. It must be evaluated with reference to a series of other relevant factors that can confirm the existence of a risk of flight, as for example those related to a fixed residence, job, belongings, family and all types of ties to the country in which he or she is being tried."[86] The European Court has also held that the danger that the accused obstruct the adequate development of the proceedings cannot be abstractly inferred, but rather it must be be supported by objective evidence, for example the risk of tampering witnesses or belonging to a criminal organization or a gang.[87]

110. With respect to necessity, the Court finds that, since the deprivation of liberty is a measure that implies a restriction to an individual's sphere of action, the judicial authority can only impose such a measure when it finds that the other legal mechanisms with a less burdensome effect on individual rights are not sufficient to satisfy the procedural objective.[88]

111. The European Court has also held that alternative measures should be available and that a measure that restricts liberty may only be imposed when it is not possible to use alternative measures to mitigate its effects; it has also stated that the authorities must consider alternative measures to ensure appearance for trial.[89] For its part, in the Universal System of Protection of Human Rights, the United Nations Standard Minimum Rules for Non-custodial Measures refer to pre-trial detention as a last resort and clarify that "[p]re-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and of the victim." It added that alternatives to pre-trial detention shall be applied at as early a stage as possible."[90]

112. The Court has also held that, in cases in which measures that restrict liberty are imposed, Article 7(5) establishes time limits on their length; therefore, when the period of pre-trial detention is no longer reasonable, the liberty of the accused should be limited by other less burdensome measures to ensure appearance at trial. The criteria that can be used to determine the reasonability of the period must be strictly related to the particular circumstances of the specific case. In view of the above and in the light of the provisions of Articles 7(3), 7(5) and 8(2) (presumption of innocence) the Court

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83 *Cf. Case of Amrhein et al. v. Costa Rica, supra*, para. 357 and *Case of Hernández v. Argentina, supra*, para. 109.

84 *Cf*. *Case of Romero Feris v. Argentina, supra,* para. 101 and *Case of Villarroel Merino et al. v. Ecuador, supra,* para. 93.

85 *Cf. Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of October 30, 2008. Series C No. 187, para. 74 and *Case of Villarroel Merino et al. v. Ecuador, supra,* para. 91.

86 *Cf. Case of Romero Feris v. Argentina, supra,* para.105. Similarly, ECHR. *Case of Idalov v. Russia*, Judgment of May 22, 2012, Application No. 5826/03, para. 145; *Case of Panchenko v. Russia*, Judgment of June 11, 2005, Application No. 11496/05, paras. 102 and 106; *Case of Becciev v. Moldavia*, Judgment of October 4, 2005, Application No. 9190/03, para. 58, and *Case of Sulaoja v. Estonia*, Judgment of May 15, 2005, Application No. 55939/00, para. 64.

87 *Cf. Case of Romero Feris v. Argentina, supra,* para. 105. Similarly, ECHR. *Case of Jarzyński v. Poland*, Judgment of October 4, 2005, Application No. 15479/02, para. 43, *Case of Podeschi v. San Marino*, Judgment of April 13, 2017, Application No. 66357/14, para. 149 and *Case of Štvrtecký v. Slovakia*, Judgment of June 5, 2018, Application No. 55844/12, para. 61

88 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 93; *Case of Amrhein et al. v. Costa Rica, supra*, para. 356 and *Case of Romero Feris v. Argentina, supra,* para. 106.

89 *Cf*. *Case of Romero Ferisvs. Argentina, supra,* para.107. Similarly, Council of Europe, Committee of Ministers, Recommendation CM/Rec (2006) 13 on pre-trial detention, the conditions in which it takes place and the guarantees against its abuse, September 27, 2006, para. 3; ECHR. *Case of Idalov v. Russia*, Judgment of May 22, 2012, Application No. 5826/03, para.140 and *Case of Aleksandr Makarov v. Russia*, Judgment of March 12, 2009, Application No. 15217/07, para.139.

90 *Case of Romero Feris v. Argentina, supra,* para. 108. Similarly: United Nations, General Assembly, UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), Resolution 45/110, December 14, 1990, Rule 6(1) and (6)2.

considers that the domestic authorities should impose alternative measures to pre-trial detention so that that its exceptional nature is not undermined.[91]

c) Duty to provide an adequate rationale for measures that deprive liberty

113. With regard to the third point, the Court has held that any restriction to liberty that does not have a sufficient justification (Art. 8(1)) that would permit an assessment as to whether it meets the aforementioned conditions will be arbitrary and, therefore, would violate Article 7(3). In order that the presumption of innocence (Art. 8(2)) be respected when precautionary measures that restrict liberty are ordered, the State must clearly substantiate and prove, depending on each specific case, the existence of the aforementioned conventional requisites.[92] To proceed otherwise would be tantamount to anticipating the sentence, which would contravene generally recognized principles of law, among them, the right to the presumption of innocence.[93]

114. The Court has, also, taken the position that pre-trial detention must be subjected to periodic review so that it is not prolonged when there no longer exist the reasons that gave rise to its adoption.[94] The Court has specifically stated that a judge does not have to wait for an acquittal for detainees to regain their liberty, but rather the judge must periodically assess whether the rationale, the necessity and the proportionality of the measure remain and whether the period of deprivation of liberty has gone beyond the limits imposed by law and by reason. Whenever it appears that a pre-trial detention does not meet these conditions, release must be ordered, without prejudice to the continuation of the respective proceedings. The Court recalls that it is the national authorities who are responsible for evaluating the appropriateness of maintaining the precautionary measures that they issue pursuant to their legal norms. In doing so, the national authorities must provide sufficient grounds that would allow the interested parties to know why the restriction to their liberty is being maintained, which in order not to be considered an arbitrary deprivation of liberty and to ensure that it is compatible with Article 7(3) of the Convention, it must be based on the need to guarantee that the detainee will not impede the efficient conduct of the investigation or evade the action of justice. Likewise, when a request is received for the release of a detainee, the judge must at least minimally substantiate (Art. 8(1)) the reasons for maintaining the pre-trial detention. In any case, even when there are reasons for keeping a person in pre-trial detention, the period of deprivation of liberty should not exceed a reasonable time (Article 7(5) of the Convention.[95]

B.2. On the compatibility of arraigo and pre-trial detention with the American Convention

115. The representatives and the Commission argue that the *arraigo* found in Article 12 of the Federal Law of 1996 and in Article 133 bis of the Federal Code of 1999, norms that were applied in the present case, are not compatible with the Convention since they infringe the rights to personal liberty, the presumption of innocence and the obligation to adopt provisions of domestic law (Arts. 7, 8(2) and 2). The representatives arrived at similar conclusions with respect to pre-trial detention. Thus, these laws should be analyzed to determine whether they contravene the rights to personal liberty and to the presumption of innocence.

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[91] *Cf*. *Case of Bayarri v. Argentina, supra*, para. 70, *Case of Amrhein et al. v. Costa Rica, supra*, para. 361 and *Case of Montesinos Mejía v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 27, 2020. Series C No. 398, para. 112.

[92] *Cf*. *Case of Argüelles et al. v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 288, para. 120; *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 251 and *Case of González et al. v. Venezuela*, supra, footnote 114.

[93] *Cf. Case of Suárez Rosero v. Ecuador. Reparations and Costs*. Judgment of January 20, 1999. Series C No. 44, para. 77; *Case of Argüelles et al. v. Argentina, supra*, para. 131 and *Case of Romero Feris v. Argentina, supra,* para. 110.

[94] *Cf*. *Case of Bayarri v. Argentina, supra*, para. 74; *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 255 and *Case of González et al. v. Venezuela*, supra, para. 99.

[95] *Cf*. *Case of Argüelles et al. v. Argentina, supra*, paras. 121 and 122 and *Case of Romero Feris v. Argentina, supra,* para.111.

116. To make such an analysis, the Court recalls that Article 2 of the Convention obligates the States Parties "to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect" to the rights protected by the Convention.[96] This duty implies the adoption of two types of measures. One is the elimination of all norms and practices that violate the guarantees provided under the Convention,[97] whether because they disregard those rights or liberties or because their exercise is impeded.[98] The other is the promulgation of norms and the development of practices conducive to the effective observance of those guarantees.[99]

117. As the Court has indicated on other opportunities, the provisions of domestic law that are adopted must be effective (principle of *effet utile*), which means that the State has the obligation to recognize and adopt in its legal order all the necessary measures in order that the provisions of the Convention are truly complied with and put into practice.[100] The Court has, thus, stated that the States not only have the positive obligation to adopt the legislative measures necessary to ensure the exercise of the rights established in the Convention, but they must also avoid enacting laws that impede the free exercise of those rights and, in turn, avoid eliminating or amending laws that protect them.[101]

118. Finally, the Court notes that the Vienna Convention on the Law on Treaties provides in its Article 27 that a State Party may not invoke the provisions of its internal law, including the provisions of its constitution, to not comply with international treaties and to not exercise an adequate control of constitutionality.

119. There follows an analysis of the conventional nature of the norms relating to *arraigo* and to pre-trial detention that were applied in this case. The analysis will refer to the normative and jurisprudential developments recapitulated in the section on general considerations on personal liberty, the right to the presumption of innocence in investigations and the criminal proceedings (*supra* paras. 95 to 114) in the understanding that they are applicable to any restriction of liberty, such as a precautionary measure prior to a criminal conviction.

a) Arraigo

120. The argument of the Commission and of the representatives refers to the institution of *arraigo*, which they contend contravenes various provisions of the Convention. The Court notes that *arraigo* is currently found in different bodies of law in Mexico (*supra* paras. 38 to 41) and that it has evolved over time.[102] The Court recalls that, at the federal level and before 2008, *arraigo* in Mexico was found in legislation, in both the Federal Code of Criminal Proceedings of 1999 and the Federal Law against

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96 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs.* Judgment of May 30, 1999. Series C No. 52, para. 207, *Case of González et al. v. Venezuela, supra*, para. 103 and *Case of Teachers of Chañaral and other municipalities v. Chile. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 10, 2021. Series C No. 443, para. 213.

97 *Cf. Case of Castillo Petruzzi et al. v.* Peru. *Merits, Reparations and Costs.* Judgment of May 30, 1999. Series C No. 52, para. 207; *Case of expelled Dominicans and Haitians v. Dominican Republic.. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2014. Series C No. 282 para. 270 and *Case of Movilla Galarcio et al. v. Colombia. Merits, Reparations and Costs*. Judgment of June 22, 2022. Series C No. 452*,* footnote 159.

98 *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. 113 and *Case of Teachers of Chañaral and other municipalities v. Chile*, *supra*, para. 185 .

99 *Cf. Case of Castillo Petruzzi et al. v. Peru, supra*, para. 207, *Case of expelled Dominicans and Haitians v. Dominican Republic, supra*, para. 270 and *Case of Movilla Galarcio et al. v. Colombia, supra,* footnote 159.

100 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C N° 73, para. 87 and *Case of Vereda La Esperanza v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31 2017. Series C No. 341*,* para. 84.

101 *Cf*. *Case of Castillo Petruzzi et al. v. Peru, supra,* para. 207 and *Case of the Community Garífuna Triunfo de la Cruz and its members v. Honduras. Merits, Reparations and Costs. para. 187*.

102 See, for example, expert opinion of Luis Raúl González Pérez, offered at the public hearing.

Organized Crime of 1996, but not in the constitution. It was incorporated into the constitution on June 18, 2008. In addition, both the Federal Code of 1999 and the Federal Law of 1996 have been amended. When the acts occurred in this case, *arraigo* was found in two federal laws: Article 12 of the Federal Law and Article 133 bis of the Federal Code (*supra* paras. 36 and 37).

121. The Court recalls that, from January 18, 2006 to April 17, 2006, Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López were deprived of their liberty by the application of *arraigo* and that the judicial decision that ordered it refers to both Article 12 and Article 133 bis[103] (*supra* para. 36). The Court notes that the judicial decision that ordered the measure of *arraigo* in this case (*supra* para. 57) referred precisely to those two laws to justify that it was competent to hear and resolve the request for *arraigo*, although in analyzing the requisites for its order, it resorted to Article 12 of the Federal Law. (*supra* para. 41).[104] Thus, the Court finds it pertinent to analyze the measure of *arraigo* contained in those two norms.

122. As has been indicated, Article 12 stated that the "judge may, at the request of the Public Prosecutor's Office of the Federation and taking into account the nature of the alleged event and the personal circumstances of the accused, decree *arraigo* against the accused in the place, form and means of implementation set out in the request, under the surveillance of the authority, which is to be exercised by the Public Prosecutor's Office and its aides and which may be extended for the period strictly necessary for processing of the preliminary investigation**,** but not to exceed ninety days, so that the person in question may participate in clarifying the events imputed to him, which might reduce the period of arraigo."

123. For its part, Article 133 bis established that the "judicial authority may, at the petition of the Public Prosecutor's Office, decree house arraigo or impose a prohibition to leave a determined geographical area without its authorization, for a person against whom a criminal action is being prepared, when there exists the risk of evading the action of justice. […] House arraigo or the prohibition to leave a determined geographical area may be extended for the period strictly necessary, but may not exceed thirty calendar days in the case of arraigo and sixty days in the case of the prohibition to leave a determined geographical area."

124. The Court will now analyze the different aspects of these norms in light of the American Convention and the Court's case law.

i. Arraigo and due process

125. Every person, who, as a result of any investigation or proceedings, is believed to be a perpetrator of or participant in an imprisonable act, is the holder of the guarantees of due process. The institution of *arraigo* of a pre-procedural nature for the purposes of investigation is an absolute denial of such guarantees since the detainee is stripped of protection. Therefore, no restrictions of any kind to liberty may be imposed other than in criminal proceedings. Otherwise, this would constitute the very denial of due process.

ii. On the right of persons subjected to arraigo to be heard and to be brought promptly before a judge or other official authorized by law to exercise judicial functions and the right not to be compelled to be a witness against themselves and the defenselessness of those persons

a. *On the right of persons subjected to arraigo to be heard and to be brought promptly before a judge or other official authorized by law to exercise judicial functions*

126. As the expert Luis Raúl González Pérez stated, *arraigo* is "an administrative measure authorized

[103] *Cf*. Order of Arraigo 03/2006, decreed by the Fourteenth District Court of the Federal District for Federal Criminal Proceedings, January 18, 2006 (evidence file, f. 382 et seq.).

[104] *Cf*. Order of Arraigo 03/2006, decreed by the Twelfth District Court of the Federal District for Federal Criminal Proceedings, January 1, 2006 (evidence file, ff. 383 and 386).

by a judicial authority to restrict personal liberty, at a stage of an investigation leading to a possible and/or apparent criminal proceeding" and is implemented "without a formal accusation, without the proceedings having been initiated, with minimum details; in other words, the accused, in reality, is treated similarly to those who face proceedings without being subjected to *arraigo*." In like manner, the expert Esteban Gilberto Arcos Cortés, who was proposed by the State, declared during the public hearing that *arraigo* is a "investigative technique" and that "it is implemented without there being formal charges, no determination of a connection to the proceedings." He added that this is the consequence of giving the Public Prosecutor's Office a technical-legal tool to go before a judge of control and request a term of 40 days, which may be extended to 80 days, a measure of that type "due to the complexity of the offenses that today apply to organized crime."[105]

127. With regard to these norms, the Court notes preliminarily that there is not one instance to hear the person investigated or his representatives, where it is possible to exercise the right of defense, before the possible application of the measure restrictive of liberty.[106] On this point, it should be recalled that Article 7(5) of the Convention establishes that "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." Similarly, Article 8(1) states that "[e]very person has the right to a hearing, […] in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations…". That right includes, in addition to its substantive dimension, a formal and procedural phase that ensures access to a competent body to determine the right that is claimed under the due procedural guarantees (such as presenting arguments, making proposals, providing evidence and, in sum, exercising individual rights).[107]

128. During the public hearing, the expert Carlos María Pelayo Moller explained that the procedure to obtain an order of *arraigo* is heard before one of the specialized judges of the National Center of Justice of Control Techniques of Investigation and while the merely formal elements of an order of *arraigo* are known "the orders themselves are generally classified as confidential, therefore the level of evidence necessary to order an *arraigo* is unknown." He added that the standard of proof for *arraigo* "is necessarily much less that that to order pre-trial detention, that standard is a well-founded suspicion that a person has committed an offense under the Federal Law against Organized Crime." The expert added that, since *arraigo* is a detention in order to investigate "it is for this reason that the person subjected to *arraigo* is left in a procedural limbo since there is no criminal proceeding against him in which there has been a formal accusation nor is it certain that this criminal proceeding will be substantiated; therefore, breaking the logic of *arraigo* becomes impossible on its own terms: I detain you to investigate, I investigate to detain you."[108]

129. The Court also notes that the current Article 12 bis of the Law against Organized Crime (*supra* para. 41), which was not in force when the events in this case occurred and which was added in the 2016, reinforces the idea that the measure of *arraigo* is applied to the person presented before a judicial authority. In effect, the article establishes that the "petition of arraigo or its extension shall be resolved immediately by the judicial authority by any means that ensures its authenticity or in a private hearing with only the appearance of a PGR agent no more than six hours following its receipt."[109]

130. Thus, it is clear that it was not contemplated that the persons investigated be heard or that they be presented before a judge or other official authorized by law to exercise judicial functions

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105 *Cf*. Expert opinion of Esteban Gilberto Arcos Cortés, offered at the public hearing.

106 *Cf*. Expert opinion of Luis Raúl González Pérez, offered at the public hearing.

107 *Cf*. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 5, 2008. Series C No. 182 para. 72 and *Case of Roche Azaña et al. v. Nicaragua. Merits and Reparations.* Judgment of June 3, 2020. Series C No. 403, para. 85.

108 *Cf*. Expert opinion of Carlos María Pelayo Moller, offered at the public hearing.

109 *Cf*. Expert opinion of Luis Raúl González Pérez, offered at the public hearing.

before an order of *arraigo*. Consequently, Article 133 bis of the Federal Code of 1999 and Article 12 of the Federal Law of 1996, in force when the acts of this case occurred, violated the rights to a hearing and to be brought before a judge or other official authorized by law to exercise judicial functions (Articles 8(1) and 7(5)).

b. On the right of persons subject to arraigo not to be compelled to be a witness against themselves

131. The Court recalls that Article 8(2)(g) of the Convention sets out the rights not to be compelled to be a witness against oneself and not to plead guilty. The exercise of this right presupposes that the accused is able to freely decide whether to make a statement or, in other words, that there is no coercion that would impede the accused from freely making that determination. A corollary is that the person investigated has the right to remain silent and abstain from making any statement in an investigation or criminal proceeding in which he has been named as a probable participant or suspect in the commission of an unlawful act. In addition, as the Court has pointed out, since the administration of criminal justice must commence with an analysis of the lawfully obtained evidence, a means of investigation that entails the use of coercion to bend the will of the accused would no longer to be valid, which would be an instrumentalization of the person and a violation, per se, of such right, regardless of the grade of coercion (be it a threat, other cruel, inhuman or degrading treatment or torture) and of the result (in other words, that a confession or information is obtained).[110]

132. This right not to be compelled to be a witness against oneself or to remain silent is also found in the constitutions of various countries of the region, including that of Mexico,[111] in the case law of the high courts of the countries of the region,[112] and in international human rights instruments, such as the International Covenant on Civil and Political Rights (Art. 14(1)(g). The European Court of Human Rights has held that while the right of non-incrimination is specifically contemplated in the European Convention on Human Rights, the right to remain silent and the right not to incriminate oneself are generally acknowledged international standards that are at the core of the idea of a fair proceeding by virtue of Article 6 of that Convention.[113] The UN Committee on Human Rights has indicated that this right "must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt."[114]

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110 *Cf*. *Case of Pollo Rivera et al. v. Peru. Merits, Reparations and Costs*. Judgment of October 21, 2016. Series C No. 319, para. 176.

111 *Cf*. Antigua and Barbuda, Article 15(7); Argentina, Article 18; Bahamas, Article 20(7); Barbados, Article 18(7); Belize, Article 6(6); Bolivia, Article 121; Brazil, Article 5(LXIII); Canada, Constitutional Act of 1982, Article 11(c); Chile, Article 19(7)(f); Colombia, Article 33; Costa Rica, Article 36; Cuba, Article 95(e); Dominica, Article 8(7); Dominican Republic, Article 69(6); Ecuador, Article 77(7) (b) and (c); El Salvador, Article 12; Grenada, Article 8(7); Guatemala, Article 8; Guyana, Article 144(7); Haiti, Article 46; Honduras, Article 88; Jamaica, Article 16(6); Mexico, Article 20(B)(II); Nicaragua, Article 34(7); Panama, Article 25; Paraguay, Article 18; Saint Kitts and Neves, Article 10(7); Saint Lucía, Article 8(7); Saint Vincent and the Grenadines, Article 8(7); Trinidad and Tobago, Article 5(2)(d); United States, Fifth Amendment; Uruguay, Article 20 and Venezuela, Article 49.(5).

112 *Cf*. Supreme Court of Chile, - Rol: 2560-2019 of April 2, 2019; Constitutional Court of Colombia, Judgment C-102/05 and Judgment C-776 de 2001; Court of Justice of the Federal District and the Territories of Brazil; Constitutional Court of Peru, The right to remain silent forms part of the right not to be compelled to be a witness against oneself, Judgment 418/2021 EXP. No. 01198-2019-PHC/TC (March 30, 2021); Supreme Court of Costa Rica, Constitutional Chamber, Resolution Nº 06359–1993; Supreme Court of Costa Rica, Constitutional Chamber, Resolution No. 12244-2006. Considering paragraph III; Supreme Court of Costa Rica, Third Chamber, Resolution No. 01301–2004 and Constitutional Chamber, 556-91, of March 20, 1991 and Supreme Court of Mexico, Review of Amparo 624/2012.

113 *Cf*. ECHR. *Case of John Murray v. Great Britain*, Judgment of February 8, 1996, Application No. 18731/91, para. 45 and *Case of Heaney and McGuinness v. Ireland*, Application No. 34720/97, para. 40. See, also, Directive (EU) 2016/343 of the European Parliament and Council, of March 9, 2016, by which they strengthen certain aspects in criminal proceedings regarding the presumption of innocence and the right to be present at trial.

114 United Nations, Human Rights Committee, Communication Nº 330/1988, Berry v. Jamaica, approved on July 4, 1994, para. 11.7; Communication Nº 1033/2001, Singarasa v. Sri Lanka, approved on July 21, 2004, para. 7.4 and Communication Nº 912/2000, Deolall v. Guyana, approved on November 1, 2004, para. 5.1. U.N. Doc. CCPR/C/81/D/1033/2001 (2004).

133. The Court notes that Article 12 of the Federal Law of 1996 established that a judge may order *arraigo,* which "may be extended for the period strictly necessary for processing of the preliminary investigation, […] so that the person in question may participate in clarifying the events imputed to him, which might reduce the period of *arraigo* (*supra* para. 37).

134. In view of the foregoing, the Court finds it clear that, under this norm, one of the objectives of the restriction to the personal liberty of persons subjected to *arraigo* is to obtain a statement on the unlawful acts that are attributed to them, since in whatever other way could they be understood to "participate" in "clarifying" those acts. Therefore, the Court has no doubt that the text of Article 12 infringes, per se*,* the right not to be compelled to be a witness against oneself (Article 8(2)(g)) since it establishes as an objective a measure that restricts liberty by obtaining a statement of the person investigated for an unlawful act without contemplating the possibility that this person may remain silent or not be compelled to be a witness against himself. In addition, the law provides an incentive for the accused to declare (or, in other words, to renounce the right to remain silent) since it provides that if he participates in clarifying the acts attributed to him the term of *arraigo* may be reduced.[115]

c. On the defenselessness of the person subjected to arraigo

135. The Court notes that, according to the expert Luis Raúl González Pérez, when *arraigo* is applied, persons subjected to it do not receive advance and detailed notice of the accusation that is intended to be formulated against them nor are they given adequate time and means to prepare a defense. In addition, persons subject to *arraigo* do not have "the opportunity to question the actions of the Public Prosecutor's Office nor to offer any evidence at that stage."[116] In effect, they are not able to interrogate witnesses or to obtain the appearance of other persons who may shed light on the events. According to the expert, this institution is contrary to "the basis of adversarial and oral criminal proceedings every time that two of its principles are affected: the right that every hearing is in the presence of a judge, which does not occur in cases of *arraigo,* and the burden of proof to prove guilt is on the accusing party, which in the case of *arraigo*, loses its meaning since the person is held without any proof of guilt."[117]

136. The Court finds that this complete defenselessness of persons subject to *arraigo*, without knowing the rationale for the situation in which they find themselves, without timely access to a legal defense and without being able to be brought before a judge is a form of coercion by the authorities, for which reason the evidence obtained in those circumstances should not be used as the basis of an eventual conviction in a criminal proceeding. The Court recalls that Article 8(3) establishes that "a confession of guilt by the accused shall only be valid if it is made without coercion." It is illustrative to recall that the expert Luis Raúl González Pérez indicated that *arraigo* also implies "suffering the effects of an anticipated punishment of deprivation of liberty without there being a formal accusation that would permit initiating legal proceedings, but rather used to cause anxiety and uncertainty conducive to breaking the will of the person and put him at the disposition of the actions that they wish to carry out."[118]

137. The Court notes that an eventual statement or obtained evidence is not an indirect consequence of arraigo, but rather it is the very purpose of the institution, as can be seen from Article 133 bis of the Federal Code of 1999 and, above all, from Article 12 of the Federal Law of 1996.

138. In view of the above, the simple subjection of persons to *arraigo* presupposes placing them in a situation of maximum vulnerability, which is against human dignity, exposes them to mental and possible physical suffering and leaves them in a state of uncertainty about their situation and fate. In this sense, given the conditions of detention, isolation and incommunicado, *arraigo* places persons

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115 In addition, at the public hearing, Jorge Tzompaxtle stated that he was interrogated by someone who had claimed to be a public defender, which the State refuted.

116 *Cf*. Expert opinion of Luis Raúl González Pérez, offered at the public hearing.

117 *Cf.* Expert opinion of Luis Raúl González Pérez, offered at the public hearing.

118 *Cf*. Expert opinion of Luis Raúl González Pérez, offered at the public hearing.

subject to this measure in a context of vulnerability faced with an eventual and probable cruel, inhuman or degrading treatment in the absence of a fair trial and, therefore, the application of this measure presupposes a violation of Article 5(2) of the Convention.

iii. On the substantive assumptions, the purpose and the need for arraigo

a. *On the substantive assumptions*

139. As was mentioned *supra*, in applying precautionary measures that restrict liberty, there must exist sufficient indicia to allow a reasonable assumption that an unlawful act occurred and that the persons subjected to the process have participated in it. In turn, a suspicion or sufficient indicia that allow a reasonable assumption that the person subjected to the process participated in the unlawful activity must be based and expressed on specific facts; in other words, not on mere conjectures nor on abstract intuitions (*supra* para. 103).

140. In this case, the Court notes that the decision of January 18, 2006, which ordered *arraigo*, contained certain information that linked the persons investigated to an unlawful act.[119]

141. Notwithstanding the above, the Court notes that neither of the two norms that govern *arraigo* clearly establishes what are the substantive assumptions that must be met in order to apply this type of restrictive measures to personal liberty and to the presumption of innocence. Article 133 of the Federal Code of 1999 referred "to a person against whom criminal proceedings are being prepared." On the other hand, Article 12 of the Federal Law of 1996 indicated that the judge may order *arraigo* "taking into account the nature of the alleged event and the personal circumstances of the accused."

142. The Court, thus, concludes that the two norms that govern *arraigo* did not refer to the substantive assumptions that must be met to apply that type of measure that restricts personal liberty. Therefore, *arraigo* was ordered without any substantive assumption that justifies its application and, therefore, violates the right to the presumption of innocence.

b. On the purpose

143. The Court observes that Article 133 bis establishes a legitimate purpose for applying *arraigo* since it requires that "there exists a well-founded risk of evading the action of justice." However, the *arraigo* found in Article 12 of the Federal Law of 1996 established that *arraigo* could be applied when it was necessary for the proper processing of the investigation with the object that the accused participate in clarifying the acts imputed to him. On this point, the Court recalls that its case law consistently holds that the finality of precautionary measures that deprive or restrict liberty must be compatible with the Convention (*supra* para. 96). In turn, pursuant to that treaty, a measure that restricts liberty only has two purposes: that the accused does not impede the development of the proceedings nor evade the action of justice (*supra* para. 106). If not, the rights to personal liberty and to the presumption of innocence would be infringed (*supra* para. 142).

144. In view of the above, the requirement in Article 12 does not comply with any of the legitimate purposes established in the Convention to restrict the liberty of a person who is being tried. In effect, it is derived from the phrase "so that the person in question may participate in clarifying the events imputed to him," which would legitimate the deprivation of liberty for investigative purposes, without complying with any of the procedural situations related to the risk of evading justice or with impeding the development of the proceedings, requirements that must also be well-founded. It must be remembered that the State authorities cannot detain in order to then investigate. During the period of investigation, those authorities must, with the support of the police and other specialized bodies, investigate the act denounced and gather the evidence on the basis of which they may present an accusation before a court against the person investigated.

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[119] *Cf*. Order of Arraigo 03/2006, decreed by the Fourteenth District Court for Federal Criminal Proceedings, January 18, 2006 (evidence file, ff. 383 and 386).

145. The Court points out that the expert Esteban Gilberto Arcos Cortés mentioned the importance of *arraigo* as "a tool of investigation" for certain offenses related to organized crime. He indicated that *arraigo* of a precautionary nature implied that when the GPR "did not have the necessary elements to present a case before a jurisdictional body, […] it requested a non-penitentiary detention in determined places while it gathered the necessary elements to attribute the acts before the jurisdictional body."[120] There is no doubt that the purpose sought by *arraigo* is to restrict the liberty of a person suspected of a crime in order to complete the means of evidence and eventually make a formal charge. It bears repeating that an investigation cannot be a legitimate purpose to deprive a person of liberty without a conviction and that the authorities cannot deprive liberty of an accused to then investigate, but rather such a deprivation is possible when the persecuting body has sufficient substantive elements and when the precautionary measure is suitable, necessary and proportionate to stave off the procedural dangers that are non-appearance in the proceedings or obstructing the means of proof.[121]

146. The Court is clear that, in the manner in which the *arraigo* is conceived in the Mexican legal order, the accused are instrumentalized and become a means to obtain evidence regarding their responsibility. The expert Luis Raúl González Pérez illustrated this idea when he affirmed that "*arraigo* also affects the right to defense, since the persons know that they are being investigated and linked to the commission of a crime, but instead of gathering the elements for their eventual defense, they are converted into mere spectators enclosed in the ministerial activity."[122]

c. On the need for arraigo

147. In the two preceding sections, the Court concluded that the institution of *arraigo* established in Article 12 of the Federal Law of 1996 and Article 133 bis of the Federal Code of 1999 infringed the substantive assumptions that must be complied with in order to apply that type of restrictive measure to personal liberty and to the presumption of innocence. In turn, it indicated that Article 12 did not comply with a legitimate purpose to restrict the liberty of a person in the framework of criminal proceedings. The Court finds it clear that, being a pre-procedural measure that restricts liberty in order to investigate, it contravened the terms of the Convention infringing, per se, the rights to personal liberty and to the presumption of innocence of those subjected to *arraigo*.

148. The foregoing is sufficient to conclude that the institution of *arraigo* included in those two norms did not comply with the elements that the authorities must take into account when restricting personal liberty. Therefore, since it is a measure that restricts liberty that has a purpose that is clearly against the terms of the Convention, the Court holds that it is not in order to continue examining the other elements of the test of proportionality to which reference has been made.

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120 *Cf*. Written version of the expert opinion of Esteban Gilberto Arcos Cortés, offered at the public hearing (evidence file, f. 31266 et seq.).

121 It should also be recalled that during the public hearing this expert indicated that *arraigo* "conformed to due process" and that from the moment that persons under *arraigo* enter the Federal Center of Arraigo "they are informed that they are at the disposal of the jurisdictional body, they are read their rights, they are medically examined and, at the same time, they are told that 'you are not nor were not even an accused person, you are here while an investigation is being conducted but you can ask for cigarettes, you can have a television set, you just have to be here.'" The expert mentioned that "if this institution did not exist, as they say in Mexico, you put on your shoes, you leave and you're never seen again and, of course, that scares you." He claimed that "this means that they have the person here" although he affirmed that it is not deprivation of liberty "because […] you have a phone, you have the opportunity to go out and smoke as many times as you wish" although he recognized, in response to a question from the Court, that the persons under *arraigo* in that center cannot leave. The expert added, alluding to a visit that he made to such a center, that "they are free to go out and smoke a cigarette, they are in a room that has a bed, they can have a TV, a DVD, family visits, a place to play if they are minors, a recreation center with basketball courts, soccer fields […] and, at the same time, they have the right to call whomever they wish for nine minutes every day and can visit and receive visits including their defense."

122 *Cf*. Written version of the expert opinion of Luis Raúl González Pérez, offered at the public hearing (evidence file, f. 675 et seq.).

iv. On the national and international rulings on arraigo

149. The Court notes that the question of the validity of the institution of *arraigo* has been considered by some domestic instances; for example, the Supreme Court of Mexico, which resolved the writ of unconstitutionality No. 20/2003 on January 5, 2005. In its decision, the Supreme Court analyzed *arraigo* and decided that the institution governed by Article 122 bis of the Code of Criminal Procedure of the State of Chihuahua, the text of which was similar to that established in the Federal Code of Criminal Procedure and the LFDO, violated the guarantee of personal liberty found in the Federal Constitution and therefore requested its annulment.[123]

150. In addition, the Ombudsperson of Mexico stated in September 2019 that "*arraigo* stipulated as a precautionary measure […] is an institution that contravenes the Convention […] since it arbitrarily deprives liberty, which is prohibited by Article 7(3) of the [American Convention] and by Article 8(2) since it is ordered before the judicial proceedings begin. […] as such, *arraigo* is a type of 'pre-conviction' punishment that is used as a means to investigate and not as a consequence of an investigation that has uncovered sufficient elements that would permit linking a person with the imprisonable offense, thus contravening the right to the presumption of innocence and, ultimately, due process.[…] Lastly, *arraigo* is a measure that contravenes the right to legal security and the principle of *pro persona* because it is used against a person who is not under formal criminal proceedings, which creates legal insecurity, and because it is an extreme precautionary measure, considered internationally as arbitrary detention, violating the principle of *pro persona* for not having applied a precautionary measure that is less burdensome."[124] In the same sense, the Human Rights Commission of the Federal District stated that *arraigo* "violated diverse human rights both in its application and in the manner that it is implemented."[125]

151. Various international bodies have affirmed that the institution of *arraigo* contravened international human rights treaties; for example, the decisions of the Working Group on Arbitrary Detention that characterized *arraigo* as a "*de facto* pre-trial that takes place not before a judge, but before officials from the Office of the Prosecutor General, who are thus empowered to perform judicial acts and evaluate evidence and present the means of proof before the person is charged" and that "amounts to an arbitrary form of preventive detention, in view of the lack of oversight by the courts."[126]

152. The UN Committee against Torture, likewise, indicated in 2007 that it was concerned about "the institution of *arraigo penal* (short-term detention), which is reported to have been converted into a form of pre-trial detention using units guarded by judicial police and personnel from the Public Prosecutor's Office, where suspects can be held for 30 days – up to 90 days in some states – while an investigation is being carried out to gather evidence and question witnesses." Although the Committee noted with satisfaction "the federal Supreme Court's decision in September 2005 declaring *arraigo penal* unconstitutional, […] it was concerned that the court's decision relates only to the Penal Code of Chihuahua State and would seem not binding on courts in other states." It recommended that "in light of the federal Supreme Court's decision, the State party should ensure that *arraigo penal* is eliminated both from legislation and in actual practice, at the federal and state levels."[127]

153. Likewise, the UN Human Rights Committee in a 2010 report "express[ed] its concern regarding the illegality of the use of 'arraigo penal' [short-term detention] in the context of combating organized crime, which allows the possibility of holding an individual without charge for up to 80 days, without

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123 *Cf.* Expert opinion of Luis Raúl González Pérez, offered at the public hearing.

124 *Cf.* Expert opinion of Luis Raúl González Pérez, offered at the public hearing.

125 *Cf.* Human Rights Commission of the Federal District, Recommendation 02/2011, cited by expert Luis Raúl González Pérez at the public hearing.

126 *Cf.* United Nations, Report of the UN Working Group on Arbitrary Detention on its visit to Mexico (October 27 to November 10, 2002), E/CN.4/2003/8/Add.3 of December 17, 2002, paras. 49 and 50.

127 United Nations, Conclusions and recommendations of the Committee against Torture (February 6, 2007), CAT/C/MEX/CO/4, para. 15.

bringing him before a judge and without the necessary legal safeguards as prescribed by article 14 of the Covenant." In addition, it regretted "the lack of clarification regarding the level of evidence needed for an 'arraigo' order." The Committee underscored that persons detained under "arraigo" are exposed to ill-treatment (Arts. 9 and 14 of the Covenant). It added that the State "should take all necessary measures to remove "arraigo" detention from legislation and practice at both federal and state levels."[128]

154. For its part, the UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) recommended that Mexico "abolish *arraigo*, which creates a situation outside judicial control that constitutes a risk of torture and ill-treatment."[129] The SPT also took note that, under Article 12 of the Federal Law to Combat Organized Crime of 1996, "a judge, at the request of the Office of the Public Prosecutor, may order the detention under *arraigo* of a person charged with participating in organized crime. This practice entails placing the suspect under the continual surveillance of the Office of the Public Prosecutor with the aim of increasing the time available to investigate the responsibility of the accused person." The SPT also indicated that, under the reform, "the maximum time during which a person can be held under *arraigo* is 80 days and that such persons are generally held in so-called 'safe houses.'"[130]

155. With regard to the above, it should be remembered that the SPT held that *arraigo* in Mexico "has become a practice that keeps legal proceedings stalled in limbo for excessive periods of time and creates obstacles to defence and to the determination of the legal status of the person detained under *arraigo* (regardless of the term used to describe this situation)."[131]

v. Conclusion

156. In view of the above, the institution of *arraigo* established in Article 12 of the Federal Law of 1996, as well as in Article 133 bis of the Federal Code of 1999, presented various problems with respect to the Convention: a) it did not permit that persons subjected to *arraigo* were heard by a judicial authority before the measure that restricted their personal liberty or freedom to circulate (*supra* para. 130); b) it restricted the liberty of persons without having sufficient elements to formally link them to a specific offense (*supra* para. 125); c) in the case of the Federal Law of 1996, it did not refer to the substantive assumptions that must be complied with in order to apply that type of restrictive measure to personal liberty and to the presumption of innocence (*supra* para. 142); d) the objective of a measure that restricts liberty found in Article 12 is not compatible with the legitimate purposes necessary to restrict personal liberty under the Court's case law (*supra* para. 144) and e) it affects the right of persons subjected to *arraigo* not to be compelled to be a witness against themselves (*supra* para. 134). On the other hand, some domestic and international instances refer precisely to these points and conclude that *arraigo* contravenes various fundamental rights, such as the rights to personal liberty, to due process and to the presumption of innocence (*supra* paras. 149 to 155).

157. For these reasons, the Court finds that Article 12 of the Federal Law against Organized Crime of 1996 and Article 133 bis of the Federal Code of Criminal Procedure of 1999 that refer to *arraigo* and that were applied in the present case contain provisions that, per se, contravene various rights established in the Convention, such as the rights not to be arbitrarily deprived of liberty (Art. 7(3)), to judicial control of the deprivation of liberty and to the reasonability of the period of pre-trial detention (Art. 7(5)), to a hearing (Art. 8(1)), to the presumption of innocence (Art. 8(2)) and not to be compelled to be a witness against oneself (Art.8(2)(g)). The Court concludes, thus, that the State infringed its obligation to adopt provisions of domestic law, as established in Article 2, regarding the

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128 Cf. UN, Concluding Observations of the Human Rights Committee of April 7,2006, CCPR/C/MEX/CO/8, para. 15.

129 Cf. UN, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico (May 31 2010), CAT/OP/MEX/1, para. 215.

130 *Cf.* UN, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico (May 31, 2010), CAT/OP/MEX/1, para. 214.

131 *Cf.* UN, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico (May 31, 2010), CAT/OP/MEX/1, para. 212.

right to personal liberty (Art. 7) and the right to the presumption of innocence (Art. 8(2)) to the detriment of Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López. DONE

b) Pre-trial detention

158. The representatives argue that pre-trial detention *sua sponte* contravenes various provisions of the Convention. The Court notes that this institution was not applied in the present case and, therefore, it will not consider it. Pre-trial detention is currently found in different domestic laws in Mexico (*supra* paras. 42 to 46). These provisions of domestic law have varied across the years.[132] When the events occurred in the present case, the Federal Code of 1999 referred to pre-trial detention in its Articles 161 and 168 (*supra* paras. 43 and 44). It was not until 2011 that the so-called pre-trial detention *sua sponte* was introduced into the legal order in Mexico (*supra* para. 45). In this section, the Court will center its analysis on the pre-trial detention that was applied in the present case.

159. The Court recalls that, from April 22, 2006 to October 16, 2008, the victims were deprived of liberty under pre-trial detention and that the judicial decision that ordered its application was based on Articles 161 and 168 of the Federal Code of 1999.[133] (*supra* paras. 43 and 44).

160. According to Article 161 of the Federal Code of 1999, "an order of formal detention shall be decreed within seventy-two hours of the accused being placed at the disposal of a judge, when the following requisites have been met: I. That the accused has given a preliminary statement in the manner and under the standards established in the preceding chapter or the record shows that he has refused to give a statement; II That it is demonstrated that the alleged offense provides for the deprivation of liberty; III. That, with respect to the prior clause, the probable guilt of the accused is demonstrated and IV. That there is no circumstance that would fully exonerate the accused from responsibility or that would quash the criminal proceedings."

161. In turn, Article 168 of the Federal Code of Criminal Procedure of 1999 established, and continues to state, that "the Public Prosecutor's Office shall indicate the *corpus delicti* involved and the probable responsibility of the accused as the basis for criminal proceedings. The judicial authority, in turn, shall examine whether both requirements are vouched for in the record. The *corpus delicti* is the combination of objective or external elements that make up the substance of a matter that the law expresses as an crime, as well as the norms, should the classification so require. The probable responsibility of the accused shall be proven when the existing evidence indicates participation in the crime, the intentional or unintentional commission of the crime and the lack of any indication of a legal cause or any reason to exclude his guilt. The *corpus delicti* and the probable responsibility shall be demonstrated by any evidentiary means set out in the law."

162. With respect to this institution, the Court notes that Article 161 refers solely to the concurrence of the substantive assumptions; in other words, to the imprisonable offense and the participation of the accused. The norm does not refer to the purposes of pre-trial detention nor to the procedural dangers that are sought to prevent, nor the requirement of an analysis of the necessity of the measure in view of the less harmful measures for the rights of the accused, such as the alternative measures to deprivation of liberty. In this context, the only circumstances that the courts may take into account when considering the imposition of this precautionary measure is that an extenuating circumstance of responsibility or the extinction of responsibility has been found. The Court likewise notes, in relation to the last point, that the norm requires an elevated standard of evidence to consider proved the extinction or exemption of responsibility, requiring that this be fully proven so that the pre-trial detention is not ordered; not be to considered, for example, the need to assess the concurrence of attenuating circumstances of responsibility nor the state of development of the offense. Therefore, as it is conceived, pre-trial detention does not have a precautionary purpose and becomes an anticipated punishment.

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132 See, for example, expert opinion of Luis Raúl González Pérez, offered at the public hearing.

133 *Cf*. Judicial Branch of the Federation. Resolution of the Judge of the Third District for Federal Criminal Proceedings of April 22, 2006 (evidence file, f. 14821 et seq.).

163. With regard to the purpose of pre-trial detention, the Court notes that the State in its answering brief affirmed that it was "one of the most active precautionary measures to dissuade persons involved in these schemes from continuing to collaborate in criminal organizations. It also seeks to have a preventive and dissuasive effect." It added that "[…] due to the transcendence and gravity of these offenses, the State has considered it necessary to establish pre-trial detention as an effective mechanism to prosecute these offenses and eliminate these conducts not only from the point of view of the special role of prevention of criminal law, but also from that of prevention in general, in seeking a dissuasive effect on the commission of offenses." On this point, the Court recalls that its case law has been clear and consistent in acknowledging only two legitimate purposes for pre-trial detention (*supra* para. 106) and that neither "the prevention in general" of certain offenses, no matter how serious, nor the "dissuasive effect" is not one of them nor should it be (*supra* paras. 108 and 109).

164. A reading of Article 161, where it deals with criminal proceedings for an offense that involves sanctions of the deprivation of liberty, it appears that when the substantive assumptions are proved, it is sufficient to verify that the statement of the accused has been taken (or there is a record of refusal to declare) in order to apply pre-trial detention. Article 161, thus, necessarily establishes the application of pre-trial for offenses that involve a certain gravity once the substantive assumptions are established, without conducting an analysis on the need for the measure of deprivation of liberty, taking into consideration the particular circumstances of the case.

165. The Court holds that Article 161 of the Federal Code of Criminal Procedure of 1999, applied in this case (*supra* para. 43), contained provisions that, per se, contravene various rights established in the Convention, such as the rights not to be arbitrarily deprived of liberty (Art. 7(5)) and to the presumption of innocence (Art. 8(2)). The Court, thus, concludes that the State infringed its obligation to adopt provisions of domestic law established in Article 2 of the Convention regarding the right to personal liberty (Art. 7) and to the presumption of innocence (Art. 8(2)) to the detriment of Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

B.3. On the application of arraigo and of pre-trial detention in the present case

166. Regarding the application of *arraigo* and of pre-trial detention against Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López by the orders of January 18, 2006 and April 22, 2006 (*supra* paras. 57 and 63), the Court notes, in the first place, that the State acknowledged its international responsibility for violating those rights by those orders.

167. In the previous chapter, the Court determined that the *arraigo* established in Article 12 of the Federal Law against Organized Crime of 1996 and in Article 133 of the Federal Code of Criminal Procedure of 1999 and pre-trial detention found in Article 161 of the Federal Code of Criminal Procedure of 1999 contravene the terms of the Convention, infringing the obligation to adopt provisions of domestic law, as established in Article 2, in relation to the rights to personal liberty and to the presumption of innocence set out in Articles 7 and 8(2) of the Convention. There is no doubt that by applying those measures that, per se, contravene the terms of the Convention, the domestic authorities infringed the rights to personal liberty and to the presumption of innocence to the detriment of the victims, thus failing to comply with its obligation of respect contained in Article 1(1) of the Convention.

B.4. Conclusion

168. In view of the above and of the State's acknowledgement of responsibility, the Court determines that the State is responsible for violating the rights to personal integrity established in Article 7(1), 7(2), 7(3), 7(5) and 7(6) of the Convention, to the presumption of innocence set forth in Article 8(2) and not to be compelled to be a witness against oneself contemplated in Article 8(2)(g), in relation to the obligation to respect and ensure the rights established in Article 1(1), as well as the obligation to adopt provisions of domestic law contained in Article 2, for having applied the institution of *arraigo* to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López (*supra* paras. 156 and 157).

169. The State is also responsible for violating the rights to personal liberty established in Article 7(1), 7(3) and 7(5) of the Convention, to the presumption of innocence set forth in Article 8(2) and not to be compelled to be a witness against oneself contemplated in Article 8(2)(g), in relation to the obligation to respect and ensure the rights established in Article 1(1), as well as the duty to adopt provisions of domestic law contained in Article 2, for having applied the institution of pre-trial detention to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López (*supra* para. 165).

170. The current texts of Article 133 of the Federal Code of Criminal Procedure and Article 12 of the Federal Law against Organized Crime continue to present various issues that were underscored in relation to the norms in force when the events occurred in the present case (*supra* para. 156), since persons subjected to *arraigo* continue to not being heard before a judicial authority before the order that restricts their personal liberty and their freedom to circulate and some of the objectives of these institutions are still not compatible with the legitimate purposes of a restriction to personal liberty under the Convention since the success of the investigation and the protection of persons and legal goods are not legitimate purposes under the Convention (*supra* para. 103). Therefore, the Court holds that the measures that restrict liberty must conform to the guidelines and standards previously stated so that they do not negatively affect the rights to personal liberty or to the presumption of innocence (*supra* paras. 96 to 114).

171. In general terms, the Court is of the opinion that any institution of a pre-procedural nature that seeks to restrict the liberty of a person in order to carry out an investigation of offenses that the person allegedly committed is intrinsically opposed to the terms of the Convention and manifestly infringes his right to personal liberty and to the presumption of innocence.

172. With regard to the current text of Article 161 of the Federal Code of Criminal Procedure concerning pre-trial detention, which was held to contravene the Convention, it has not been amended in relation to that which was in force and which was applied at the time of the events of this case.

173. Finally, the Court, for the reasons expressed, has no doubt that these institutions contravene the Convention. It notes that the State affirmed that it now had an adversarial criminal procedure. The two institutions analyzed in this chapter are not in accord with the Convention precisely because they infringe some of the principles of that system, such as the principle of adversarial proceedings, equality of arms in the proceedings, the presence of a judge and the publicity.

VIII.2
THE RIGHTS TO PERSONAL INTEGRITY[134] AND TO PRIVACY[135] IN RELATION TO THE OBLIGATION TO RESPECT THE RIGHTS[136]

A. Arguments of the parties and of the Commission

174. The ***Commission*** claimed that the victims were held incommunicado on January 12, 2006 for seven and a half hours (between 11:30 a.m. and 7:00 p.m.). It added that their only human contact was with a medical doctor to whom they had to pay a fee to be examined. It indicated that they were then taken to the Public Prosecutor's Office of the city of Orizaba, where they were held incommunicado until January 14, when they gave their first statements. The Commission also claimed that the victims had to remain the night of January 16 on the floor of the UEITA offices. It also alleged that they were not able to communicate with family members in order to inform them of the detention. The Commission, therefore, concluded that such a situation affected the victims' personal integrity, in

134 Article 5 of the Convention.

135 Article 11(2) of the Convention.

136 Article 1(1) of the Convention.

violation of Article 5(1) of the Convention, read in conjunction with Article 1(1) thereof, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

175. The Commission also alleged that the sum of violations resulting from the arbitrary deprivation of liberty and from the proceedings without judicial guarantees also affected their right to mental integrity. It concluded that the State violated Article 5(1) of the Convention, read in conjunction with its Article 1(1) thereof, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

176. The Commission also argued that the search of the vehicle in which Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López were traveling negatively affected their right to privacy and it concluded that the State infringed the right established in Article 11(2) of the Convention, read in conjunction with Article 1(1) thereof, to their detriment.

177. The ***representatives*** augmented the Commission's allegations with "the fact that the detention of the victims was arbitrary increased their vulnerability before the authorities, which added to the precarious conditions of detention of *arraigo* and the Mexican penitentiary system, and the threats to which they were subjected infringed their right to mental integrity." With regard to the alleged violation of the right to privacy, they agreed with the Commission's position and added that the searches of March 31, 2006 of the home of the mother of the brothers Tzompaxtle Tecpile and that of the shop that housed the family business violated their right to privacy. They argued that these actions were carried out without a search warrant and were an abuse of power under the law that allows the authorities to investigate crimes since no element of the applicable criminal offenses could be investigated or proved as a result of the documents and publications gathered.

178. The ***State*** acknowledged its international responsibility for violating Articles 5(i) and 11 of the Convention to the detriment of the victims. It specifically referred to its responsibility for the events related to the conditions of isolation and incommunicado to which Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López were subjected during their detention, as well as the detention and search of the vehicle in which they were traveling (*supra* para. 14).

179. Regarding the alleged violation to the right to privacy due to the search of the home of the mother of the brothers Tzompaxtle Tecpile and of the shop that housed the family business, the State claimed that the decision of October 16, 2008 of the Second Central Criminal Court of the Seventh Circuit, which acquitted Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López of the charges brought by the OPP, held that the acts involved in the searches that were the basis for the federal judge to consider proved the crime of terrorism were not legally valid and, therefore, reversed the decision of the domestic court.

B. Considerations of the Court

180. The Court recalls that the State acknowledged its responsibility for violating Articles 5 and 11(2) of the Convention, in relation to the obligation to respect the rights contained therein, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López (*supra* para. 14). However, there remains the controversy on the alleged infringement of the right to privacy (Article 11(2)) due to the searches, on March 31, 2006, of the home of the mother of the brothers Tzompaxtle Tecpile and of the shop that housed the family business.

181. Notwithstanding the above and the State's acknowledgement, given the nature of the facts of the case and of the violations produced, the Court deems it necessary to refer to some points related to the rights to personal integrity and to privacy and to analyze the alleged violations of the Convention that were not acknowledged by the State regarding the searches of the home of the mother of the brothers Tzompaxtle Tecpile and of the shop that housed the family business. Thus, this section will take up those points in the following order: a) the right to personal integrity of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López and b) the right to privacy of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

B.1. The right to personal integrity of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López

182. Under Article 5 of the Convention, all persons deprived of liberty have the right to be placed in a situation of detention that is compatible with their personal dignity. The Court has pointed out that the physical harm, suffering, damages to health and general harm suffered by persons while they are deprived of liberty may be a form of cruel treatment when, due to the conditions of the confinement, there is a deterioration of physical, mental and moral integrity, strictly prohibited by Article 5(2) of the Convention, which is not a natural and direct consequence of the deprivation of liberty itself. With regard to the conditions of detention, the Court has stated that maintaining persons in conditions of isolation and incommunicado or unduly restricting visits violates the right to personal integrity.[137]

183. The Court has noted that various experts who appeared at the public hearing stated that "different international and national bodies have documented that the condition of incommunicado is a common practice when the measure of arraigo is imposed." The experts, likewise, indicated, that there have been reports of cases of torture and other cruel, inhuman or degrading treatment in applying that measure.[138] They also stated that, in addition to "encouraging torture, *arraigo* is related to incommunicado and to impeding the right to an adequate defense" and that "the lack of access to an adequate defense is frequently combined with a lack of contact with family members or other persons, in a context of incommunicado."[139]

184. On this point, the UN Human Rights Committee has stated that "persons detained under "arraigo" are exposed to ill-treatment"[140] and the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has observed "of all of the reports of abuse heard by the delegation during its visit, the most alarming came from people held under "arraigo" (investigative or pre-trial detention)." It has also pointed out that, where there have been detentions under *arraigo*, "although this form of detention is intended to be the least restrictive of liberty, it is in fact - since persons detained under this arrangement have not yet been formally investigated - the form of detention that is the most restrictive of the liberty of the individual. People under *arraigo* are at times held completely incommunicado and neither their families nor their lawyers have any information on their whereabouts. Such situations can render the individual defenseless against situations of torture and cruel, inhuman or degrading treatment. The delegation interviewed persons detained under *arraigo* in all the states visited." It concluded that "the institution of *arraigo penal* could lead to encouraging the practice of torture by creating spaces of little oversight and vulnerability for the persons held under *arraigo,* who do not have any clearly defined legal status to be able to exercise their right of defense."[141]

185. The representatives asserted that "the repeated state of incommunicado of the victims during the first days of detention and even the judicial order of detention under *arraigo* caused them severe anguish, especially because they did not know what was happening at the beginning and also when they learned that they were being investigated for the grave offense of terrorism, which they did not commit and on which the State ultimately acquitted them." In addition, "the fact that the detention of the victims was arbitrary increased their vulnerability before the authorities, which added to the precarious conditions of detention of *arraigo* and the Mexican penitentiary system, and the threats to which they were subjected infringed their right to mental integrity." In turn, Gerardo Tzompaxtle declared that the damages caused to them "are much mental damage, psychological damage, societal

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137 *Cf*. *Case of Tibi v. Ecuador, supra,* para. 150; *Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2006. Series C No. 160, para. 315 and *Case of Hernández v. Argentina*, *supra*, para. 60.

138 Statement of expert Carlos María Pelayo Moller, offered at the public hearing. Also, statement of the expert Luis Raúl González Pérez at the public hearing.

139 Affidavit of Stephanie Erin Brewer, offered at the public hearing (evidence file, f. 31096 et seq.).

140 Cf. UN, Final observations of the Human Rights Committee (April 7, 2010), CCPR/C/MEX/CO/5, para. 15.

141 *Cf.* UN, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico (May 31, 2010), CAT/OP/MEX/1, paras. 142, 217 and 238.

damage in that everyone views you with disdain, speaks bad about you, criticizes you, and says bad things about you."[142]

186. The Court is clear that the conditions of incommunicado and isolation in which the victims were deprived of their liberty under *arraigo*, which were acknowledged by the State, transcend the circumstances of the specific case and are usually found in the contexts in which *arraigo* is applied. As was indicated in the experts' statements and in the reports of different international human rights organizations, the application of *arraigo* carries with it a series of harmful effects to human rights that extend beyond the rights to personal liberty and to the presumption of innocence analyzed in a previous chapter (*supra* paras. 156 and 157) and that includes situations intrinsically linked with harm to the personal integrity of persons held under *arraigo*. Those harms to the right to personal integrity are usually presented under the form of measures of incommunicado, of isolation, of tortures or other cruel, inhuman or degrading treatment. In this scenario, persons held under *arraigo* usually find themselves in a situation of complete vulnerability and defenselessness with regard to the harm to their physical and psychological integrity. This is, precisely, what occurred in this specific case.

187. In view of the above and the State's acknowledgement of responsibility, the Court finds that in the case *sub examine* there was also a violation of Article 5, in relation to its obligation of respect established in Article 1(1), to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

B.2. The right to privacy of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López

a) The search of the vehicle in which the victims were traveling

188. The Commission and the representatives alleged that the search of the vehicle in which the victims were traveling was an infringement of their right to privacy, set forth in Article 11(2) of the Convention, which provides that "(n)o one may be the object of arbitrary or abusive interference with his privacy, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

189. The Court has stipulated, with regard to Article 11, that although this provision is entitled "Protection of honor and dignity" in the Spanish version of the Convention, [Right to Privacy in the English version] its content includes, *inter alia*, the protection of privacy.[143] The Court has held that the sphere of personal and family privacy protected by this article is characterized by being exempt and immune from abusive or arbitrary invasions or interferences by third parties or public authorities. Therefore, the Court considers that the possessions that persons are carrying when they are in a public place, even when those persons are in a car, represent belongings that, similar to those that are to be found in their home, are included within the sphere of protection of the right to privacy. Therefore, they may not be subjected to arbitrary interference by third parties or the authorities.[144] The European Court of Human Rights, likewise, has indicated with respect to the searches and their relationship with the right to privacy that that "the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life."[145]

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142 Affidavit of Gerardo Tzompaxtle (evidence file, f. 31093).

143 *Cf. Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2006 Series C No. 148, paras. 192 and 193 and *Case of Fernández Prieto and Tumbeiro v. Argentina, Merits and Reparations.* Judgment of September 1, 2020. Series C No. 411 para.102.

144 *Cf. Case of Fernández Prieto and Tumbeiro v. Argentina, supra,* para. 102.

145 *Cf.* ECHR. *Case of Gillan and Quinton v. Great Britain,* Judgment of June 28, 2010, Application No. 4150/05, paras. 62 to 65.

190. Although the State acknowledged its responsibility for the search of the vehicle in which the victims were traveling (*supra* para. 14), at a previous procedural stage it had argued that the search was done with the consent of the driver, Gerardo Tzompaxtle Tecpile, as was registered in the Report No. 43/2006, of January 12, 2006, issued by the policemen who were at the scene and, therefore, it cannot be referred to as a "search." It added that the agents of the Federal Preventive Police requested the pertinent documents from Gerardo Tzompaxtle Tecpile, who was not in possession of a driver's license as he stated in his statement of January 14, 2006. The different versions as to where they were headed and the evasion of two of the passengers, added to the above, were considered reasonable justifications to ask the passengers for permission to search the vehicle.

191. The Court deems it important, as it did in *Fernández Prieto and Tumbeiro v. Argentina,*[146] *to* determine whether the domestic authorities had the authority, either by law of by regulations, to search the vehicle. On this point, the Court notes that the State did not refer to any norm that enabled the authorities to search vehicles; it only alluded to the authorization of the driver and to "compliance of duties." With regard to what constitutes "a reasonable suspicion" that a crime has been committed, the European Court of Human Rights has indicated that these words "mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[147]

192. Therefore, the search of the vehicle in which the victims were traveling infringed the right to privacy recognized in Article 11(2), in relation to the State's obligation contained in Article 1(2), to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López.

b) The searches of the house of the mother of the brothers Tzompaxtle Tecpile and the shop that housed the family business

193. With regard to this allegation, the Court notes that the State acknowledged in its answering brief that the decision of October 16, 2008 of the Second Collegiate Criminal Court of the Seventh Circuit, which acquitted Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López, of the charges brought by the Federal Public Prosecutor considered that the search that served as the base for the federal judge to consider as proved the offense of terrorism had no legal basis (*supra* para. 71). On the basis of that declaration of invalidity, the State argued that the "judge reversed the violation expressed by the domestic court."

194. In the inter-American system there is a dynamic and complementary control of the States' conventional obligations to respect and ensure human rights, conjointly between the domestic authorities (primarily obligated) and the international instances (in a complementary role), so that the criteria of decision and the mechanisms of protection, both domestic and international, can be put in agreement and made adequate. Thus, in application of the principle of complementarity (or subsidiarity), the Court has affirmed that State responsibility under the Convention can only be demanded on the international level after a State has had the opportunity to acknowledge, when appropriate, a violation of a right and to repair by its own means the harm caused. In this way, when the State ceases the human rights violations and repairs the victims of those violations, the Court is not empowered to declare the international responsibility for those violations.[148]

195. On this point, the Court notes that there is no doubt that the State, through one of its judicial bodies, acknowledged that there was an infringement to privacy to the detriment of Gerardo Tzompaxtle Tecpile and of Jorge Marcial Tzompaxtle Tecpile when, on October 32, 2006, authorities searched the home of their mother and the shop that housed the family business (*supra* para. 31).

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146 *Cf. Case of Fernández Prieto and Tumbeiro v. Argentina, supra,* paras. 68 et seq.

147 ECHR. *Case of Ilgar Mammadov v. Azerbaijan*, Judgment of October 13, 2014, Application No. 15172/13, para. 88.

148 *Cf. Case of the Santo Domingo Massacre v. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of November 30, 2012. Series C No. 259, para. 143 and *Case of Habbal et al. v. Argentina, supra*, para. 82.

However, the State did not specifically indicate how the victims were repaired for those events. The State only alluded to the fact that, in the decision of October 16, 2008 that acquitted Gerardo Tzompaxtle Tecpile, Jorge Marcial Tzompaxtle Tecpile and Gustavo Robles López, of the OPP's charge, the "judge reversed the violation found in the lower court" (*supra* para. 71). Thus, it cannot be concluded that the State repaired the violations of the right to privacy of Gerardo Tzompaxtle Tecpil and Jorge Marcial Tzompaxtle Tecpile and that the principle of complementarity should be applied to the events relating to the aforementioned searches. Therefore, the State is responsible for the infringement of the right to privacy, contained in Article 11(2) of the Convention, in relation to the obligation of respect contained in Article 1(1) therein, to the detriment of Gerardo Tzompaxtle Tecpile and Jorge Marcial Tzompaxtle Tecpile for the searches of the house of their mother and the shop that housed the family business.

IX
REPARATIONS[149]

196. On the basis of Article 63(1) of the Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[150]

197. Reparation for the harm caused by the infringement of an international obligation requires, to the extent possible, full restitution (*restitutio in integrum*), which consists in the restoration of the prior situation. If this is not possible, as occurs in most cases of human rights violations, the Court will determine the measures to ensure the infringed rights and to redress the consequences of the violations.[151] Therefore, the Court has considered the need to provide different types of reparation that would fully redress the damages in a way that, in addition to pecuniary compensation, other measures such as restitution, rehabilitation, satisfaction and guarantees of non-repetition would have a special relevance for the damage caused.[152]

198. The Court has also established that reparations must have a causal connection with the facts of the case, the alleged violations, the proven damages and the measures requested for the redress of the resulting damages. The Court will, therefore, analyze such concurrence to rule properly and according to law.[153]

199. Therefore, in view of the considerations expressed on the merits and on the violations of the Convention declared in this judgment, as well as in light of the criteria established in its case law on the nature and scope of the obligation to repair, the Court shall now proceed to analyze the claims presented by the Commission and the representatives, as well as the observations of the State, in order to order the measures to redress the damage caused.[154]

200. The Court reiterates that, during the proceedings before the Commission, the representatives and the State signed a Memorandum of Understanding, which was not endorsed by the Commission

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149 Application of Article 63(1) of the American Convention.

150 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25 and *Case of Deras García et al. v. Honduras, supra*, para. 90.

151 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 24 and *Case of Deras García et al. v. Honduras, supra*, para. 91.

152 *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 Deras García et al. v. Honduras, supra*, para. 91.

153 *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 Deras García et al. v. Honduras, supra*, para. 92.

154 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra,* paras. 25 and 26 and *Case of Deras García et al. v. Honduras, supra*, para. 93.

(*supra* para. 2(d)). In any event, the State is in the process of complying with various measures of reparation that have been agreed upon by the representatives and that are now the subject of claims before the Court.

A. Injured party

201. The Court, pursuant to the terms of Article 63(1) of the Convention, considers an injured party to be anyone who has been declared a victim of a violation of a right recognized in the Convention. Therefore, the Court considers, as "the injured party," Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, who as victims of the violations declared in Chapter VIII and in the Chapter on Acknowledgement of State Responsibility (*supra* Chapter IV) are considered the beneficiaries of the reparations ordered by the Court. The Court notes that, according to the representatives, Gustavo Robles López died on November 26, 2015 (*supra* para. 79) and thus his interests, where appropriate, are wielded by his heirs, Anacely Martínez García, his permanent companion, and David Martínez García, their son."

202. Notwithstanding the above, the Court also notes that, under the Memorandum of Understanding, the parties agreed to recognize Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and the heirs of Gustavo Robles López as direct victims and that "accordingly, the Executive Commission for Assistance to Victims, on the basis of Title Four of the General Law for Victims, will be asked to take the necessary steps to include those persons in the National Registry of Victims so that they might have access to the measures of assistance and care established by that law."[155] In virtue of the broad acknowledgement of State responsibility and of the spirit and scope of the agreement in favor of the family members of the aforementioned victim, the Court recognizes the agreement in this aspect and will consider Anacely Martínez García and David Martínez García as beneficiaries of the measures of reparations agreed to in the Memorandum of Understanding.

B. Guarantees of non-repetition

203. The ***Commission*** requested that the State be ordered to adapt its "domestic legal order, including the constitutional and legal norms that maintain the institution of *arraigo*, so as to definitively eliminate that institution." Until this occurs, the Commission requested that the State be ordered "to ensure that the justice operators, called upon to apply *arraigo*, refuse to do so by invoking control of constitutionality in light of the standards established in this judgment."

204. The ***representatives*** requested that the State be ordered to adapt its domestic legal order, including constitutional and legal norms, by definitively eliminating the institutions of *arraigo* and pre-trial detention *sua sponte*. They added that such a measure is appropriate even though the laws have been modified since the events occurred because the laws have not been cleansed of "the toxic effects" of those institutions and because there has not been a compliance with the duty to adopt provisions of domestic law. The representatives claimed that "as long as this legislative measure is not complied with, the national justice operators, especially the judges, must exercise a control of constitutionality regarding those institutions and not apply them in any case before them, but rather they must apply measures that do not violate human rights, such as justified pre-trial detention and other measures of a precautionary nature."

205. The ***State*** expressed "being open to a public debate on the control mechanisms and restrictions of *arraigo* after its transformation since the entry into force of an accusatory criminal system." It proposed "that an open assembly be organized," which would "include the diversity of positions on this institution with State authorities and with civil society." It invited the representatives of the victims to participate in its planning. It added that "the proposal of an open assembly seeks to create a democratic dialogue in the Congress that would include the different positions on *arraigo*, especially

[155] *Cf.* Memorandum of Understanding for an eventual signing of an Agreement of Compliance of the Report on the Merits of Case 13,016, of February 20, 2020, Third (evidence file, f. 6044).

those of State institutions, such as the Supreme Court, the Legislature, the federal administrative authorities and civil society that are opposed to this legal institution." It claimed that this mechanism "could result, democratically, in the elimination of *arraigo* and it therefore considered it the ideal mechanism to comply with the State's commitments under the Memorandum of Understanding."

206. With regard to the elimination of pre-trial detention *sua sponte*, the State indicated that "this claim was unacceptable" because both the representatives and the Commission "have failed to demonstrate how the institution of pre-trial detention violated the right to personal liberty of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López and, therefore, the Court could not analyze that legal institution in its totality from a specific case in which the alleged violation did not exist." It also claimed that its argument was strengthened since the conclusions in the Commission's Report on the Merits "did not consider that recommendation necessary."

207. With regard to this request, the ***Court*** notes, in the first place, that in the Memorandum of Understanding, the State "committed to take steps to pass legislation to eliminate the institution of *arraigo* in the Mexican normative by means of meetings to be held in coordination with the Congress."

208. The Court notes that the request for reparations presented by the representatives related to the amended normative refers to the institutions of *arraigo* and of pre-trial detention (*supra* para. 204). It should be remembered that in Chapter VIII.1 of this judgment, the Court concluded that the State is responsible violating its obligation to adopt provisions of domestic law, established in Article 2, regarding the rights to personal liberty and the presumption of innocence (Articles 7 and 8(2)), to the detriment of Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López, because they had been charged with the legal institutions of *arraigo* and pre-trial detention that were, by means of their regulation through the Federal Law against Organized Crime of 1996 and the Federal Code of Criminal Procedure of 1999, *per se*, contrary to the Convention (*supra* para. 157).

209. However, as has been indicated in the chapter on the facts (*supra* paras. 39 to 41), the texts of these norms has been amended after the events that gave rise to the case. The Court will now analyze the current normative provisions and compare them with those that were in force when the events occurred to determine whether the issues in the normative that was applied were corrected or whether they continue in the amended norms or in others that subsequently appeared in the legal order.

B.1. On the institution of arraigo

210. The Court notes that both Article 12 of the Federal Law against Organized Crime[156] and Article 133 bis of the Federal Code of Criminal Procedure[157] have texts that are different than those in force when the events occurred.

211. With respect to Article 133 of the Federal Code and Article 12 of the Federal Law, as was pointed out in Chapter VIII.1 on the merits (*supra* para. 170), the Court notes that some of the problematic issues that were discussed in that chapter (*supra* para. 156) continue to exist, such as: a) persons *arraigados* are not heard by a judicial authority before a decree that restricts their personal liberty or their freedom to circulate; b) those norms do not refer to the substantive assumptions that must be complied with in order to apply that type of restrictive measures to personal liberty and the presumption of innocence and c) some of the objectives of the measures that restrict liberty are not compatible with legitimate purposes to restrict personal liberty under the Court's case law (since the

156 It should be recalled that Article 12 of the Federal Law against Organized Crime of 1996 establishes that:

> The judge may, at the request of the Public Prosecutor's Office of the Federation and taking into account the nature of the alleged event and the personal circumstances of the accused, decree *arraigo* against the accused in the place, form and means of implementation set out in the request, under the surveillance of the authority, which is to be exercised by the Public Prosecutor's Office and its aides and which may be extended for the period strictly necessary for processing of the preliminary investigation**,** but not to exceed ninety days, so that the person in question may participate in clarifying the events imputed to him, which might reduce the period of *arraigo*. CHECKED
>
> The current text of Article 12 of the Federal Law against Organized Crime reads as follows:
>
> The control judge may, at the request of the Public Prosecutor's Office of the Federation, order *arraigo* when it involves the crimes set forth in that Law, provided that it is necessary for the success of the investigation, for the protection of persons, or legal goods or when there is a well-founded risk that the accused might evade the action of justice.
>
> The arraigo may not exceed forty days and shall be overseen under the authority of the agent of the Public Prosecutor's Office and the Police that are under his leadership and immediate orders in the investigation.
>
> The duration of the arraigo may be extended provided that the Public Prosecutor's Office demonstrates that the causes that gave origin to it continue, but its total duration may not exceed eighty days.

157 It should be recalled that Article 133 bis of the Federal Code of Criminal Procedure establishes that:

> The judicial authority may, at the request of the Public Prosecutor's Office, order house *arraigo* or impose a prohibition to leave a determined geographical area without his authorization for the person against whom the implementation of criminal proceedings is being prepared, provided that the exists a well-founded risk of evading the action of justice. The Public Prosecutor's Office and its aides shall oversee that the order of the judicial authority is duly complied with.
>
> House arraigo or the prohibition to leave a determined geographical area may be prolonged for the period strictly essential, but should not exceed thirty natural days in the case of *arraigo* and sixty natural days in case of the prohibition to leave a determined geographical area.
>
> When the accused person asks that the house *arraigo* or the prohibition to leave a determined geographical area is not honored, the judicial authority shall decide, after consulting the Public Prosecutor's Office and the accused as to whether it should be maintained.

The current text of Article 133 bis of the Federal Code of Criminal Procedure reads as follows:

> The judicial authority may, at the request of the Public Prosecutor' Office, order the house *arraigo* of the accused when it concerns serious crimes, provided that it is necessary for the success of the investigation, the protection of persons, or legal goods or when there exists a well-founded risk that the accused might evade the action of justice. The Public Prosecutor's Office and its aides shall oversee that the order of the judicial authority is duly complied with.
>
> House *arraigo* shall be prolonged for the period strictly essential, but shall not exceed forty days.
>
> The accused may request that the arraigo be annulled when he considers that the causes that gave rise to tit have disappeared. In this assumption, the judicial authority shall consult the Public Prosecutor's Office whether it should be maintained.

success of the investigation and the protection of persons or legal goods are not legitimate ends). Those same problematic issues were repeated in the text of Article 16 of the Federal Constitution.[158]

B.2. On pre-trial detention

212. With respect to pre-trial detention, Articles 161 and 168 of the Federal Code of Criminal Procedure continue to be in force with the same text as when the events occurred. In addition, Article 19 of the Federal Constitution[159] and Article 3 of the Federal Law against Organized Crime establish that the offense of organized crime, as well as that mentioned in Article 2(o), 2(o)(Bis) and 2(o)(Ter) of that law, impose pre-trial detention *sua sponte* (*supra* para. 46).

213. The Court notes that the problematic issues that have been indicated in the chapter on the merits still persist and were even amplified in the later norms. Those aspects are a) they do not refer to the purposes of pre-trial detention nor to the procedural dangers to be guarded against (*supra* para. 106) in cases of pre-trial detention *sua sponte* for offenses related to organized crime; b) nor do they propose analyzing the need of the measure compared with others less harmful to the rights of the persons being tried, such as alternative measures of deprivation of liberty (*supra* para. 111) and c) that it necessarily establishes the application of pre-trial detention for offenses with a certain gravity once the material assumptions are established, without having to analyze the need for the precautionary measure in view of the particular circumstances of the case (*supra* para. 108).

B.3. Conclusion

214. In view of the foregoing, while it is true that the laws used to apply *arraigo* and pre-trial detention to the events of this case has varied, the Court has no doubt that the aspects that make it incompatible with the Convention, as has been pointed out *supra*, continue in their latest texts. These aspects lead the Court to declare that the norms that govern the institutions of *arraigo* (Article 133 bis Federal Code of Criminal Procedure and Article 12 of the Federal Law against Organized Crime) and of pre-trial detention (Article 161 of the Federal Code of Criminal Procedure) were contrary to the Convention and to the State's obligation to adapt its domestic provisions, pursuant to Article 2 of the Convention.

215. The Court recalls that a State's general duty under Article 2 includes both the adoption of measures that derogate all norms and practices that imply a violation of the guarantees set forth in

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158 The law on *arraigo* has been complemented subsequent to the events of the case by Article 16 of the Constitution of Mexico, which reads as follows (*supra* para. 38): "The judicial authority, at the request of the Public Prosecutor's Office and in the case of organized crime offenses, may order the arraigo of a person, with the modalities of place and time specified by law, but may not exceed forty days, provided that it is necessary for the success of the investigation, the protection of persons or legal assets, or when there is a well-founded risk that the accused will evade the action of justice. This period may be extended, provided that the Public Prosecutor's Office proves that the causes that gave rise to it still exist. In any case, the total duration of the arraigo may not exceed eighty days."

159 Article 16 establishes that:

"Detentions before a judicial authority in excess of seventy-two hours, counted from the moment the accused is presented before the authority, are prohibited unless formal charges are presented indicating the place, time and circumstances of such crime, as well as the evidence that a event has occurred that the law classifies as a crime and that there exists the probability that the accused has committed or participated in its commission."

The Public Prosecutor's Office may request that the judge order pre-trial detention when other precautionary measures are not sufficient to ensure the presence of the accused at his trial, the development of the investigation, the protection of the victim, witnesses or the community, as well as when the accused is on trial or has been previously convicted for having committed a willful crime. The judge may order preventive detention *sua sponte* in cases of sexual abuse or violence against minors, organized crime, willful homicide, feminicide, rape, kidnapping, human trafficking, home robberies, use of social programs for electoral purposes, corruption through unlawful enrichment and the abuse of office, robbery of trucks in any of its forms, crimes in the area of hydrocarbons, petroleum products or petrochemicals, the forced disappearance of persons and disappearances committed by persons, crimes committed by violent means such as firearms and explosives designed for the exclusive use of the Army, Navy and Air Force, as well as serious crimes determined by law against the security of the nation, of the free development of the personality and of health.

the Convention and the issuance of norms and the development of practices that lead to the effective observance of such guarantees.[160]

216. With respect to the institution of *arraigo* as a pre-trial measure that restricts liberty in order to investigate, the Court finds that it is incompatible with the Convention since the hypotheses that underlie its inherent characteristics are not compatible with the rights to personal liberty and to the presumption of innocence. Thus, the Court considers that the State must leave without effect, in its legal order, the norms on *arraigo* as a pre-trial measure that restricts liberty in order to investigate.

217. With respect to pre-trial detention, the Court, as it has done in other cases,[161] orders that the State adapt its legal order so that it is compatible with the Convention. To that effect, the State shall take into consideration what has been indicated in paragraphs 96 to 114 of the judgment, which sets out the requisites that measures of this nature must comply with so that they conform with the Convention.

218. On the other hand, the derogation or adaptation of domestic law would not necessarily ensure the rights contained in the Convention under the obligation contained in Article 2. There also has to be a development of State practices conducive to the effective observation of the rights and liberties established in the Convention. The mere existence of a norm does not ensure that its application is adequate. The application of the norms or their interpretation, both in jurisdictional practice and in the manifestation of State public order, must be adjusted to the same end that Article 2 pursues.

219. Therefore, domestic authorities, in applying *arraigo* or pre-trial detention, must exercise an adequate control of conventionality so that they do not negatively affect the conventional rights of persons being investigated or being tried for an offense. It bears repeating that when a State has ratified an international treaty such as the American Convention, all of its organs, including its judges, are subjected to it, which obligates them to ensure that the effect of the Convention is not diminished by the application of norms contrary to the treaty's object and purpose,. Therefore, within their respective competences and the relevant procedural rules, the judges and bodies involved in the administration of justice at all levels have the obligation to exercise *ex officio* a control of conventionality between the domestic norms and the Convention and, in so doing, they must take into account not only the treaty, but also its interpretation by the Court, which is the final interpreter of the Convention.

C. Measures of satisfaction[162]

C.1 Publication of the judgment

220. The ***representatives*** requested that the State be ordered to publish the complete official summary of this judgment in the Official Gazette of the Diario Semanario Judicial (Weekly Legal Diary) of the Federation and in its Gazette, as they are the main organs of dissemination of legal information in Mexico. It also asked that the State be ordered to publish, once, the official summary of the Court's judgment in a newspaper of wide national circulation, in a legible and adequate font. Finally, they requested that the full judgment be available for one year in an official Website of the Government of Mexico. The ***Commission*** did not specifically refer to this measure.

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160 *Cf*. *Case of Durand and Ugarte*. *Merits.* Judgment of August 16, 2000. Series C. No. 68, para. 137; *Case of the "Juvenile Reeducation Institute" v. Paraguay*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, para. 112 and *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, para. 85.

161 *Cf*. *Case of the Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits and Reparations*. Judgment of November 17, 2021. Series C No. 445, para. 144 and *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 26, 2001. Series C No. 77, para. 98.

162 The Commission recommended that the State, in general terms, "fully repair Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and the heirs of Gustavo Robles López, with measures of compensation and satisfaction that include indemnification for the pecuniary and non-pecuniary damages caused."

221. The ***State*** indicated that, should the Court deliver a judgment, "it commits to implement the measures regarding publication and the dissemination thereof." The Court notes that the Memorandum of Understanding establishes that the State commit to "publishing in two newspapers of national circulation the summary of the Report on the Merits and to publish the entire document on the Webpages of the Secretariats proposed by the representatives" (*supra* para. 2(d)).

222. Therefore, the ***Court*** orders, as it has done in other cases,[163] that the State publish, within six months of notification of this judgment, in a legible and adequate font: a) the Court's official summary of this judgment, once, in the Official Gazette and in the Diario Semanario Judicial of the Federation and its Gazette; b) the Court's official summary of this judgment, once, in a newspaper of wide national circulation and c) the complete judgment, available for one year, on the official Website of the Government of Mexico in a manner that is available to the public and on the initial page of the Website. The State shall immediately inform the Curt once it has published each of the above, irrespective of the period of one year to present its first report, as ordered in Operative Paragraph 12 of this judgment.

C.2 Public act of acknowledgement of international responsibility

223. The ***representatives*** requested, in order to redress the damage caused to the victims, the holding of a public act of acknowledgement of responsibility and apology to the victims. They indicated that to be "an effective measure of satisfaction," such act "must have the participation of senior authorities of the State, held in the presence of, and in coordination with the prior agreement, of the victims and their representatives." The ***Commission*** did not specifically refer to this measure.

224. The ***State*** affirmed that, in the event that the Court found the State responsible, it committed to hold the act of acknowledgement. The Court noted that the Memorandum of Understanding establishes that State "senior officials shall offer the victims of the case an Act of Public Apology and Acknowledgement of Responsibility for the events indicated by the Commission in its Report on the Merits. The format of such act will be coordinated with the victims and their representatives" (*supra* para. 2(d)).

225. The ***Court*** deems it necessary to order, with the purpose of repairing the harm caused to the victim and to avoid that events such as in this case are not repeated, that the State hold a public act of acknowledgement of international responsibility with regard to the events of the present case. At that act, there must be references to the human rights violations declared in this judgment. The act shall be held in a public ceremony in the presence of senior State officials and of the victims declared in this judgment, if they so wish, and their representatives.[164]

226. The State, the victims and/or their representatives must agree on the means of compliance of the public act and on specific aspects, such as the place and date on which it will be held.[165] In addition, the State shall ensure that the victims have the possibility of attending, for which it should pay the transportation expenses. The Court, as it has done in other cases,[166] orders that the State disseminate the act by the broadest possible means of communication, including the radio, television and social media. The State authorities who should be present or participate in the act must be senior State officials, including senior officials of the Secretariat of Justice. The State shall have one year from the

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163 *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 79 and *Case of Digna Ochoa et al. v. Mexico*, *supra*, para. 167.

164 *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs, supra,* para. 81 and *Case of Manuela et al. v. El Salvador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 2, 2021. Series C No. 441, para. 276.

165 *Cf. Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2009. Series C No. 209, para. 353 and *Case of Manuela et al. v. El Salvador*, *supra*, para. 277.

166 See, for example, *Case of the Miguel Castro Castro Prison v. Peru, supra*, para. 445 and *Case of Manuela et al. v. El Salvador*, *supra*, par. 276.

notification of this judgment to comply with the obligation to hold an act of acknowledgement of international responsibility.

C.3 Scholarships

227. The ***representatives*** claimed that "the violations suffered by the victims had the consequence of limiting their possibilities and those of their direct family members of adequately continuing with their professional formation." They recalled that, nonetheless, "both Jorge Marcial Tzompaxtle Tecpile and David Martínez García, son of Gustavo Robles López, have made grand efforts to enter the university" and that, in doing so, "they have had to overcome an important series of obstacles arising from the stigmatization of this case and the structural discrimination that confronts indigenous persons in the Mexican educational system. These obstacles could be resolved to a great extent with the granting of scholarships." They also referred to the Memorandum of Understanding in which the State committed to provide such educational benefits. The representatives indicated that in the case of David Martínez García the scholarship was calculated at a total value of MXN 344,044.00 (approximately USD 16,800 at the current exchange rate). Nevertheless, they claimed that "to date only MXN 57,340.80 have been paid." They added that the scholarship for Jorge Marcial Tzompaxtle Tecpile "has not been determined nor paid by the State." The ***Commission*** did not refer specifically to this measure.

228. The ***State*** indicated that, with regard to the scholarship of David Martínez García, a partial payment was made because "the Rules of Operation of the Escrow Account for the Compliance with the Human Rights Obligations" do not permit the payment in advance for the total of years of study, but that the scholarship is paid in accordance with the school cycles." While the State manifested its will to continue to comply with its commitment under the Memorandum of Understanding, it requested that the representatives offer proof of registration for the next school cycle in order to make the corresponding payment. On the other hand, ""due to the limitations of the Rules of Operation and in order to cover the school years that David Martínez García had already spent prior to the signing of the Memorandum of Understanding, the State will analyze the possibility that, with the collaboration with another mechanism, an additional USD 114,681.60 to that mentioned by the representatives be covered."

229. In the Memorandum of Understanding, the State committed to offer a scholarship to the son of Gustavo Robles López, to be paid from the aforementioned Escrow Account in accordance with its Rules of Operation, which would be done "through the Human Rights Unit of the Ministry of the Interior." The Memorandum stipulates that "an sub-account in his name will be created and annual payments will be made once he has presented the documents that show his registration in the following school cycle, until he concludes his university studies. The financial proposal that will be presented to the Technical Committee of the Escrow Account consists in creating a sub-account in the amount of MXN 344,044.80. The offer of a scholarship so that Jorge Marcial Tzompaxtle Tecpile might begin to study for a Master's degree is awaiting the reply of the pertinent authorities."

230. The ***Court*** finds it necessary to order, in accordance with the agreement of the parties in the Memorandum of Understanding, a scholarship for the son of Gustavo Robles López and another for Jorge Marcial Tzompaxtle Tecpile for a Master's degree. These scholarships will be governed under the provisions of the Memorandum. The scholarship for the son of Gustavo Robles López will be administered by the Unit for the Defense of Human Rights of the Ministry of the Interior, which will provide a scholarship "to be paid by the Endowment in order to comply with the human rights obligations and is to be based on the Endowment's Rules of Operation." In addition, "a sub-account in his name will be created and annual payments will be made, once he has presented the documents that show his registration in the following school cycle, until he concludes his university studies." The document mentions that the "financial proposal that will be presented to the Endowment's Technical Committee consists in creating a new sub-account in the amount of MXN 344,044.80."

231. As to the award of Mr. Tzomplaxtle, the Court grants a period of six months from the notification of this judgment to inform on the program of studies of a Master's degree that he wishes to follow. Once this information is received, the State shall have a period of one year to provide this award.

C.4 Productive projects

232. The ***representatives*** claim that, due to the events in this case, the brothers Tzompaxtle Tecpile and Gustavo Robles López, as well as their direct family members, "have had difficulty to develop productive economic activities because of the resources spent in the defense of the victims as well as because of the effects of stigmatization caused by the State's false accusations and they fear of again being subjected to arbitrary detention or to other human rights violations." They alleged that an "adequate measure of reparation would be a State grant of sufficient capital to begin [the victims'] own productive projects." They added that brothers Tzompaxtle Tecpile had presented a proposal to produce cow milk that they asked to be considered under this measure of reparation. The representatives added that "the amount that would be requested of the State for this project would be MXN 434,100." They also requested that an equal amount, in equity, be ordered so that Anacely Martínez García and David Martínez García, heirs of Gustavo Robles López, could develop their own productive project, in line with their own conditions and life plans." The ***Commission*** did not specifically refer to this measure.

233. For its part, the ***State*** reiterated its willingness "to continue to comply with its commitment under the Memorandum of Understanding" and, therefore, it asked the representatives "to renew the dialogue in order to analyze these proposals so as to propose a list of productive programs and projects that the State offers so that it can make an assessment of the relevance and usefulness of those projects and programs."

234. With respect to this request, the ***Court*** notes that the Memorandum of Understanding stipulates that "in order to complement the measures of compensation, the victims may consider productive projects, through State programs, for which the State will provide a list of productive programs and projects it offers so that an assessment can be made on the relevance and usefulness of such projects and programs."

235. The ***Court*** deems that, in accordance with the above, the State must provide the amount of MXN 434,100 so that Jorge and Gerardo Tzomplaxtle can manage a productive project of their choice. The State has a period of one year from the notification of this judgment to make that payment.

236. Under the terms of the Memorandum, the State is to place at the disposal of Anacely Martínez García and David Martínez García the list of productive programs and projects that the State offers so that they might evaluate the relevance and usefulness of those projects and programs. The State has a period of three months from the notification of this judgment to implement this order. Once Anacely Martínez García and David Martínez García identify a project that meets their needs, the State shall finance that project up to an amount of MXN 232,500, which shall be paid within one year of notification of this judgment.

D. Measures of rehabilitation[167]

237. The ***representatives*** argued that the victims have suffered harm to their personal integrity as a result of the events in this case and that this harm could be mitigated through adequate medical and psychological care. They recalled that the Memorandum of Understanding contained a commitment to provide adequate, preferential and free medical care, medicine and psychological care at the three levels of care. They also recognized that the State "has already implemented measures of that type in the present case" and, therefore, ask the Court "to order that medical care continue to

[167] The Commission recommended that the State, in general terms, "fully repair Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and the heirs of Gustavo Robles López, with measures of compensation and satisfaction that include indemnification for the pecuniary and non-pecuniary damages caused."

be provided free of charge and for the period deemed necessary to the brothers Tzompaxtle Tecpile and to the heirs of Gustavo Robles López."

238. For its part, the ***Commission*** requested that the Court order the "immediate, free care of a physical or mental nature of the victims of this case for the necessary period."

239. In the Memorandum of Understanding, the ***State*** manifested its commitment to provide free, adequate and preferential medical care, medicine and psychological care, at the three levels of care, establishing contact with the Federal Ministry of Health and the Ministries of Health of the States of Veracruz and Guerrero, which will act as liaisons for communications in cases of emergency and for any eventuality regarding health care that might present itself. The linkage will enable a dialogue to resolve such emergencies, with the office of the Minister of Health in charge of the road map to health." It added in its arguments that "the Ministries of Health of Vera Cruz and of Guerrero shared information in October 2021 on the medical services provided up to that moment and that, therefore, it reiterates its intent to continue complying with its commitment under the Memorandum of Understanding."

240. The ***Court*** notes that the measure requested was agreed to by the parties in the Memorandum of Understanding and that there is no controversy on the fact that the measure must continue to be implemented in the terms established in the Memorandum; in other words, that the medical and psychological care should be adequate, preferential and free and that it include medical care, medicine and psychological attention. In addition, under the Memorandum, the Federal Ministry of Health and the Ministries of Health of the States of Veracruz and Guerrero, "shall act as liaison for communications in cases of emergency and for any eventuality regarding health care that might be presented. This linkage will enable a dialogue to resolve such emergencies, with the office of the Minister of Health in charge of the road map to health." Therefore, the Court considers it proper to order this measure, under the terms of the Memorandum of Understanding and in accordance with the order contained in this paragraph, to the benefit of the victims declared in this case and the family members of Gustavo Robles López. The Court will not monitor compliance of this measure of reparation regarding the heirs of Gustavo Robles López.

E. Compensation

241. The ***representatives*** indicated that the State agreed to and paid each of the victims, or his heirs in the case of Gustavo Robles López, the corresponding compensation and, thus, consider that this measure has been satisfied by the State.

242. The Court, therefore, deems it proper to order the aforementioned measure of reparation in the understanding that the State has complied with the terms of the Memorandum.

F. Expenses and costs

243. The ***representatives*** indicated that the State had covered the costs and expenses of the domestic legal proceedings and of the process before the Inter-American Commission until October 2020 by reimbursing the Solidarity Network for the Decade against Impunity the amount of MXN 228,937.18 (approximately USD 10,855) and an additional USD 5,000. They asked the Court to determine, in equity, the proper amount for their work since November 2020, when they had expenses for meetings with the victims in diverse places and carried out investigations, gathered and presented evidence until the conclusion of the international proceedings. They, thus requested the amount of MXN 48,556.42 (the equivalent of USD 2,422.18) for disbursements related to the hearing on preliminary objections and eventually on the merits, reparations and costs. They also indicated that the amount granted for costs and expenses should consider the national and international stages of compliance of the judgment.

244. The ***State*** expressed that it was committed to pay the relevant costs and expenses from November 2020 to the conclusion of the international proceedings in the event that the Court declares its international responsibility.

245. The ***Court*** recalls that, in accordance with its case law, costs and expenses form part of the concept of reparation as long as the activity undertaken by the victim, with the purpose of obtaining justice at both the national and international levels, implies disbursements that should be honored when the State's international responsibility is declared in a judgment. With respect to the reimbursement of costs and expenses, the Court shall prudently assess their scope, which includes the expenses incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity and may take into account the expenses indicated by the parties, as long as the *quantum* is reasonable.[168]

246. The Court has indicated that "the claims of the victims and their representatives for costs and expenses, and the supporting evidence, must be presented to the Court at the first procedural opportunity granted to them; in other words, in the pleadings and motions brief, without prejudice to those claims being updated with new costs and expenses arising from the proceedings before the Court."[169] The Court also reiterates that the mere submission of evidentiary documents is not sufficient, but rather the parties must show the relationship of the evidence with the matter pleaded and that, in the case of alleged financial disbursements, the items and their justification must be clearly indicated.[170]

247. As both the representatives and the State affirm that part of the costs and expenses disbursed have been paid and that there remain only the expenses incurred since November 2022 during the current proceedings and in view of the amounts requested by the representatives and the receipts of expenses presented, the Court fixes, in equity, the payment of USD 2,500.00 (two thousand five hundred United States dollars) for the concept of costs and expenses. This sum must be delivered directly to the representatives. At the monitoring stage of compliance with this judgment, the Court may order that the State reimburse the representatives the reasonable expenses that they might incur at that procedural stage.[171]

G. Reimbursement of the expenses to the Victim's Legal Assistance Fund

248. The President of the Court, by Resolution of May 24, 2022, granted the request of the representatives for access to the Legal Assistance Fund and ordered that financial aid be assigned to cover the expenses for the presentation of the two individuals who testified at the public hearing and the appearance of up to two legal representatives in the public hearing, as well as for the affidavits of two persons, as long as such expenses are reasonable.

249. The State was sent the report on the disbursements from the Fund, which reached the total of USD 4,372,75 (four thousand three hundred seventy-two United States dollars and seventy-five cents) and, pursuant to Article 5 of the Fund's Operating Rules, it was granted a period to present the observations that it deemed pertinent. The State did not present any observations. The Court, pursuant to Article 5, must now evaluate whether it should order the State to reimburse the Legal Assistance Fund for the disbursements that have been incurred.

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168 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C No. 39, paras. 82 and 244 and *Case of Manuela et al. v. El Salvador*, *supra*, para. 317.

169 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs*, supra, para. 79 and *Case of the Former Employees of the Judiciary v. Guatemala*, *supra*, para. 160.

170 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 277 and *Case of Manuela et al. v. El Salvador*, *supra*, para. 318.

171 *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs.* Judgment of September 1, 2010. Series C No. 217, para. 29 and *Case of Digna Ochoa et al. v. Mexico*, *supra*, para. 193.

250. In view of the violations declared in this judgment, the Court orders the reimbursement to the Fund of USD 4,372,75 (four thousand three hundred seventy-two United States dollars and seventy-five cents) for the expenses incurred. This sum must be remitted to the Court within 90 days of notification of this judgment.

H. Method of compliance of the payments ordered

251. The State shall comply with its monetary obligations by payment in United States dollars or the equivalent in the national currency, on the closest date to the payment, using the exchange rate published or calculated by a pertinent bank or financial institution, on the day closest to the day of payment. In the event that this is not possible, the State shall ensure that the funds are available domestically for a period of ten years.

252. In the event that the State delays in reimbursing the expenses to the Victim's Legal Assistance Fund, it shall pay an interest on the amount owed that is equal to the banking interest on arrears in Mexico.

X
OPERATIVE PARAGRAPHS

253. Therefore,

THE COURT

DECIDES,

unanimously:

1. To accept the acknowledgement of State responsibility, in the terms of paragraphs 19 to 27 of this judgment.

DECLARES,

Unanimously, that:

2. The State is responsible for violating the right to personal liberty contained in Article 7(1), 7(3) and 7(5) of the American Convention on Human Rights, the right to the presumption of innocence recognized in Article 8(2) and the right not to be compelled to be a witness against oneself found in Article 8(2)(g) of the Convention, in relation to the obligation to respect and ensure the rights established in Article 1(1) of the Convention, as well as the obligation to adopt provisions of the domestic law established in Article 2 of the Convention, for applying the institution of *arraigo* to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms of paragraphs 120 to 157 and 166 to 168 of this judgment. By virtue of its acknowledgement of responsibility, the State is also responsible for violating the right to personal liberty contained in Article 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) of the American Convention, with regard to the obligation to respect the rights established in Article 1(1) thereof, to the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms of paragraph 22 of this judgment.

3. The State is responsible for violating the right to personal liberty contained in Article 7(1), 7(3) and 7(5) of the American Convention on Human Rights, the right to the presumption of innocence recognized in Article 8(2) of the Convention, in relation to the obligation to respect and to ensure the rights established in Article 1(1) of the Convention, as well as the obligation to adopt provisions of the domestic law established in Article 2 thereof, for applying pre-trial detention to

the detriment of Jorge Marcial Tzompaxtle Tecpile, Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms of paragraphs 158 to 167 and 169 of this judgment.

4. The State is responsible for violating the right to personal integrity and the right to privacy, contained in Articles 5 and 11(2) of the American Convention on Human Rights with regard to the obligation of respect the rights established in Article 1(1) thereof, to the detriment of Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms of paragraphs 22 and 180 to 195 of this judgment.

5. The State is responsible for violating the right to a fair trial and the right to judicial protection, contained in Articles 8(2)(b), (d), (e) and (g) and 25(1) of the American Convention on Human Rights, with regard to the obligation of respect the rights established in Article 1(1) thereof, to the detriment of Jorge Marcial and Gerardo Tzompaxtle Tecpile and Gustavo Robles López, in the terms of paragraph 22 of this judgment.

AND ESTABLISHES,

Unanimously, that:

6. This judgment is, per se, a form of reparation.

7. The State shall leave without effect in its domestic order the provisions on pre-procedural *arraigo*, in the terms of paragraphs 210, 211, 214 to 216, and 218 to 219 of this judgment.

8. The State shall conform its domestic legal order on pre-trial detention, in the terms of paragraphs 212, 213 and 217 to 219 of this judgment.

9. The State shall issue the publications ordered in paragraph 222 of this judgment within six months of notification of this judgment.

10. The State shall hold a public act of acknowledgement of international responsibility with regard to the facts of this case, in the terms of paragraphs 225 and 226 of this judgment.

11. The State shall provide adequate, preferential and free medical, psychological or psychiatric care, where appropriate, in accordance with what is established in paragraph 240 of this judgment.

12. The State shall pay the amounts fixed in this judgment to finance productive projects and educational scholarships, as well as the reimbursement of costs and expenses, in the terms of paragraphs 230, 231, 235, 236 and 245 to 247 and 251 of this judgment.

13. The State shall reimburse the Victim's Legal Assistance Fund of the Inter-American Court of Human Rights the amounts disbursed during the processing of this case, in the terms of paragraphs 248 to 250 and 252 of this judgment.

14. The State shall, within one year of notification of this judgment, present the Court with a report on the measures adopted to comply with this judgment.

15. The Court will monitor the full compliance of this judgment, in exercise of its attributions and in compliance with its duties under the American Convention on Human Rights, and will close this case once the State has fully complied with the provisions of this judgment.

Done in the Spanish language at San José, Costa Rica on November 7, 2022.

I/A Court HR. *Case of Tzompaxtle Tecpile et al. v. Mexico.* Preliminary Objection, Merits, Reparations and Costs. Judgment of the Inter-American Court of Human Rights of November 7, 2022. Judgment adopted in San José, Costa Rica.

Ricardo C. Pérez Manrique
President

Humberto Antonio Sierra Porto

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Registrar

So ordered,

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Registrar