INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF HERNÁNDEZ *V.* ARGENTINA

JUDGMENT OF NOVEMBER 22, 2019

(Preliminary objection, merits, reparations and costs)

In the case of *Hernández v. Argentina*,

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

Eduardo Ferrer Mac-Gregor Poisot, President
Eduardo Vio Grossi, Vice President
Humberto Antonio Sierra Porto, Judge
Elizabeth Odio Benito, Judge
L. Patricio Pazmiño Freire, Judge, and
Ricardo Pérez Manrique, Judge

also present,

Pablo Saavedra Alessandri, Secretary,

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

Judge Eugenio Raúl Zaffaroni, an Argentine national, did not take part in either the processing of this case or the deliberation and signature of the judgment in accordance with the provisions of Article 19(1) of the Court's Rules of Procedure.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On February 8, 2018, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court the case of *"José Luis Hernández"* versus the Argentine Republic (hereinafter "the State" or "Argentina"). According to the Commission, the case relates to: the violation of the personal integrity of José Luis Hernández while he was deprived of liberty because the disease he contracted while he was detained was not treated opportunely or in equal conditions to someone who was not deprived of liberty and this had neurological consequences including total loss of vision in one eye, permanent partial inability to use one arm and memory loss; the violation of his personal liberty and presumption of innocence because he was subjected to mandatory preventive detention and was deprived of liberty for one year and six months in a police station; the lack of access to an effective judicial remedy to protect his right to health, and the violation of the personal integrity of his mother, Raquel San Martín de Hernández, owing to the anguish she was caused by her son's deprivation of personal liberty.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a) *Petition.* In a communication of June 30, 1998, the representatives (hereinafter "the petitioners") lodged the initial petition with the Commission.

b) *Admissibility Report.* On July 21, 2011, the Commission adopted Admissibility Report No. 82/10.[1]

c) *Merits Report.* On September 5, 2017, the Commission adopted Merits Report No. 96/17 (hereinafter also "the Merits Report" or "Report No. 96/17"), pursuant to Article 50 of the Convention, in which it reached a series of conclusions and made several recommendations to the State.[2]

d) *Notification to the State.* On November 8, 2017, Report No. 96/17 was notified to the State, granting it two months to report on compliance with the recommendations.

e) *Reports on the Commission's recommendations.* The State did not respond to the Merits Report.

f) *Submission to the Court.* On February 8, 2018, the Commission submitted all the facts and human rights violations described in the Merits Report to the jurisdiction of the Inter-American Court.[3]

3. *The Inter-American Commission's requests.* The Commission asked this Court to conclude and declare the international responsibility of the State for the violations described in the Merits Report and to order Argentina, as measures of reparation, to comply with the recommendations

[1] This was notified to the parties on July 27, 2011.

[2] *Conclusions.* The Commission concluded that the State was responsible for the violation of the rights established in Articles 5(1), 5(2), 7(1), 8(1), 8(2) and 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Mr. Hernández. It also concluded that the State had violated Article 5(1) to the detriment of Raquel San Martín de Hernández. Lastly, the Commission concluded that the State was not responsible for the violation of the rights established in Articles 8(1) and 25(1) of the American Convention in relation to the civil action seeking damages.

[3] The Commission appointed Executive Secretary Paulo Abrão and Commissioner Luis Ernesto Vargas Silva as its delegates before the Court.

included in the report (*supra* para. 2.c).

II
PROCEEDINGS BEFORE THE COURT

4. *Notification to the representatives and to the State.* The Court notified the Commission's submission of the case to the presumed victims' representatives (hereinafter "the representatives") and to the State on April 10 and 13, 2018,[4] respectively.

5. *Brief with pleadings, motions and evidence.* On June 8, 2018, the representatives submitted to the Court their brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"). The representatives referred to and endorsed the Commission's description of the facts. They also endorsed the Commission's arguments regarding the preliminary objection and the merits of the matter. However, they also alleged that the State was responsible for the violation of the rights established in Articles 8(1) and 25(1) of the Convention in relation to the civil action seeking damages. Lastly, they asked the Court to order the State to adopt diverse measures of reparation and to reimburse costs and expenses.

6. *Answering brief.* On August 28, 2018, the State[5] submitted to the Court its brief answering the submission of the Merits Report and the pleadings and motions brief (hereinafter "answering brief"). The State presented one preliminary objection. This brief was notified to the parties and to the Commission on October 12, 2018.

7. *Observations on the preliminary objection.* On November 6 and 12, 2018, the representatives of the presumed victims and the Commission, respectively, presented their observations on the preliminary objection filed by State.

8. *Public hearing.* In an order of the President of March 20, 2019,[6] the parties and the Inter-American Commission were called to a public hearing to receive their final oral observations on the preliminary objection, the merits, and eventual reparations and costs. The public hearing took place on May 6, 2019, during the Court's sixtieth special session held in Montevideo, Uruguay.[7]

9. *Final written arguments and observations.* On May 31 and June 5, 2019, the representatives and the State, respectively, forwarded their final written arguments. On June 3, 2019, the Commission presented its final written observations.

10. *Deliberation of the case.* The Court began deliberating this judgment on November 21, 2019.

III
JURISDICTION

11. The Inter-American Court has jurisdiction to hear this case, pursuant to Article 62(3) of the American Convention, because Argentina has been a State Party to the Convention since

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[4] The difference in dates was due to the fact that the documents were sent by courier.

[5] In a communication of May 17, 2018, the State appointed Alberto Javier Salgado, Director of International Human Rights Litigations of the Ministry of Foreign Affairs and Worship, as its Agent, and Ramiro Cristóbal Badía, Coordinator of Matters concerning International Human Rights of the Secretariat of Human Rights and Multiculturalism of the Nation, as Deputy Agent.

[6] *Cf. Case of Hernández v. Argentina. Call to a hearing*. Order of the President of the Inter-American Court of Human Rights of March 20, 2019. Available at: http://www.corteidh.or.cr/docs/asuntos/hernandez_20_03_19.pdf

[7] There appeared at this hearing: (a) for the Inter-American Commission: Erick Acuña Pereda, adviser, and (b) for the Argentine State: Ramiro Cristóbal Badía, National Director for Matters concerning International Human Rights of the Secretariat of Human Rights and Multiculturalism of the Nation, and Gonzalo Bueno, Legal adviser of the International Human Rights Litigations Directorate of the Ministry of Foreign Affairs and Worship. In a brief of May 2, 2019, the representatives advised that they would not attend the hearing for personal reasons.

September 5, 1984, and accepted the contentious jurisdiction of the Court on the same date.

IV
PRELIMINARY OBJECTION

A. Objection of failure to exhaust domestic remedies

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

12. The ***State*** argued that Mr. Hernández had the real possibility of obtaining reparation by an action for damages – an appropriate and effective remedy to obtain due redress – but this was used negligently because the claim was filed belatedly when the statute of limitations on the action had expired. Therefore, all the courts that heard the domestic proceedings agreed that the said action could not succeed because the time limit for filing it had expired. Consequently, the State argued that it could not be considered responsible with regard to the action for damages and it should be considered that the domestic remedies had not been exhausted "in due and proper form" in keeping with the provisions of Article 46(1)(a) of the American Convention.

13. The ***Commission*** argued that Mr. Hernández had complied with the requirement of the exhaustion of domestic remedies, taking into account that he had filed a series of complaints and requests in order to obtain adequate detention conditions and appropriate medical attention for his disease, and that the petition did not refer exclusively to the action for damages, but related to a series of conditions before and after his diagnosis. It also considered that Mr. Hernández had exhausted the domestic remedies relating to his request for release from detention and his right to health. Regarding the action for damages, the Commission argued that the obligation to make reparation arose from the State's international responsibility without requiring the activation of judicial mechanisms to obtain reparation derived from the violation of the American Convention. Additionally, the Commission indicated that the preliminary objection was time-barred because, during the admissibility stage, the State had filed the "fourth instance" objection and not the objection of failure to exhaust domestic remedies. Accordingly, it indicated that it was not for the international organs to rectify the lack of precision of the arguments of a State that had not filed the preliminary objection at the appropriate procedural moment.

14. The ***representatives*** argued that Mr. Hernández had filed the civil action for damages on April 2, 1993, because he was unable to do this while he was subject to the exclusive control of those who had caused him the harm and who, in addition, would be sued personally; also, because if he had done so, he would have placed himself in a situation of greater risk. In addition, they argued that even when Mr. Hernández obtained his conditional release on May 29, 1991, he continued under the exclusive control of the State and, therefore, was in a situation of risk and vulnerability. Consequently, Mr. Hernández had not been able to file the civil action for damages at an earlier date, and the assertion that he should have done so constituted an argument that was purely formal. They also noted that the presumed victim was not fully aware of the harm, its extent and the repercussions he was suffering from until April 4, 1991. Accordingly, they argued that Mr. Hernández had tried to duly exhaust the domestic remedies but was prevented from doing so, and this also constituted the exception indicated in Article 46(2)(b) and a violation of Articles 8 and 25 of the Convention. Lastly, they argued that the preliminary objection was time-barred.

A.2. Considerations of the Court

15. The Court has indicated that Article 46(1)(a) of the Convention establishes that, admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 requires that the remedies under domestic law have been pursued and exhausted in accordance with

generally recognized principles of international law.[8] In this regard, the Court has developed standards to analyze an objection based on presumed non-compliance with the requirement to exhaust domestic remedies. First, it has interpreted the objection as a defense available to the State and, as such, the State may waive it either explicitly or tacitly. Second, this objection must be filed opportunely so that the State may exercise its right to defend itself. Third, the Court has indicated that the State that presents this objection must specify the domestic remedies that have not yet been exhausted and demonstrate that those remedies are applicable and effective.[9] The Court has reiterated that, at the admissibility stage before the Commission, the State must specify clearly the remedies that, in its opinion, have not been exhausted.[10] In addition, the arguments that substantiate the preliminary objection filed by the State before the Commission at the admissibility stage must correspond to those submitted to the Court.[11]

16. Based on the foregoing, in the instant case, the Court finds it necessary to examine whether the objection of failure to exhaust domestic remedies was presented clearly at the proper procedural moment.[12] The Court notes that, in its communication of June 6, 2003, in which it responded to the petition that the representatives had lodged before the Inter-American Commission, the State mentioned the "complementary or contributive nature of the international protection systems," known as the "fourth instance," specifying that "José Luis Hernández enjoyed the guarantees of due process and used all the judicial instances, while the State complied with the obligations assumed under Arts. 8 and 25 of the American Convention."[13] To prove this, it indicated that "the judgment that the petitioner had referred to as arbitrary because it was not in his favor, was based on legal, procedural and substantive norms, and was delivered pursuant to the rules of due process."[14] The State also argued that, following the rejection of the civil action for damages because this was time-barred, the petitioner was "seeking a new 'instance' to try and "revisit" these judicial rulings […] and – despite the petitioner's efforts to deny that possibility – this evidently introduces the doctrine of the so-called 'fourth instance.'"[15]

17. The Court notes that the purpose of the State's argument before the Commission at the admissibility stage was to allege that the actions of the judicial authorities complied with the obligations established in Articles 8 and 25 of the American Convention and that, therefore, the Inter-American Commission should declare the petition lodged by Mr. Hernández inadmissible in

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[8] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 63, and *Case of Perrone and Preckel v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of October 8, 2019. Series C No. 384, para. 33.

[9] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections,* Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 16, 2017. Series C No. 333, para. 76.

[10] *Cf. Case of Brewer Carías v. Venezuela. Preliminary objections.* Judgment of May 26, 2014, para. 77, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of March 15, 2018. Series C No. 353, para. 51.

[11] *Cf. Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 29, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of March 15, 2018. Series C No. 353, para. 51.

[12] *Cf.* Case of *Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88*,* and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 26.

[13] The State's brief with additional information addressed to the Commission on June 6, 2003 (evidence file, folios 261 and 262).

[14] The State's brief with additional information addressed to the Commission on June 6, 2003 (evidence file, folio 262).

[15] Report of May 21, 2003, of the Assistant Secretary of Justice of Buenos Aires province addressed to the Ministry of Foreign Affairs, International Trade and Worship of the Nation. Attached to the State's communication of July 21, 2003 (evidence file, folio 20).

order to avoid acting as a fourth instance. The Court notes that it was not until its answering brief that the State alleged, for the first time, that Mr. Hernández had not duly exhausted the domestic remedies in accordance with generally recognized principles of international law (Article 46(1)(a)). In this regard, the Court recalls that a preliminary objection based on the failure to exhaust domestic remedies must be presented at the proper procedural moment; that is, during the admissibility stage before the Commission.[16] This did not occur in the instant case, because the State alleged the inadmissibility of the case before the Commission on the basis that it had not violated any of the guarantees protected by the American Convention to the detriment of Mr. Hernández[17] and, before the Court, the State argued that the domestic remedies had not been exhausted. Consequently, the Court finds that the State did not file this preliminary objection during the admissibility procedure and, therefore, it was filed belatedly.

18. The Court has also indicated that "when domestic mechanisms exist to determine forms of reparation [that meet] criteria of objectivity, reasonableness and effectiveness to adequately redress the violations that have been declared of rights recognized in the Convention," such proceedings and their results "may be assessed." Accordingly, civil actions to seek reparation for harm filed by the victims in the domestic sphere may be relevant for both the classification and definition of specific aspects or degrees of State responsibility, and the satisfaction of certain claims in the context of integral reparation.[18] Therefore, the Court has taken into account the decisions made in the domestic sphere in such proceedings when assessing the requests for reparations in cases before the inter-American system.[19] However, this assessment has been made based on the circumstances of each specific case, according to the nature of the right that has allegedly been violated and the claims of the person who has submitted the case. Consequently, this analysis may correspond to the merits of the matter or, if appropriate, to the stage of reparations.[20] However, in the instant case, there is no need to assess the appropriateness and effectiveness of the said civil action for damages in order to establish State responsibility for the facts of this case or to redress the consequences, because it was not necessary for the presumed victim or the members of his family to exhaust it.[21]

19. The Court also notes that the instant case relates to alleged violations of the rights to personal integrity and personal liberty while Mr. Hernández was detained. The Court has verified that he filed remedies aimed at protected those rights throughout the time he was detained. Specifically, the Court notes the numerous complaints filed by Raquel San Martín de Hernández requesting that her son be provided with adequate medical care, and the subsequent orders issued by the judge and addressed to the prison authorities requiring that they provide him with medical

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16 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Terrones Silva et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2018. Series C No. 360, para. 22.

17 *Cf.* The State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folio 262).

18 *Cf. Case of Cepeda Vargas v. Colombia*. *Preliminary objections, merits, reparations and costs*. Judgment of May 26, 2010. Series C No. 213, para. 246, and *Case of García Ibarra et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 17, 2015. Series C No. 306, para. 186.

19 *Cf. Case of the "Mapiripán Massacre" v. Colombia. Merits.* Judgment of September 15, 2005. Series C No. 134, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 14, 2014. Series C No. 287, paras. 548 and 549.

20 *Cf. Case of the Santo Domingo Massacre v. Colombia*, *Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, paras. 37 and 38, and *Case of García Ibarra et al. v. Ecuador*, *Preliminary objections, merits, reparations and costs.* Judgment of November 17, 2015. Series C No. 306, para. 186.

21 *Cf. Mutatis mutandis, Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 64, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 25.

care;[22] also, the motion for his release filed by Mr. Hernández's lawyer in October 1990, to allow the presumed victim to regain his liberty while the proceedings against him continued.[23] The complaints and motion filed represented use of the available domestic remedies for the protection of the rights to health, personal integrity and personal liberty of Mr. Hernández. Therefore, it is clear that the dispute in this case is not limited to verifying whether the action for damages constituted a violation of the rights to judicial guarantees and judicial protection of Mr. Hernández, but also relates to the State's conduct in relation to the protection of other rights. These matters must be analyzed as a substantive issue in this judgment.

20. Consequently, having confirmed that the State's allegation regarding the failure to exhaust domestic remedies was time-barred; that, at this stage, it is not appropriate to assess the appropriateness and effectiveness of the action for damages, and that the dispute in the instant case relates to other rights that require an in-depth analysis, the Court rejects the preliminary objection of failure to exhaust domestic remedies filed by the State.

V
EVIDENCE

A. Admissibility of the documentary evidence

21. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, as well as those requested by the Court or its President as helpful evidence and, as in other cases, it admits them in the understanding that they were presented at the appropriate procedural moment (Article 57 of the Rules of Procedure)[24] and that their admissibility was not contested or challenged.

B. Admissibility of the testimonial and expert evidence

22. In addition, the Court deems it pertinent to admit the expert opinion provided by affidavit in this case,[25] insofar as it is in keeping with both the purpose defined by the President in the order requiring it, and the purpose of this case.[26] However, the President declared that the sworn statement of Raquel San Martín de Hernández was inadmissible because it was time-barred.[27]

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[22] *Cf.* Report of the Secretary of the Lomas de Zamora No. 4 Criminal Court, of July 6, 1989; Brief of Mr. Hernández's lawyers addressed to the Criminal Judge, of August 1, 1990, and Brief of Mr. Hernández's lawyers addressed to the Criminal Chamber, of February 12, 1991 (helpful evidence, folios 507, 576 and 339 and 340). Also, the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folio 258).

[23] *Cf.* Decision in case No. 15,494 issued by the Departmental Criminal and Correctional Appellate Chamber of October 19, 1990, rejecting the appeals filed by Mr. Hernández's lawyer and by Mr. Hernandez himself and confirming the decision on the motion for release (helpful evidence, folios 640 and 641).

[24] In general, and according to Article 57(2) of the Rules of Procedure, the documentary evidence should be presented together with the brief submitting the case, the pleadings and motions brief, or the answering brief, as applicable; evidence forwarded outside these procedural opportunities is not admissible, save for the exceptions established in the said Article 57(2) of the Rules of Procedure (namely, *force majeure*, grave impediment or if it refers to a supervening fact; that is, one that occurred following the said procedural moments). *Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 26.

[25] The Court acknowledged receiving the expert opinion of Corina Giacomello provided by affidavit on April 30, 2019 (merits file, folios 395 to 419).

[26] On April 29, 2019, the Inter-American Commission, through the Chief of Staff of the Executive Secretariat, advised the Court that it withdrew the offer of the expert opinion of Manuel Fruns (merits file, folio 432).

[27] In communications of June 5, 2019, addressed to the State's agents, the presumed victims' lawyers, and the Inter-American Commission, the Court's Secretary advised them that the sworn statement of Raquel San Martín de Hernández had been submitted with the representatives' final written arguments and not within the time frame established

VI
FACTS

23. Based on the arguments presented by the parties and the Commission, the Court will set forth the relevant facts of the case as follows: (a) the detention and sentencing of Mr. Hernández; (b) the detention conditions of Mr. Hernández and the complaints concerning his health, and (c) the civil action for damages. In this regard, the Court notes that since it has not had access to Mr. Hernández's medical records while he was detained, all the references to his disease and the medical care received are based on information in the criminal case file provided as evidence by the State.

A. Detention and sentencing of José Luis Hernández

24. José Luis Hernández was arrested on February 7, 1989, for the offense of attempted robbery.[28] Following his arrest, criminal case No. 24,498 was opened entitled "Hernández José Luis [and another], Attempted robbery" in the No. 4 Criminal Court of the Lomas de Zamora Judicial Department, Buenos Aires province (hereinafter "the trial judge").[29]

25. On February 14, 1989, the trial judge issued the ruling of preventive detention in the case of José Luis Hernández. In this decision, he indicated that, based on the records of the investigation he would proceed, *prima facie,* to reclassify the offense to "aggravated robbery owing to the use of a weapon," an offense defined and penalized in article "166(2) of the Criminal Code," "with *prima facie* evidence of the criminal responsibility and perpetration by José Luis Hernández [and another] of the act described."[30] Consequently, the trial judge decided to convert the arrest into preventive detention.[31]

26. On September 28, 1990, Mr. Hernández was sentenced to five years' imprisonment, the legal consequences, and costs for the offense of robbery, aggravated by perpetration with a firearm.[32] On May 21, 1991, the Criminal Appellate Chamber amended both the legal classification of the offense and Mr. Hernández's punishment to "attempted robbery, aggravated by perpetration with weapons" and to two years and eight months' imprisonment without parole, respectively.[33] On May 29, 1991, and because Mr. Hernández had a record of good conduct, had served more than two-thirds of the sentence of 2 years and 8 months' imprisonment, and was not a repeat offender, it was decided to grant him conditional release.[34] Mr. Hernández was deprived of liberty for approximately two years and three months.

B. José Luis Hernández's detention conditions and complaints concerning his health

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in the order of the President requiring it, so that it was time-barred and the President had determined that it was inadmissible (merits file, folios 519, 522, 525 and 528).

28 *Cf.* Decision of the Monte Grande Police Station of February 7, 1989, and Hearing by the Monte Grande No. 5 Criminal Court of February 9, 1989 (helpful evidence, folios 361, 394 and 395).

29 *Cf.* Criminal case file for the offense of "attempted robbery" against José Luis Hernández, Case No. 24,498, Criminal and Correctional Court, Buenos Aires province, 1989 (helpful evidence, folio 349).

30 Decision of the Lomas de Zamora No. 4 Criminal Court of February 14, 1989 (helpful evidence, folio 427).

31 *Cf.* Decision of the Lomas de Zamora No. 4 Criminal Court of February 14, 1989 (helpful evidence, folio 430).

32 *Cf.* Ruling of the Lomas de Zamora No. 4 Criminal Court of September 28, 1990 (helpful evidence, folio 587).

33 *Cf.* Judgment of the First Chamber of the Departmental Criminal and Correctional Appellate Chamber of Lomas de Zamora of May 21, 1991 (helpful evidence, folios 682 and 683).

34 *Cf.* Judgment of the trial judge of May 29, 1991 (helpful evidence, folio 752).

27. José Luis Hernández was detained from February 7, 1989, to August 3, 1990, in the Monte Grande Police Station, Buenos Aires province (hereinafter "the Monte Grande Police Station").[35] The day of his arrest, and once he had been transferred to the Monte Grande Police Station, Mr. Hernández was subjected to a physical examination by a doctor in which it was found that he was "lucid ... and with normal autopsychic orientation, without signs of intoxication and an external examination of his body reveal[ed] no recent traumatic injuries."[36]

28. On March 20, 1989, the then Chief of Police of Buenos Aires province (hereinafter "the Police Chief") requested that Mr. Hernández be transferred from the Monte Grande Police Station to the corresponding prison, basing this request on "the large number of detainees housed in that police station," and establishing that there was "unrest among them owing to the conditions because they do not have sufficient physical space."[37] On March 29, 1989, the trial judge ordered his transfer to Prison No. 1 of the Prison Service of Buenos Aires province (hereinafter "Prison No. 1").[38] Mr. Hernández was transferred to this Prison on August 3, 1990.[39]

29. On July 6, 1989, Raquel San Martín de Hernández, Mr. Hernández's mother, informed the court hearing the case that her son was suffering from a "very severe influenza-like condition and also an ear infection that requires medical care that, to date, it has not been possible to provide, so that the intervention of the court is required to ensure that he is provided with the appropriate treatment." She also indicated that her son should be transferred to a prison as the conditions he was in were "deplorable because at th[at] time there [were] more than 40 detainees, which exceed[ed] the capacity of that police station."[40] The same day, the trial judge ordered that Mr. Hernández undergo a medical check-up and that he be "provided with the appropriate treatment" if any illness was detected.[41] Mr. Hernández did not receive medical assistance.[42] On January 16, 1990, the Police Chief endorsed the request to transfer him to the corresponding prison, as a "result of the large number of detainees housed in that place, and the lack of sufficient physical space."[43]

30. On August 1, 1990, Mrs. San Martín de Hernández reported to the trial judge that, for approximately one week, Mr. Hernández had been suffering from severe headaches. She stated that "the medical care provided through the Monte Grande Police Station where he is lodged has not helped at all" and, therefore, she asked that he undergo a medical examination and that the Police Station's hygiene conditions be verified to determine whether there was a possible outbreak

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35 *Cf.* Decision of the Monte Grande Police Chief of February 7, 1989, concerning the detention of Mr. Hernández and Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of August 3, 1990, reporting on his admission to Prison No. 1 (helpful evidence, folios 361 and 362 and 562).

36 Report of the Monte Grande Police Station's police doctor of February 7, 1989 (helpful evidence, folio 378).

37 Note 319 of the Monte Grande Police Chief addressed to the Lomas de Zamora Criminal Judge on March 20, 1989 (helpful evidence, folio 487).

38 *Cf.* Petitioners' communication of August 19, 1998 (evidence file, folio 285) and decision of Lomas de Zamora Criminal Judge No. 4 of March 29, 1989 (helpful evidence, folio 488).

39 *Cf.* Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of August 3, 1990 (helpful evidence, folio 562).

40 *Cf.* Report of the Secretary of the Lomas de Zamora No. 4 Criminal Court of July 6, 1989 (helpful evidence, folio 507) and the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folio 258).

41 *Cf.* Ruling of Lomas de Zamora No. 4 Criminal Judge of July 6, 1989 (helpful evidence file, first part, folio 508).

42 *Cf.* Petitioners' communication of August 19, 1998 (evidence file, folio 286) and the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folio 258).

43 Nota No. 01 the Monte Grande Police Chief of January 16, 1990 (helpful evidence file, first part, folio 536).

of hepatitis among the detainees.[44] The same day, the trial judge ordered that "José Luis Hernández be provided with the corresponding medical attention and also, that a possible outbreak of hepatitis among the prison population be investigated."[45]

31. On August 2, the Police Chief informed the court by telephone that Mr. Hernández had been examined and had been diagnosed with presumed hepatitis.[46] The same day, the trial judge ordered the immediate transfer of Mr. Hernández to the hospital of the Provincial Prison Service and, accordingly, the Court Secretary asked the Head of Prison No. 1 "to order the transfer of [Mr. Hernández] and his immediate admission to the hospital of the said institution so that he can be provided with the corresponding medical treatment because he has today been diagnosed with a case of presumed hepatitis."[47] On August 3, 1990, Mr. Hernández was transferred from the Monte Grande Police Station to Prison No. 1.[48]

32. On August 14, 1990, the trial judge ordered that José Luis Hernández be provided with medical attention and that he be informed of Mr. Hernández's health status and the treatment he had received.[49] On August 15, 1990, the Head of Prison No. 1 informed the trial judge that Mr. Hernández had been transferred to the San Juan de Dios Hospital in the city of La Plata because "he had symptoms of meningitis, dehydration and poor general health."[50]

33. On August 29, 1990, the Head of Prison No. 1 issued a new report addressed to the trial judge, in which he indicated that on "15-08-90, the defendant was transferred to the San Juan de Dios Hospital in La Plata, because he had symptoms of acute tuberculous meningitis" (hereinafter also "tuberculous meningitis"); he also indicated that Mr. Hernández was "receiving specific treatment for his disease, which was responding favorably."[51] The same day, the Head of Prison No. 1 issued another report addressed to the trial judge to inform him that Mr. Hernández had been transferred from the San Juan de Dios Hospital to the Neuropsychiatric Ward of the Alejandro Korn Hospital in Melchor Romero.[52]

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[44] *Cf.* Brief of Mr. Hernández's lawyers addressed to the Criminal Judge on August 1, 1990 (helpful evidence, folio 576) and the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folio 258).

[45] Decision of the Lomas de Zamora No. 4 Criminal Judge of August 1, 1990, and Communication of the same date from that Court's Secretary to the Monte Grande Police Chief informing him of the trial judge's decision (helpful evidence, folios 577 and 578).

[46] *Cf.* Record of the Court's Secretary (helpful evidence, folio 556).

[47] Decision of the Lomas de Zamora No. 4 Criminal Judge of August 2, 1990, and Communication of the same date from the Court's Secretary to the Head of the Prison Service advising him of the trial judge's decision (helpful evidence, folios 556 and 557).

[48] *Cf.* Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of August 3, 1990, advising that Mr. Hernández had been admitted to Prison No. 1 (helpful evidence, folio 562), and the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folio 258).

[49] *Cf.* Decision of the Lomas de Zamora No. 4 Criminal Judge of August 14, 1990 (helpful evidence, first part, folio 563).

[50] Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of August 15, 1990 (helpful evidence, folio 566) and Decision of October 10, 1995, issued by the La Plata judge of first instance in the case entitled: "Hernández José Luis ref/Police Headquarters of Bs. As. province and others/Damages. Court No. 4 (B) P.C." Annex to the petitioners' communication of July 24, 2000 (evidence file, folio 5).

[51] Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of August 29, 1990 (helpful evidence file, first part, folio 569) and Decision of October 10, 1995, issued by the La Plata judge of first instance, in the case entitled: "Hernández José Luis ref/Police Headquarters of Bs. As. province and others/Damages. Court No. 4 (B) P.C.". Annex to the petitioners' communication of July 24, 2000 (evidence file, folio 5).

[52] *Cf.* Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of August 30, 1990 (helpful evidence, folio 570) and the State's brief of June 6, 2003, with additional information addressed to the Commission, in which the State indicated with regard to the transfer to the Alejandro Korn Hospital that: "to provide specific treatment for acute tuberculous meningitis, Hernández was transferred from the San Juan de Dios Hospital to the

34. On September 6, 1990, the Head of Prison No. 1 advised the trial judge of a health report dated September 1, 1990, "prepared by the Medical Clinical Service,"[53] which indicated that Mr. Hernández, "an inpatient in the Alejandro Korn Hospital in Melchor Romero, being treated for tuberculous meningitis […] has a ventricular drainage catheter […]; his condition is improving, he responds to painful stimuli."[54] On September 18, 1990, Mr. Hernández re-entered Prison No. 1.[55] Following a new complaint filed by Mr. Hernández's mother, on September 27, 1990, the trial judge ordered the immediate admission Mr. Hernández to the San Juan de Dios Hospital, so that he "be provided with adequate medical care and to determine if he has AIDS."[56]

35. On October 2, 1990, the Head of Prison No. 1 advised that the San Juan de Dios Hospital was unable to receive Mr. Hernández because "that hospital had no free bed"; therefore, he was "sent to private practice." He also advised that Mr. Hernández could not be transported by ambulance because the Prison Service did not have an appropriate vehicle and was unable to obtain an ambulance because this service was only provided for emergencies.[57] The medical report prepared in Prison No. 1 referred to Mr. Hernández as a "patient with tuberculous meningitis with neurological sequelae" who was still "hemodynamically stable, afebrile, lucid, under specific treatment."[58]

36. On October 8, 1990, the Head of the Security and Treatment Unit of the Olmos Prison informed the trial judge of Mr. Hernández's health situation. To this end, he transcribed the content of a medical report that indicated the following:

> "Patient with no sense of time and space. Attention span conserved, amnesic lapses that make questioning him difficult. Ptosis of the right eye affecting the right occulomotor nerve. Symmetric mydriatic pupils that respond to light. Reduction of visual acuity. Slight paralysis of the upper left arm. Remaining movement and muscle strength conserved. Reduction of muscular consistency in legs (due to weight loss). Deep reflexes present and symmetric. Deep pain sensitivity S/P. Walks supported by others, pronounced truncal ataxia that prevents him from walking without support. Tests on heel and knees S/P. Finger-to-nose test: reveals slight tremor when ending the movement. Comment: In view of the medical record and neurological condition requires treatment for evolution (has already been evaluated by the neurosurgery service which has requested a CAT-scan of the brain to monitor situation and the corresponding procedure has been initiated)." [59]

37. On October 17, 1990, the trial judge refused a motion for his release filed by Mr. Hernández's

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Alejandro Korn Hospital and, on September 18, 1990, re-entered the Olmos Prison" (evidence file, folio 258).

[53] Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of September 6, 1990 (helpful evidence, folio 571).

[54] Communication from the Head of the Olmos Prison of the Prison Service of Buenos Aires province of September 6, 1990 (helpful evidence, folio 571).

[55] *Cf.* Decision of October 10, 1995, issued by the La Plata judge of first instance, in the case entitled: "Hernández José Luis ref/Police Headquarters of Bs. As. province and others/Damages. Court No. 4 (B) P.C." Annex to the petitioners' communication of July 24, 2000; Petitioners' communication of August 19, 1998, and the State's brief of June 6, 2003, with additional information addressed to the Commission (helpful evidence, folios 5, 287 and 258).

[56] Decision of the Lomas de Zamora No. 4 Criminal Judge addressed to the Director of the San Juan de Dios Hospital, of September 27, 1990 (helpful evidence, folio 579).

[57] *Cf.* Communication from the Head of the Olmos Prison of the Buenos Aires Prison Service of October 2, 1990 (helpful evidence, folio 590).

[58] *Cf.* Communication from the Head of the Olmos Prison of the Buenos Aires Prison Service of October 2, 1990 (helpful evidence, folio 590).

[59] Communication from the Head of the Security and Treatment Unit of the Olmos Prison of the Buenos Aires Prison Service of October 8, 1990 (helpful evidence, folio 605).

lawyer, basing his decision on "the severity of the punishment imposed," and that Mr. Hernández was receiving "satisfactory medical care."[60] Mr. Hernández's lawyer filed an appeal, which was dismissed on October 19, 1990, confirming the decision of the trial judge. Notwithstanding the decision on the appeal, the trial judge was asked to "order the pertinent measures, pursuant to his authority," to ensure that the accused would be provided with the medical care that his current health situation required, if necessary, ordering his internment in the appropriate place."[61]

38. On October 22, 1990, Mr. Hernández's lawyer filed an application for *habeas corpus,* but this was denied because "the matter […] was not included under the provisions of article 403(12) of the Code of Criminal Procedure – and therefore the application filed must be denied."[62] On October 23, 1990, Mr. Hernández's mother addressed a letter to the trial judge in which she indicated that her son was "interned in the hospital of the said unit with an infectious disease that has left my son in a condition that he will have great difficulty in recovering from," and therefore requested "that his release be granted."[63]

39. On October 24, 1990, the Head of the Security and Treatment Unit of Prison No. 1 informed the trial judge that an attempt had been made to transfer Mr. Hernández to the San Juan de Dios Hospital in La Plata, as had been ordered, but this had not been possible because there were no free beds in the ward requested.[64]

40. On October 31, 1990, a report was issued by a forensic doctor of the departmental expert appraisals office advising the trial judge that Mr. Hernández was suffering from an "infectious disease with neurological effects [and therefore] he needs to be admitted to a neurology service where he can be examined and treated appropriately."[65] The doctor considered that "given the absence of beds in the San Juan Hospital in La Plata, a center qualified to treat him, his admission to the San Martin Polyclinic in La Plata or the Alejandro Korn Hospital in Melchor Romero should be requested."[66]

41. On October 31, 1990, the trial judge ordered the admission of Mr. Hernández to the San Martín Hospital in La Plata.[67] The same day, the judge addressed a letter to the director of that medical center requesting that he "order the urgent admission of [Mr. Hernández] to his hospital and provide him with the appropriate medical treatment."[68] On November 2, 1990, Mr. Hernández

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[60] Notification addressed to Mr. Hernández's lawyer and Brief of appeal against the interlocutory decision of October 18, 1990 (helpful evidence, folios 634 and 614 to 617), and Annex to the petitioner's communication of August 19, 1998 (evidence file, folios 233 and 288).

[61] Decision in Case No. 15,494 issued by the Departmental Criminal and Correctional Appellate Chamber on October 19, 1990, dismissing the appeals filed by Mr. Hernández's lawyer and by Mr. Hernandez himself and confirming the decision on the motion for release (helpful evidence, folios 640 and 641).

[62] Decision of the First Chamber of the Departmental Criminal and Correctional Appellate Chamber of October 23, 1990, rejecting the application for *habeas corpus* (helpful evidence file, first part, folio 619).

[63] Brief of Mr. Hernández's mother addressed to the trial judge on October 23, 1990 (helpful evidence file, first part, folio 622).

[64] *Cf.* Communication from the Head of the Security and Treatment Unit of the Olmos Prison of the Prison Service of Buenos Aires province of October 24, 1990 (helpful evidence file, first part, folio 623).

[65] Communication of the forensic doctor of the departmental expert appraisals office addressed to the Lomas de Zamora No. 4 Criminal Judge, of October 31, 1990 (helpful evidence file, first part, folio 629).

[66] Communication of the forensic doctor of the departmental expert appraisals office addressed to the Lomas de Zamora No. 4 Criminal Judge, of October 31, 1990 (helpful evidence file, first part, folio 629).

[67] *Cf.* Decision of the Lomas de Zamora No. 4 Criminal Judge of October 30, 1990, and Communication of the said judge addressed to the Head of Prison No. 1 of the Provincial Prison Service of October 31, 1990 (helpful evidence file, first part, folios 630 and 631).

[68] Communication of the Lomas de Zamora No. 4 Criminal Judge of October 31, 1990 (helpful evidence file, first

was admitted to the San Juan Hospital in La Plata. Subsequently, during November, Mr. Hernández was again transferred to Prison No. 1.[69]

42. On December 6, 1990, the trial judge ordered the Head of Prison No. 1 to inform him of the evolution of Mr. Hernández's health and that, thereafter, he should be provided with a weekly report in this regard and also concerning the different measures that should be taken in the opinion of the medical professionals.[70] In response to this order, on December 12, 1990, Prison No. 1 advised that Mr. Hernández had been examined by the Clinical Medicine Service of the Prison Central Hospital, and this had resulted in the following report:

> "The inmate was discharged and transferred from the General San Martin Hospital and re-admitted to Ward 3, bed 2, of this H.C.S.P. [Prison Service Central Hospital], and this ward corresponds to the Neuro-phthisiology service. This service found that, on admission, he was stable and at the consolidation stage of his treatment with tuberculostatic medicines, continuing with specific medication (Rifampicin and Nicotine). On 30/11 results of laboratory analyses were received with biological values within normal parameters. The opinion consigned in the K.C, by the Pneumo-phthisiology service is to use tuberculostatic medicines because the clinical evolution has been favorable. On 5-12-90, the inmate weighed 55 kgs and merely experienced headaches and dizziness when standing up. Consequently, the attending physician requested a consultation with Neurology. This service reviewed his neurological evolution on 07-12-90 and reported a favorable evolution without neurological signs of his disease evolving adversely."[71]

43. On February 22, 1991, Mr. Hernández's lawyer informed the trial judge that the Director of the Olmos Hospital had advised Mrs. San Martín that her son had allegedly acquired AIDS during his confinement in Prison No. 1, and this had allegedly been confirmed by the second set of tests performed on him. He therefore asked the judge to request the corresponding reports and tests.[72] On February 27, 1991, the trial judge asked Prison No. 1 to provide information on "the actual status of the health of [Mr. Hernández] and whether, based on the disease he was suffering from, he was receiving appropriate treatment and undergoing periodic tests." He also indicated that Prison No. 1 should "advise whether [Mr. Hernández] had contracted the acquired immunodeficiency syndrome during his confinement in that Prison Unit, and also report on the evolution of the disease and the treatment indicated, or on changes recorded in his health during his confinement in that prison."[73]

44. Owing to the absence of a response from Prison No. 1, on April 1, 1991, the trial judge required Prison No. 1 to provide information on the status of Mr. Hernández's health within 24 hours.[74] On April 3, 1991, the Provincial Prison Service informed the trial judge of the neurological problems from which Mr. Hernández had suffered up until that time.[75] In the said report it

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part, folio 632).

69 *Cf.* Petitioners' communication of August 19, 1998 (evidence file, folio 290).

70 *Cf.* Communication of the Lomas de Zamora No. 4 Criminal Judge, of December 6, 1990 (helpful evidence, folio 335).

71 Communication of the Head of Prison No. 1 addressed to the trial judge, of December 12, 1990 (helpful evidence, folio 338).

72 *Cf.* Brief of Mr. Hernández's lawyers addressed to the Criminal Chamber of February 12, 1991 (helpful evidence, folio 339 and 340).

73 Communication of the head of the Lomas de Zamora No. 4 Criminal Court addressed to the Director of Prison No. 1 of the Provincial Prison Service, of February 27, 1991 (helpful evidence, folio 343).

74 *Cf.* Communication of the head of the Lomas de Zamora No. 4 Criminal Court addressed to the Director of Prison No. 1 of the Provincial Prison Service, of April 1, 1991 (helpful evidence, folio 345).

75 *Cf.* Allegation of Mr. Hernández's lawyer concerning the statute of limitations objection filed by the Head of the

indicated that he suffered from: neurological – paralysis of the sixth cranial nerve, surgical trauma; signs of intracranial hypertension. With amnesic ptosis, mydriatic pupils, reduction of visual acuity, paralysis of the right arm."[76]

45. On April 12, 1991, the Secretary of the court hearing the case informed the trial judge that Mr. Hernández had indicated that he had "received excellent medical care, but considered that the medication was insufficient because he was once again suffering from the headaches he had suffered from before being treated six months previously […]; that he had been advised before last year's end-of-year festivities that he would have to undergo another operation on his head owing to the effects of the meningitis and, to date, this ha[d] not been performed." He had also indicated that, in other respects, he was "improving."[77]

46. On May 29, 1991, Mr. Hernández obtained his conditional release.[78] As a result of his meningitis, Mr. Hernández suffered neurological problems consisting in the loss of vision in one eye, partial and permanent incapacity of his left arm, and memory loss.[79] Mr. Hernández died on December 24, 2015, at 47 years of age.[80]

C. Civil action for damages

47. On April 2, 1993, José Luis Hernández filed a civil action for damages against the Police Headquarters of Buenos Aires province, and Carlos Alberto Pallero and Lorenzo Alfredo Núñez, owing to the disease he contracted while detained, as well as the lack of adequate care and its effects.[81] On October 10, 1995, a judgment was delivered in which the first instance judge decided to reject the action by applying the two-year statute of limitations established in the Civil Code, considering that the time for filing the civil action should be calculated starting in October 1990, because the damage had already been caused to the plaintiff. On that basis, he considered that, by April 2, 1993, the civil action was already subject to the statute of limitations.[82]

48. The first instance judge rejected Mr. Hernández's assertion that it was not until April 4, 1991 – the date on which the report on the consequences of his disease prepared by the Provincial Prison Service was received by the trial judge – that he became aware of the physical repercussions owing to this report of the Provincial Prison Service.[83] The first instance judge

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Olmos Prison (evidence file, folio 31).

[76] Communication of the Head of Prison No. 1 addressed to the trial judge, of April 3, 1991 (helpful evidence file, first part, folio 346) and Petitioners' communication of August 19, 1998 (evidence file, folio 289).

[77] Report of the Secretary of the court hearing the case addressed to the judge of April 12, 1991, Communication of the Head of Prison No. 1 addressed to the trial judge, of December 12, 1990 (helpful evidence, folio 348).

[78] *Cf.* Decision of the trial judge of May 29, 1991, (helpful evidence, folio 752).

[79] *Cf.* Decision of October 10, 1995, issued by the La Plata judge of first instance, in the case entitled: "Hernández José Luis ref/Police Headquarters of Bs. As. province and others/Damages. Court No. 4 (B) P.C." Annex to the petitioners' communication of July 24, 2000, and Brief with the initial petition lodged before the Commission on August 19, 2008 (evidence file, folios 5 to 9 and 290).

[80] *Cf.* Pleadings and motions brief (merits file, folio 117).

[81] *Cf.* Report of the Assistant-Secretariat of Justice of Buenos Aires province addressed to the Ministry of Foreign Affairs, International Trade and Worship of the Nation dated May 21, 2003. Annex to the communication of the State of July 21, 2003, and Brief with the initial petition lodged before the Commission on August 19, 2008 (evidence file, folios 20 and 290).

[82] *Cf.* Decision of October 10, 1995, issued by the La Plata judge of first instance, in the case entitled: "Hernández José Luis ref/Police Headquarters of Bs. As. province and others/Damages. Court No. 4 (B) P.C." Annex to the petitioners' communication of July 24, 2000, and Brief with the initial petition lodged before the Commission on August 19, 2008 (evidence file, folios 9 and 290).

[83] *Cf.* Decision of October 10, 1995, issued by the La Plata judge of first instance, in the case entitled: "Hernández José Luis ref/Police Headquarters of Bs. As. province and others/Damages. Court No. 4 (B) P.C." Annex to the petitioners'

reasoned that, "in this regard, it should be noted that the damage had already been caused to the plaintiff [October 29, 1990, f. 182 criminal case] and he recovered his freedom on May 19, 1991, which revealed that the plaintiff could have known of the disease he was suffering from, even if he did not know before that."[84]

49. On September 12, 1996, the First Chamber of the First Appellate Chamber confirmed the decision of the first instance judge.[85] Subsequently, on October 3, 1996, Mr. Hernández filed a special remedy of inapplicability of the law on nullity before the Supreme Court of Justice of Buenos Aires province. On December 17 that year, it was decided that the appealed judgment was founded on explicit legal norms.[86] On April 8, 1997, the special remedy filed by the presumed victim for the Supreme Court of Justice of the Nation to hear his appeal was rejected. On December 17, 1996, the complaint filed before the same Supreme Court was also rejected.[87]

VII
MERITS

50. As indicated by the parties and the Commission, the Court notes that the disputes in this case concern the acts or omissions of the authorities in relation to the prison conditions of Mr. Hernández while he was detained, as well as the medical attention he received; the decision of February 14, 1989, ordering preventive detention; the authorities' response to his mother's complaints requesting that Mr. Hernández be provided with medical attention; the trial judge's decision on the request for release on special grounds filed by his lawyers; the response to the civil action for damages, and the anguish that Mr. Hernández's mother suffered owing to the deterioration of her son's health. On this basis, the Court will examine this case as follows in relation to Mr. Hernández: (a) the presumed violation of the rights to personal integrity and to health; (b) the presumed violation of the right to personal liberty, and (c) the presumed violation of judicial guarantees and judicial protection. It will also analyze whether the right to personal integrity of Raquel San Martín, the presumed victim's mother, was violated.

VII-1
RIGHT TO PERSONAL INTEGRITY[88] AND RIGHT TO HEALTH[89]

A. Arguments of the Commission and of the parties

51. The ***Commission*** argued that States have two essential obligations in relation to the health of persons deprived of liberty: (i) opportune medical care in order to make a comprehensive medical diagnosis, and (ii) adequate treatment based on the principle of equivalence. In the instant case, the Commission alleged that on numerous occasions the authorities failed to provide medical care that would have permitted the timely diagnosis of Mr. Hernández's ailments and that these omissions occurred over a prolonged period that the State has neither explained nor

communication of July 24, 2000 (evidence file, folio 7).

84 Decision of October 10, 1995, issued by the La Plata judge of first instance, in the case entitled: "Hernández José Luis ref/Police Headquarters of Bs. As. province and others/Damages. Court No. 4 (B) P.C.". Annex to the petitioners' communication of July 24, 2000, and Brief with the initial petition lodged before the Commission on August 19, 2008 (evidence file, folio 290).

85 *Cf.* Brief with the initial petition lodged before the Commission on August 19, 2008, and the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folios 291 and 259).

86 *Cf.* Brief with the initial petition lodged before the Commission on August 19, 2008, and the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folios 291 and 259).

87 *Cf.* Brief with the initial petition lodged before the Commission on August 19, 2008, and the State's brief of June 6, 2003, with additional information addressed to the Commission (evidence file, folios 291 and 259).

88 Article 5 of the American Convention.

89 Article 26 of the American Convention.

justified. The Commission considered that, in light of Mr. Hernández's symptoms, all the authorities were obliged to take every measure required to obtain a diagnosis and to provide specific treatment for meningitis. Regarding the treatment that Mr. Hernández received, the Commission alleged that this did not meet the international standards for the principle of equivalence. It also considered that the impact of meningitis on the presumed victim was an additional factor that proved the lack of adequate medical care. The Commission concluded that the State was responsible for the violation of the Mr. Hernández's right to personal integrity and not to be subjected to cruel, inhuman and degrading treatment.

52. The ***representatives*** indicated that the Argentine State had deprived Mr. Hernández of his right to receive care while he was under its exclusive responsibility. The argued that the State had disregarded its obligation to provided him with the necessary care to, at least, preserve the status of his health before he was deprived of his liberty. Specifically, they argued that the State had violated Mr. Hernández's rights to personal integrity and health owing to the lack of an opportune diagnosis and adequate medical care in conditions of equivalence while he was imprisoned and in the exclusive custody of the State; omissions that were reiterated and that led to serious harm and permanent effects on his physical and mental health. They also asked that, based on the *iura novit curia* principle, the Court declare the violation of the right to life, because his physical deterioration and death resulted from the medical conditions that commenced while he was detained.

53. The ***State*** argued that there was no evidence to consider that Mr. Hernández's health had been impaired prior to July 10, 1990, because no complaints had been filed before the judge despite several allegations made by his representative. The State explained that the influenza-like condition reported by Mr. Hernández's mother in July 1989 had not constituted a danger to his health and that there was no evidence of any kind that would allow that assertion to be substantiated. It argued that it was only on August 2, 1990, that the judge was informed that Mr. Hernández had been diagnosed with a possible hepatitis, and his immediate admission to hospital and a series of tests were ordered. Consequently, the State alleged that the medical treatment he received from then on was constant and permanent in one of the most prestigious hospitals of Buenos Aires province, the "San Juan de Dios" Hospital in La Plata. The State also argued that it was not possible to relate Mr. Hernández's ailments in July 1989 to those that resulted in a syndrome of meningitis on August 15, 1990. In this way, the State repudiated any relationship between the two diseases and argued that this relationship would have to be demonstrated by a medical opinion. Lastly, it argued that the statements made by the presumed victim's mother on October 23, 1990, revealed that Mr. Hernández had not been subjected to cruel or inhuman treatment. Consequently, the State asked the Court to declare that the State was not responsible for the violation of Articles 5(1) and 5(2) of the Convention.

B. Considerations of the Court

54. The Court notes that, in this section, the dispute consists in determining whether the State is responsible for the violation of Mr. Hernández's personal integrity as a result of the prison conditions in which he was detained, and also owing to the alleged lack of adequate medical attention while he was deprived of liberty and the consequences that the treatment – or the lack of it - may have had on his health. The Court notes that neither the Commission nor the representatives explicitly alleged the violation of Article 26 of the Convention in relation to the right to health. However, based on the *iura novit curia* principle – which international case law has used repeatedly, in the sense that the Court has the authority to examine the possible violation of the provisions of the Convention that have not been alleged in the briefs submitted to it, in the understanding that the parties have had the opportunity to express their respective positions in

relation to the facts that substantiate them[90] – the Court will rule on the right to health. Accordingly, in this section, the Court will address the matter as follows: (a) first, it will examine the allegations regarding the violation of personal integrity, and (b) then, it will proceed to examine whether, in this case, Mr. Hernández's right to health was violated.

B.1. The content of the right to personal integrity of persons deprived of liberty

55. Article 5 of the American Convention recognizes that every person has the right to have his physical, mental, and moral integrity respected, stipulates that no one shall be subjected to torture or to cruel inhuman or degrading punishment or treatment, and establishes that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. The Court has established that the violation of personal integrity is a type of violation that has different connotations of degree and that its physical and mental effects vary in intensity based on endogenous and exogenous factors that must be proved in each specific situation.[91] The Court has also indicated that the right to personal integrity is of such importance that it may not be suspended under any circumstance.[92] Furthermore, the Court has indicated that the general obligations to respect and to ensure rights established in Article 1(1) of the American Convention result in special duties that are determined based on the particular needs for protection of the subject of law, due either to his personal conditions or to the specific situation in which he finds himself.[93]

56. Therefore, with regard to persons deprived of their liberty, the Court has determined that the State occupies a special position of guarantor because the prison authorities exercise strong control and authority over those who are in their custody.[94] This is due to the special interaction of restraint between the person deprived of liberty and the State, characterized by the particular intensity with which the State is able to regulate his rights and obligations and due to the circumstances inherent in confinement, where the person deprived of liberty is prevented from satisfying for himself a series of basic needs that are essential for leading a decent life.[95] Consequently, pursuant to Article 5(1) and 5(2) of the Convention, everyone deprived of liberty has the right to live in detention conditions that are compatible with his personal dignity. This signifies that the State has the duty to safeguard the health and well-being of persons deprived of liberty and to ensure that the manner and method of deprivation of liberty do not exceed the inherent and inevitable level of suffering.[96]

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[90] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 163, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 204.

[91] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 57, and *Case of Girón et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 390, para. 78.

[92] *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 157, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 167.

[93] *Cf. Case of the Pueblo Bello Massacre v. Colombia,* Judgment of January 31, 2006. Series C No. 140, para. 111; and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 168.

[94] *Cf. Case of Neira Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 168.

[95] *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay, Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 152, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 168.

[96] *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay, Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 159, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 169.

57. The Court has also established that personal integrity is directly and immediately linked to care for human health,[97] and that the lack of adequate medical care may result in the violation of Article 5 of the Convention.[98] This Court has indicated that it may be considered that the lack of adequate medical care for a person who is deprived of liberty and in the State's custody violates Article 5(1) and 5(2) of the Convention, depending, among other factors, on the particular circumstances of the specific person, such as his health status or the type of ailment he suffers from, the time that has passed without receiving treatment, the accumulative physical and mental effects[99] and, in some cases, the person's sex and age.[100] The Court recalls that, in order to interpret the content of the right of persons deprived of liberty to decent and humane treatment, numerous decisions of international bodies cite the United Nations Standard Minimum Rules for the Treatment of Prisoners as providing basic rules for their accommodation, hygiene, medical treatment and physical exercise, among other matters.[101]

58. Based on the criteria established in the preceding paragraphs, the Court will now analyze whether Mr. Hernández's detention conditions constituted a violation of his right to personal integrity.

B.2. The impairment of the right to personal integrity of José Luis Hernández

59. The Court has indicated that the lack of adequate medical care does not meet the minimum material requirements of decent treatment that respects the inherent dignity of the human person in the sense of Article 5 of the American Convention. In the case of persons deprived of liberty, the fact that the authorities did not have the intention to humiliate or demean a victim does not inevitably lead to the conclusion that Article 5(2) of the Convention has not been violated. Under the American Convention, the suffering and harm to personal integrity caused by the lack of adequate medical care for a person deprived of liberty – and the consequent harm to his health – may, in themselves, constitute cruel, inhuman and degrading treatment.

60. Furthermore, the Court recalls that, according to Article 5 of the Convention, all persons deprived of their liberty have the right to detention conditions that are compatible with their personal dignity. In this regard, the Court has indicated that the injuries, sufferings, damage to health or harm suffered by a person while he is deprived of liberty may ultimately constitute a form of cruel punishment when, owing to the conditions of confinement, there is a deterioration in physical, mental and moral integrity – strictly prohibited by paragraph 2 of Article 5 of the

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97 *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 22, 2007. Series C No. 171, para. 117, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 90.

98 *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, paras. 156 and 157, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 90.

99 *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela, Preliminary objection, merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 103, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 90.

100 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala,* Merits. Judgment of November 19, 1999. Series C No. 63, para. 74, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 90.

101 *Cf. Case of Raxcacó Reyes v. Guatemala. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 133, para. 99, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 174. United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

Convention – that is not a natural and direct consequence of the deprivation of liberty itself.[102] With regard to the conditions of the premises on which persons deprived of liberty are detained, keeping a detainee in overcrowded conditions, lacking ventilation and natural light, without a bed to rest on or adequate hygiene conditions, in isolation and incommunicado, or with undue restrictions of the visiting regime constitutes a violation of personal integrity.[103] Since the State is responsible for detention centers, it must guarantee that inmates have conditions that ensure their fundamental rights and respect their dignity.[104]

61. With regard to the foregoing, the Court recalls that Mr. Hernández was never examined by a doctor to verify the causes of the influenza-like condition and earache that his mother reported on July 6, 1989, even though the trial judge ordered a medical examination and the provision of treatment; that he was detained in the Monte Grande Police Station from February 7, 1989, to August 3, 1990, even though there was insufficient space to accommodate all the detainees, a situation that was reported by the Police Chief on March 20, 1989, and by Mr. Hernández's mother on July 6, 1989, and that, although the trial judge issued constant orders that the presumed victim should be provided with medical care once his meningitis was known, the prison authorities complied with those orders belatedly or not at all. The Court considers that these State omissions, although they were not intended to humiliate or punish Mr. Hernández, did constitute degrading treatment that the presumed victim experienced while in the State's custody.

B.3. The right to health

62. The Court notes that, in the instant case, one of the legal issues identified relates to the scope of the right to health understood as an autonomous right derived from Article 26 of the American Convention. In this section, this issue is addressed based on the approach adopted by the Court since the case of *Lagos del Campo v. Peru,*[105] which it has continued to adopt in subsequent decisions.[106] In this regard, the Court recalls that already in the case of *Poblete Vilches et al. v. Chile* it had asserted the following:

> Thus, it can clearly be interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER), by derivation from the norms recognized in the Charter of the Organization of American States (OAS), and also the rules of interpretation established in Article 29 of the Convention itself; particularly insofar as they prevent excluding or limiting the enjoyment of the rights established in the American Declaration and even those recognized by domestic law. Furthermore, based on a systematic, teleological and evolutive interpretation, the Court has resorted to the national and

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[102] *Cf. Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs.* Judgment of November 25, 2004. Series C No. 119, para. 101, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2005. Series C No. 160*,* para. 314.

[103] *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004, para. 150, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006, para. 315.

[104] *Cf. Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137, para. 223, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, para. 315.

[105] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 141 to 150 and 154.

[106] *Cf. Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349*,* para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359*,* para. 73*,* and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 175.

> international *corpus iuris* on the matter to give specific content to the scope of the rights protected by the Convention, in order to derive the scope of the specific obligations relating to each right.[107]

63. In this section, the Court will rule on the right to health and, in particular, on the right to health of persons deprived of liberty, autonomously, as an integral part of the ESCER and, to this end, it will proceed as follows: (a) the right to health as an autonomous and justiciable right; (b) the content of the right to health, and (c) the impairment of the right to health in this case.

B.3.1. The right to health as an autonomous and justiciable right

64. In order to identify those rights that may be derived from Article 26 by interpretation, it is necessary to take into account that this article makes a direct referral to the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. From a reading of the latter, the Court notes that this Charter recognizes health in its Article 34(i)[108] and 34(l),[109] which establish, among other basic objectives of integral development, that of the "[p]rotection of man's potential through the extension and application of modern medical science," as well as the "[u]rban conditions that offer the opportunity for a healthful, productive, and full life." Meanwhile, Article 45(h)[110] stresses that "man can only achieve the full realization of his aspirations within a just social order," and therefore the States agreed to dedicate every effort to the application of various principles, including: "[d]evelopment of an efficient social security policy." Therefore, the Court reiterates that there is a reference with a sufficient degree of specificity to derive the existence of the right to health recognized by the OAS Charter. Consequently, the Court considers that the right to health is a right protected by Article 26 of the Convention.[111]

65. Accordingly, the Court must reiterate the scope of the right to health and, in particular, of the right to health of persons deprived of liberty in the context of the facts of the instant case in light of the international *corpus iuris* on this matter. The Court recalls that the obligations contained in Articles 1(1) and 2 of the American Convention constitute the definitive grounds for determining the international responsibility of a State for violations of the rights recognized in the

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107 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 103, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 170.

108 Article 34(i) of the OAS Charter establishes: "[t]he Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: […] (i) Protection of man's potential through the extension and application of modern medical science."

109 Article 34.l of the OAS Charter establishes: "[t]he Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: […] (l) Urban conditions that offer the opportunity for a healthful, productive, and full life."

110 Article 45(h) of the OAS Charter establishes: "[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: […] (h) Development of an efficient social security policy."

111 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 106, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 99.

Convention,[112] including those recognized by virtue of Article 26. However, the Convention itself makes an explicit reference to the norms of general international law for its interpretation and application, especially in Article 29, which establishes the *pro persona* principle.[113] In this way, as has been the consistent practice of this Court,[114] when determining the compatibility of a State's acts and omissions, or its laws, with the Convention or other treaties for which the Court has jurisdiction, the Court is able to interpret the obligations and rights they contain in light of other pertinent treaties and norms.[115]

66. Therefore, the Court will reiterate the sources, principles and criteria of the international *corpus iuris* as special rules applicable when determining the content of the right to health. The use of the said norms for the determination of the right in question will be used as a supplement to the provisions of the Convention. In this regard, the Court notes that it is not assuming competence with regard to treaties for which it does not have this, and it is not according conventional rank to provisions contained in other national and international instruments related to the ESCER.[116] To the contrary, the Court will make an interpretation in keeping with the standards established by Article 29, and in conformity with its case law, which allows it to update the meaning of the rights derived from the OAS Charter that are recognized by Article 26 of the Convention. The determination of the right to health will give special emphasis to the American Declaration, because as this Court has established:

> […] the Member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.[117]

67. Similarly, this Court has indicated on other occasions that human rights treaties are living instruments the interpretation of which must evolve with the times and current circumstances. This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of

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[112] *Cf. Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 107, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 174.

[113] *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. 143, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 174**.**

[114] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs. Judgment of March 8, 2018.* Series C No. 349, para. 103; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329, para. 168; *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272*,* para. 129; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 83; *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 78 and 121, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 100.

[115] *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 176.

[116] *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. 143, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 175.

[117] *Cf. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89, July 14, 1989. Series A No. 10, para. 43, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 175.

Treaties.[118] Also, Article 31(3) of the Vienna Convention authorizes the use of means of interpretation such as relevant agreements or practice or rules of international law that the States have agreed to concerning the subject-matter of the treaty, and these are some of the means related to an evolutive vision of the treaty. Accordingly, in order to determine the scope of the right to health, and in particular of the right to health of persons deprived of liberty, as derived from the economic, social, educational, scientific and cultural standards of the OAS Charter, the Court will refer to the relevant instrument of the international *corpus iuris*.

68. The Court will now verify the meaning and scope of this right for the purposes of this case.

B.3.2. The content of the right to health

69. Based on the foregoing, Article 34(i) and 34(l) of the OAS Charter establish, among other basic objectives of integral development, the [p]rotection of man's potential through the extension and application of modern medical science," and also "urban conditions that offer the opportunity for a healthful, productive, and full life." In addition, Article 45(h)[119] stresses that "man can only achieve the full realization of his aspirations within a just social order," and therefore the States agreed to dedicate every effort to the application of various principles, including: "[d]evelopment of an efficient social security policy."

70. Furthermore, Article XI of the American Declaration allows the right to health to be identified when stating that "every person has the right to the preservation of his health through sanitary and social measures relating to […] medical care, to the extent permitted by public and community resources."[120]

71. Similarly, Article 10 of the Protocol of San Salvador establishes that "everyone shall have the right to health understood to mean the enjoyment of the highest level of physical, mental and social well-being" and indicates that health is a public good.[121] The same article establishes that, among measures to ensure the right to health, States must ensure "[u]niversal immunization against the principal infectious diseases," "[p]revention and treatment of endemic, occupational and other diseases," and "[s]atisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable."

72. At the universal level, Article 25 of the Universal Declaration of Human Rights[122] establishes that "everyone has the right to a standard of living adequate for the health and well-being of

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118 *Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 114, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 176.

119 Article 45(h) of the OAS Charter establishes: "[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: […] (h) Development of an efficient social security policy."

120 Adopted at the Ninth Pan-American Conference held in Bogota, Colombia, 1948.

121 Article 10 of the Protocol of San Salvador establishes: "1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community, [and] (b) Extension of the benefits of health services to all individuals subject to the State's jurisdiction."

122 Adopted and proclaimed by United Nations General Assembly Resolution 217 A (iii) of December 10, 1948, in Paris. Article 25 establishes that: "1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in

himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." For its part, Article 12 of the International Covenant on Economic, Social and Cultural Rights recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

73. Additionally, the right to health is recognized in Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination;[123] Article 12(1) of the Convention on the Elimination of All Forms of Discrimination against Women;[124] Article 24(1) of the Convention on the Rights of the Child;[125] Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[126] and Article 25 of the Convention on the Rights of Persons with Disabilities.[127] This rights is also established in various regional human rights instruments such as in Article 17 of the Social Charter of the Americas;[128] Article 11 of the revised version of the 1961 European Social Charter;[129] Article 16 of the African Charter of Human and Peoples' Rights,[130] and recently in the Inter-American Convention on Protecting the Human

circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

[123] Adopted by United Nations General Assembly Resolution 2106 A (XX) of December 21, 1965. Entered into force on January 4, 1969. Entered into force for Chile on November 19, 1971. Article 5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) Economic, social and cultural rights, in particular: […] (iv) The right to public health, medical care, social security and social services. […]

[124] Adopted by the United Nations General Assembly on December 18, 1979. Entered into force on September 3, 1981. Article 12(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

[125] Adopted by United Nations General Assembly Resolution 44/25 of November 20, 1989. Entered into force on September 2, 1990. Ratified by Chile on August 14, 1990. Article 24(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.[...]

[126] Adopted by United Nations General Assembly Resolution 45/158, of December 18, 1990. Ratified by Chile on April 12, 2005. Article 28. Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

[127] Adopted by the United Nations General Assembly on December 13, 2006. Entered into force on May 3, 2008. Ratified by Chile on August 25,. Article 25. States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.

[128] Adopted at the Second Plenary Session of the OAS General Assembly on June 4, 2012. Its Article 17 establishes that member states reaffirm that the enjoyment of the highest attainable standard of health is a fundamental right of all persons without discrimination and recognize that health is an essential condition for social inclusion and cohesion, integral development and economic growth with equity. Also, with regard to integral development, Article 33(2) expressly mentions the area of health.

[129] Council of Europe (Strasbourg). Adopted in Turin on October 18, 1961. Article 11: The right to protection of health. With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; [and] (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

[130] Adopted at the XVIII Assembly of Heads of State and Government of the Organization of African Unity in Nairobi, Kenya, on July 27, 1981. Article 16. 1. Every individual shall have the right to enjoy the best attainable state of physical

Rights of Older Persons.[131] The right to health has also been recognized in section II, paragraph 41 of the Vienna Declaration and Programme of Action,[132] and in other international instruments and decisions.[133]

74. The right to health is also recognized at the constitutional level in Argentina: in Article 42 of the Constitution.[134]

75. Additionally, the Court observes a broad regional consensus on the consolidation of the right to health which is explicitly recognized in various Constitutions and domestic laws of the States of the region, including: Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.[135]

B.3.3. Standards for the right to health applicable in the instant case

76. This Court has already recognized that health is a fundamental human right essential for the satisfactory exercise of the other human rights, and that all human beings have the right to enjoy the highest attainable standard of health that allows them to live decently, understanding health not only as the absence of illness or disease, but also as a complete state of physical, mental and social well-being derived from a lifestyle that permits the individual to achieve a complete balance. The Court has specified that the general obligation to protect health results in the State's duty to

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and mental health. 2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

131 Adopted at the Fifth regular period of sessions of the OAS General Assembly in Washington, D.C., on June 15, 2015. Entered into force on January 11, 2017. Ratified by Chile on November 7, 2017. Article 19. Right to health. Older persons have the right to physical and mental health without discrimination of any kind. States Parties shall design and implement comprehensive-care oriented intersectoral public health policies that include health promotion, prevention and care of disease at all stages, and rehabilitation and palliative care for older persons, in order to promote enjoyment of the highest level of physical, mental and social well-being. […] However, for the purpose of this analysis, it should be noted that this provision was not in force when the facts of the case occurred.

132 Adopted by the World Conference on Human Rights in Vienna on June 25, 1933. Section II, para. 41. The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span. In the context of the World Conference on Women and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the Proclamation of Tehran of 1968, the World Conference on Human Rights reaffirmed, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

133 The following is relevant for the analysis of the right to health, CESCR, *General Comment No. 14: The right to the highest attainable standard of health,* which will be addressed *infra*. The General Comments of the Committee on the Rights of the Child are also useful, especially *General Comment No. 3: "HIV/AIDS and the Rights of the Child*," CRC/GC/2003/3 (2003), and also *General Comment No. 4: "Adolescent health and development in the context of the Convention on the Rights of the Child,"* CRC/GC/2003/4 (2003). In addition, *General Recommendation No. 24* of the Committee on the Elimination of Discrimination against Women, *"Article 12 of the Convention (Women and Health)"* of February 2, 1999, A/54/38/Rev.1, and the reports of United Nations Special Rapporteurs on the right to health. UN. Commission on Human Rights, "*Non-discrimination in the field of health*," Resolution 1989/11. Adopted at the 45th session on March 2, 1989, E/CN.4/RES/1989/11.

134 Article 10 establishes: "Right to Social Security. The State recognizes the universal and progressive right of everyone to social security to protect them from the contingencies established by law and to increase their quality of life." Article 11 establishes: "Free access to health services and pensions. The State guarantees free access to health services and to pensions through public, private and mixed entities. It will also supervise their efficient operation."

135 The constitutional provisions of the States Parties to the American Convention include: Barbados (art. 17.2.A); Bolivia (art. 35); Brazil (art. 196); Chile (art. 19) Colombia (art. 49); Costa Rica (art. 46); Dominican Republic (art. 61); Ecuador (art. 32); El Salvador (art. 65); Guatemala (arts. 93 and 94); Haiti (art. 19); Honduras (art. 145); Mexico (art. 4); Nicaragua (art. 59); Panama (art. 109); Paraguay (art. 68); Peru (art. 70); Suriname (art. 36); Uruguay (art. 44), and Venezuela (art. 83).

ensure the access of everyone to essential health services, ensuring good quality and efficient medical services, as well as to promote the improvement of its population's health.[136]

77. Similarly, the Court has established that the operationalization of this obligation begins with the duty to establish regulations. It has therefore indicated that States are responsible for regulating, on a permanent basis, the provisions of services (both public and private) and the execution of national programs to ensure the delivery of quality services.[137] The Court has taken into account CESCR General Comment No. 14 on the right to the highest attainable standard of health.[138] In particular, the Comment stresses that this right includes prompt and appropriate health care and also the following interrelated and essential elements of availability, accessibility, acceptability and quality, the application of which will depend on the conditions prevailing in each State:

> a) Availability. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.
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> b) Accessibility. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions::
>
> > i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds;
> >
> > ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities;
> >
> > iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households;

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136 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 118, *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 105.

137 *Cf. Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 134, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 106.

138 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 118, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 106.

iv) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas8 concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

c) Acceptability. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

d) Quality. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires*, inter alia,* skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.[139]

78. In this regard, the Court concludes that the right to health refers to the right of everyone to enjoy the highest attainable standard of physical, mental and social well-being. This right includes prompt and appropriate health care in keeping with the principles of availability, accessibility, acceptability and quality. Compliance with the State's obligation to respect and ensure this right must pay special attention to vulnerable and marginalized groups, and must be provided progressively based on available resources and the applicable domestic laws. The Court will now refer to the specific obligations that arise when providing health care to individuals suffering from tuberculosis. The Court notes that the concepts mentioned are taken from different responsible sources, but that medical science on this matter is advancing continuously and, consequently, the citations included here as an illustration do not contradict or call into question more recent knowledge; moreover, the Court does not take a position in matters and discussions that belong to the medical and biological sciences.[140]

79. On this basis, with regard to the medical treatment that should be ensured to anyone with tuberculosis, the Court considers that the International Standards of Tuberculosis Care prepared by the Tuberculosis Coalition for Technical Assistance (hereinafter "the ISTC") constitute an authorized reference to clarify some of the State's international obligations in this regard. In general, these standards establish that the basic principles of care for persons with tuberculosis are the same worldwide: (a) a diagnosis should be established promptly and accurately, and (b) standardized treatment regimens of proven efficacy should be used with appropriate treatment support and supervision, the response to treatment should be monitored and the essential public health responsibilities carried out.[141] In particular, the ISTC indicates that an effective response to tuberculosis requires a series of actions relating to diagnosis, treatment and public health responsibilities.

80. First, all persons with otherwise unexplained productive cough lasting two–three weeks or more should be evaluated for tuberculosis.[142] Second, the treatment of tuberculosis requires that

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139 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, paras. 120 and 121, and Committee on Economic, Social and Cultural Rights, General Comment No. 14: *The right to the highest attainable standard of health,* August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

140 *Cf.* Case of *Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 39.

141 *Cf.* Tuberculosis Coalition for Technical Assistance. International Standards of Tuberculosis Care. The Hague: Tuberculosis Coalition for Technical Assistance, 2006, p. 5

142 *Cf.* Tuberculosis Coalition for Technical Assistance. International Standards of Tuberculosis Care (ISTC). The Hague: Tuberculosis Coalition for Technical Assistance, 2006, standard 1. *Manual de Procedimiento del Programa de Tuberculosis para Poblaciones Privadas de Libertad en Gendarmería de Chile*, Ministry of Health, p. 17. *Atención y Cuidado de la Salud de las Personas Privadas de su Libertad*. *Plan estratégico de salud integral en el servicio penitenciario federal 2012-2015*, Ministry of Justice and Human Rights of the Nation, 2013, p. 57. *Guía para el control de la tuberculosis en población privada de libertad,* Ministry of Health, March 2012, p. 9.

all patients (including those with HIV infection) who have not been treated previously should receive an internationally accepted first-line treatment regimen using drugs of known bioavailability. The doses of antituberculosis drugs used should conform to international recommendations.[143] In addition, all patients should be monitored for response to therapy.[144] Third, regarding public health responsibility, all providers of care for patients with tuberculosis should ensure that persons (especially children under 5 years of age and persons with HIV infection) who are in close contact with patients who have infectious tuberculosis are evaluated and managed in line with international recommendations.[145]

81. As it has reiterated in its recent case law, the Court considers that the nature and scope of the obligations derived from the protection of the right to health include aspects that can be enforced immediately, and others that are of a progressive nature.[146] In this regard, the Court recalls that, with regard to the former (obligations that can be enforced immediately), States must adopt effective measures to ensure access without discrimination to the services recognized by the right to health, ensure that men and women have equal rights and, in general, advance towards the full realization of the ESCER. Regarding the latter (obligations of a progressive nature), progressive realization means that States Parties have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of this right, and insofar as their available resources permit, by legislative or other appropriate means. In addition, there is also the obligation to ensure non-retrogressivity in relation to the rights achieved. Based on the foregoing, the treaty-based obligations to respect and to ensure rights, and also to adopt domestic legislative provisions (Articles 1(1) and 2) are fundamental to achieve the realization of this right.[147]

82. In the instant case, the Court must examine the State's conduct as regards compliance with its obligation to ensure the right to health of Mr. Hernández in relation to the medical attention he received while he was deprived of liberty.

B.4. The impairment of the right to health of José Luis Hernández

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143 *Cf.* Tuberculosis Coalition for Technical Assistance. International Standards of Tuberculosis Care (ISTC). The Hague: Tuberculosis Coalition for Technical Assistance, 2006, standard 8. *Guía para el control de la tuberculosis en población privada de libertad,* Ministry of Health of El Salvador, March 2012, p. 16. *Cf.* Article 6.6.1 of the *Norma Oficial Mexicana NOM-006-SSA2-2013 Para la prevención and control de la tuberculosis,* Ministry of Health, November 13, 2013.

144 *Cf.* Tuberculosis Coalition for Technical Assistance. International Standards of Tuberculosis Care (ISTC). The Hague: Tuberculosis Coalition for Technical Assistance, 2006, standards 10 and 11. *Atención y Cuidado de la Salud de las Personas Privadas de su Libertad. Plan estratégico de salud integral en el servicio penitenciario federal 2012-2015,* Ministry of Justice and Human Rights of the Nation, 2013, p. 72. *Guía de Práctica Clínica. Prevención, diagnóstico, tratamiento y control de la tuberculosis,* Ministry of Public Health of Ecuador, March 2018, p. 75. *Manual de Procedimiento del Programa de Tuberculosis para Poblaciones Privadas de Libertad en Gendarmería de Chile*, Ministry of Health, p. 33.

145 *Cf.* Tuberculosis Coalition for Technical Assistance. International Standards of Tuberculosis Care (ISTC). The Hague: Tuberculosis Coalition for Technical Assistance, 2006, standard 16. *Guía para el control de la tuberculosis en población privada de libertad,* Ministry of Health, March 2012, p. 18. *Atención y Cuidado de la Salud de las Personas Privadas de su Libertad. Plan estratégico de salud integral en el servicio penitenciario federal 2012-2015,* Ministry of Justice and Human Rights of the Nation, 2013, p. 65. *Manual Técnico Administrativo para la atención e intervención en salud pública a la población privada de la libertad a cargo del Instituto Nacional Penitenciario y Carcelario*, December 15, 2015, p. 50.

146 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104 and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 98, and *mutatis mutandis, Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 190

147 *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 190.

83. The Court will analyze whether the medical treatment that Mr. Hernández received was satisfactory based on the standards for the right to health. To this end, bearing in mind the arguments of the parties, the observations of the Commission, and the aforementioned precedents, the analysis will focus on determining the following: (a) whether health care for persons deprived of liberty was regulated in Argentina at the time of the facts; (b) the moment at which the State became aware of Mr. Hernández's disease and provided adequate medical care, and (c) whether there is a causal nexus between the medical care provided – or the lack of it – and the impairment of the presumed victim's health.

84. To guarantee the right to health of those who are deprived of liberty, the first obligation assumed by the State is that of regulating the provision of medical care,[148] because health care is related to the prevailing conditions in each State, including the way in which it is regulated. The Court observes that, from the time of Mr. Hernández's detention on February 7, 1989, until he was granted conditional release on May 29, 1991, this aspect was regulated by a series of provincial and national laws and regulations.[149] Based on these provisions, the Court notes that during the time that Mr. Hernández was detained, the domestic laws of the State established the right of persons deprived of liberty to receive medical care. Consequently, the Court concludes that the State regulated medical care for persons deprived of liberty.

85. Second, the Court must determine the moment at which the State became aware of the presumed victim's disease and did take the necessary measures to provide adequate medical treatment. In this regard, the Court notes that when Mr. Hernández entered the Monte Grande Police Station on February 7, 1989, he was "lucid … and with normal autopsychic orientation, without signs of intoxication and an external examination of his body reveal[ed] no recent traumatic injuries" (*supra*, para. 27). It was while detained in the Monte Grande Police Station that Mr. Hernández began to reveal symptoms that his health was compromised and his mother reported this to the trial judge on two occasions: on July 6, 1989, when she indicated that her son was suffering from "a very severe influenza-like condition and also an ear infection that requires medical care that, at that date, it has not been possible to provide" and requested his transfer to Prison No. 1, and on August 1, 1990, when she reported that Mr. Hernández had been suffering from severe headaches for a week. As a result of the second complaint, Mr. Hernández was transferred to Prison No. 1 and, on August 15, 1990, the trial judge was advised that Mr. Hernández had been admitted to the San Juan de Dios Hospital in La Plata because he had "symptoms of acute tuberculous meningitis."

86. The State argued that it had not failed to comply with its obligation to provide Mr. Hernández with medical care prior to August 1990 because there was no evidence that allowed it to know that his health was at risk prior to his mother's second complaint and the subsequent diagnosis of tuberculous meningitis.

87. In this regard, the Court recalls that every persons deprived of liberty has the right to live in detention conditions compatible with his personal dignity.[150] Also, since the State is responsible

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148 *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 171, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 115.

149 (a) Federal Prison Act, No. 412/58 of January 14, 1958; (b) Penal Enforcement Code for Buenos Aires province, No. 5619 of October 5, 1950; (c) Law No. 1373/1962 containing the Regulatory Standards for the Penal Enforcement Code and Organic Structure of the General Directorate of Prisons of February 19, 1962; (d) Law No. 9079/1978, Organic Law of the Prison Service of Buenos Aires province of June 9, 1978, and (e) Decree No. 1300/1980, Regulating the Organic Law of the Prison Service of Buenos Aires province, of August 1, 1980.

150 *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 150, and *Case of De La Cruz Flores v. Peru. Merits, reparations and costs.* Judgment of November 18, 2004. Series C No. 115, para. 124.

for detention centers, it must ensure that inmates have conditions that protect their rights.[151] Regarding health care, compliance with the requirement of quality signifies that, in addition "to being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality."[152] The Court recalls that numerous decisions of international bodies cite the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter "the Rules for the Treatment of Prisoners") in order to interpret the content of the right of persons deprived of liberty to decent and humane treatment, and as basic rules for their accommodation, hygiene, medical treatment and physical exercise, among other matters.[153]

88. In particular, in relation to the Rules for the Treatment of Prisoners, States must provide skilled medical care, including psychiatric treatment, to persons deprived of liberty, both for emergency situations and for regular care, either in the prison or detention center or, if this is not possible, in hospitals or health centers that offer the required service. The health care service should keep adequate, updated and confidential medical records for all persons deprived of liberty, which should be accessible to these persons when requested. The medical services should be organized and coordinated with the general public health administration services and this means establishing prompt and appropriate procedures for the diagnosis and treatment of those who are ill, as well as for their transfer when their health status requires specialized care in special prison establishments or in civil hospitals. To implement these obligations, health care protocols are required together with agile and effective mechanisms for the transfer of prisoners, particularly in situations of emergency or serious illness.[154]

89. The Court considers that the State was obliged to ensure that a doctor examined the presumed victim to verify the causes of his influenza-like symptoms and the earache from which he suffered and to provide medical treatment if necessary. This was especially relevant because Mr. Hernández was deprived of liberty and also owing to the lack of sufficient space for those who were detained in the Monte Grande Police Station, a situation reported by the Police Chief on March 20, 1989, and January 16, 1990, and by the presumed victim's mother on July 6, 1989, and due to the reports of an outbreak of hepatitis that was verified following an order of the trial judge of August 1, 1990. The Court considers that, even though the said symptoms were not decisive to know if Mr. Hernández had contracted tuberculous meningitis prior to August 3, 1990, this did not exempt the State from its obligations with regard to health care based on the presumed victim's symptoms and the conditions in which he was detained. Consequently, the Court notes that the State failed to take measures to diagnose Mr. Hernández's health condition when the

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151 *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 150, and *Case of De La Cruz Flores v. Peru. Merits, reparations and costs.* Judgment of November 18, 2004. Series C No. 115**,** para. 124.

152 *Cf.* Committee on Economic, Social and Cultural Rights, General Comment No. 14: *The right to the highest attainable standard of health*, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

153 *Cf. Case of Raxcacó Reyes v. Guatemala. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 133, para. 99, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 174. United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

154 *Cf.* United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rules 22(1), 24 and 25, Tuberculosis Coalition for Technical Assistance. International Standards of Tuberculosis Care (ISTC). The Hague: Tuberculosis Coalition for Technical Assistance, 2006, standard 1. *Cf. Manual de Procedimiento del Programa de Tuberculosis para Poblaciones Privadas de Libertad en Gendarmería de Chile*, Ministry of Health, p. 17. *Atención y Cuidado de la Salud de las Personas Privadas de su Libertad*. *Plan estratégico de salud integral en el servicio penitenciario federal 2012-2015,* Ministry of Justice and Human Rights of the Nation, 2013, p. 57. *Guía para el control de la tuberculosis en población privada de libertad,* Ministry of Health, March 2012, p. 9.

judge became aware of the initial symptoms, which represented an initial problem in the quality of the health care.

90. Third, the Court must determine whether the State provide Mr. Hernández with appropriate medical treatment once it became aware of his disease and whether there was a causal nexus between the said medical treatment – of lack of it – and the impairment of his right to health.

91. The Court notes that, while Mr. Hernández was detained, he received constant medical care in the San Juan de Dios and Alejandro Korn Hospitals and in the hospital of Prison No. 1. However, the Court has no evidence that would allow it to determine the type of specific medical care that Mr. Hernández received while he was in the said hospitals.[155] The State argued that the allegations with regard to the presume victim's health and the lack of adequate medical care had not been proved by any type of evidence. In this regard, the Court has indicated that owing to the control that the State exercises over a person who is detained, and the consequent control of the evidence regarding his physical condition, detention conditions, and possible medical care, it is the State that has the burden of proof to provide a satisfactory and convincing explanation of what happened and to disprove the allegations abouts its responsibility with valid probative elements.[156] The failure to hand over the evidence that would clarify the type of care received by someone is particularly serious in cases involving arguments related to the violation of the right to health. In its capacity as guarantor, the State has the responsibility both to ensure the rights of the individual in its custody and to provide information and evidence related to what occurs with regard to the detainee.[157]

92. Notwithstanding the foregoing, the Court recalls that, on August 15, 1990, Mr. Hernández was transferred to the San Juan de Dios Hospital in La Plata with symptoms of "acute tuberculous meningitis" and that he was "receiving a specific treatment for his disease, which was responding favorably." Also, that on August 29, 1990, Mr. Hernández was transferred to the Alejandro Korn Hospital owing to a lack of beds and re-admitted to Prison No. 1 the following September 18. While in the Alejandro Korn Hospital, Mr. Hernández received medical treatment for tuberculous meningitis, owing to which the trial judge was informed that he was improving. Mr. Hernández was readmitted to Prison No. 1 on September 18, 1990, and on September 27, 1990, his transfer to the San Juan de Dios Hospital was ordered; however, the order could not be complied with because that hospital "had no free bed." Consequently, on October 2, 1990, Mr. Hernández was transferred to private practice. On October 23, 1990, Mr. Hernández was admitted to the hospital of Prison No. 1 and, on October 24, 1990, an attempt was made to transfer him to the San Juan de Dios Hospital; however, this was no possible owing to a lack of free beds in the requested ward. On November 2, 1990, Mr. Hernández was transferred to the San Martin Hospital of La Plata, and then, the same month, was returned to Prison No. 1 where he received medical treatment until he obtained his conditional release on May 29, 1991.

93. The Court recalls that the right to health refers to the right of everyone to enjoy the highest attainable standard of physical, mental and social well-being. This right includes timely and appropriate health care in accordance with the principles of availability, accessibility, acceptability

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155 The Court recalls that, based on Article 58(b) of the Court's Rules of Procedure, on April 1 and July 4, 2019, the State was asked to provide as helpful evidence the complete medical records of José Luis Hernández concerning the health services he had received in: (i) the Monte Grande Police Station; (ii) Prison No. 1; (iii) the San Juan de Dios Hospital; (iv) the San Martín Hospital in La Plata, and (v) the Alejandro Korn Hospital in Melchor Romero. The State did not forward this information and merely sent information on several actions taken during the criminal proceedings against Mr. Hernández.

156 *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 138, *and Case of Quispialaya Vilcapoma v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2015. Series C No. 308, para. 118.

157 *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 138, *and Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 173.

and quality. Compliance with the State's obligation to respect and to ensure this right must guarantee special care for vulnerable and marginalized groups and be provided progressively in keeping with available resources and the applicable domestic laws. In this regard, the Court notes that on at least three occasions, on August 29, 1990, September 27, 1990, and October 24, 1990, it was not possible to admit Mr. Hernández to the corresponding hospital because no beds were available. The Court also notes that, as a result of the impossibility of admitting Mr. Hernández to hospital for that reason, there were prolonged periods of time – considering the nature of his disease – during which he ceased to receive medical care. The Court notes that the unavailability of beds and the resulting impossibility of providing him with immediate medical care represented a problem concerning the availability and accessibility of health care services.

94. The Court also recalls that Mr. Hernández experienced suffering and problems with his health and his physical and mental capacities as a result of his disease, which continued even after he had obtained his freedom. This is verified by the medical reports that were presented to the trial judge indicating that the presumed victim suffered from "dehydration and poor general health," "reduction of visual acuity," "impairment of the right occulomotor nerve," "Reduction of muscular consistency," "pronounced truncal ataxia that prevents him from walking without support," and also permanent neurological problems that consisted in the loss of vision in one eye, partial permanent paralysis of the left arm and memory loss. The Court also recalls that, on October 23, 1990, Mr. Hernández's mother had informed the trial judge that her son's disease had left him "almost unable to recuperate." Consequently, this Court has no doubt that Mr. Hernández suffered serious damage to his health as a result of the disease he contracted while he was detained and this continued after he had served his sentence.

95. In this case, there is no dispute that there is a causal nexus between the harm that Mr. Hernández suffered to his health and the disease he contracted while he was in the State's custody, and it was for the State to provide evidence to prove that adequate and timely treatment had been provided while the presumed victim was deprived of his liberty, and this did not occur in the instant case. Therefore, as the State failed to comply with the burden of proof to demonstrate that it provided Mr. Hernández with adequate medical treatment while he was detained in order to refute the allegations related to the lack of medical care and the effects on Mr. Hernández's personal integrity, and the problems of quality, accessibility and availability of the health services, the Court concludes that the physical and mental consequences suffered by Mr. Hernández as a result of his disease while he was detained may be attributed to the State and generate its international responsibility for the violation of the right to health.

B.5. Conclusion

96. The Court concludes that the personal integrity of Mr. Hernández was violated because he was deprived of liberty in a detention center that did not have sufficient space to accommodate the detainees, and because the authorities failed to comply promptly with the orders of the trial judge to provide him with medical care once his health status had been reported. These facts constituted degrading treatment pursuant to Article 5(2) of the Convention. Additionally, there is no doubt that Mr. Hernández's health was severely affected as a result of the tuberculous meningitis that he contracted while detained in the Monte Grande Police Station between February 7, 1989, and August 3, 1990; that he endured suffering as a result of his disease, and that it had permanent effects that impaired his physical and mental capacities and that continued after he had served his sentence. Furthermore, the Court recalls that the State did not provide any evidence that would prove it had complied with its obligation to provide the presumed victim with adequate medical treatment before and after it became aware that he had contracted tuberculous meningitis; moreover, the Court notes the existence of omissions that can be attributed to the State in relation to the quality, availability and accessibility of health care services. For these reasons, the existence of a causal nexus can be verified between the State's acts and omissions relating to the detention conditions and the failure to provide Mr. Hernández with medical care

and the violation of his right to personal integrity and health. Consequently, the State is responsible for the violation of Articles 5(1), 5(2) and 26 of the American Convention in relation to Article 1(1) of this instrument.

VII-2
RIGHTS TO PERSONAL LIBERTY[158] AND PRESUMPTION OF INNOCENCE[159]

A. Arguments of the Commission and of the parties

97. The ***Commission*** considered that the preventive detention was imposed on Mr. Hernández arbitrarily and that it violated the principle of the presumption of innocence. The Commission also noted that Mr. Hernández was deprived of his liberty for one year and six months in a police station, which is not an appropriate place to ensure the State's position as guarantor. Consequently, the Commission concluded that the State had violated the right to personal liberty and to the presumption of innocence pursuant to Articles 7(1), 7(3) and 8(2) of the American Convention in relation to Article 1(1) of this instrument.

98. The ***representatives*** argued that Mr. Hernández was detained in an arbitrary and discriminatory manner for the presumed perpetration of an offense against property, even though the conditions for keeping him detained had not been met. Regarding the alleged risk of flight, the representatives indicated that this was an assertion made by the police and the only support for this was a police memorandum. They also argued that if Mr. Hernández had tried to escape, he could not be attributed with any responsibility for this, because flight is a natural and spontaneous act for the essential survival of the individual. They indicated that the request filed by his defense lawyer for his release was rejected, preventive detention was ordered and he was housed in the Police Station where he had been detained without considering the degrading detention conditions of those cells. They also argued that the serious disease that Mr. Hernández contracted showed that there was no danger of him escaping so that, in application of article 2 of Law 10,933, his release on special grounds should have been authorized when this was requested.

99. The ***State*** argued that the trial judge had ordered the preventive detention of Mr. Hernández based on reasonable indications that connected the accused to the offense, which is a necessary conditions to order the non-punitive precautionary measure. The State argued that the judge had examined the different probative elements presented and these allowed him to conclude that there were sufficient indications of responsibility. It also argued that the judge took into account the possibility that the accused could escape, based on evidence that the accused had tried to escape when he was arrested. Additionally, the State argued that preventive detention was ordered based on the procedural rules in force at the time – that is, 30 years ago – so that the trial judge made an appropriate assessment of the procedural risks established at that time. Consequently, it argued that the State was not responsible for the violation of the right to personal liberty and the presumption of innocence of Mr. Hernández.

B. Considerations of the Court

100. The Court has held that the essential content of Article 7 of the American Convention is the protection of the liberty of the individual against any arbitrary or unlawful interference by the State.[160] It has indicated that this article contains two very different types of rules, one general

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158 Article 7 of the American Convention.

159 Article 8 of the American Convention.

160 *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 223, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 76.

and the other specific. The general rule can be found in the first paragraph: "Every person has the right to personal liberty and security." While the specific rule is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7(2)) or arbitrarily (Article 7(3)), to be informed of the reasons for the detention and the charges that have been made (Article 7(4)), to judicial control of the deprivation of liberty (Article 7(5)) and to contest the lawfulness of the detention (Article 7(6)).[161] Thus, any violation of paragraphs 2 to 7 of Article 7 of the Convention necessarily results in the violation of its Article 7(1).

101. Article 7(2) of the Convention establishes that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." This paragraph recognizes the principal guarantee of the right to physical liberty: the legal reservation, according to which, the right to personal liberty can only be modified by law.[162] The legal reservation must, necessarily be accompanied by the principle of the prior definition of the offense, which obliges the States to establish, as specifically as possible and "beforehand," the "reasons" and "conditions" for the deprivation of physical liberty. In addition, it requires that its application be strictly subject to the procedures objectively defined by law.[163] Accordingly, Article 7(2) of the Convention refers automatically to domestic law. Any requirement established by domestic law that is not met when depriving someone of their liberty will signify that this deprivation of liberty is unlawful and contrary to the American Convention.[164]

102. Regarding the arbitrariness referred to in Article 7(3) of the Convention, the Court has established that no one may be subject to detention or imprisonment for reasons and by methods that – although classified as lawful – may be considered incompatible with respect for the fundamental rights of the individual because, among other matters, they are unreasonable, unpredictable or disproportionate.[165] The Court has considered that the domestic law, the applicable procedure, and the corresponding general explicit or tacit principles are required to be compatible with the Convention. Therefore, the concept of "arbitrariness" should not be considered the same was "contrary to the law," but should be interpreted more broadly to include elements of irregularity, injustice and unpredictability.[166]

103. The Court has considered that for a precautionary measure that restricts liberty not to be arbitrary, it is necessary: (a) that substantive evidence is presented related to the existence of a wrongful act and linking the accused to that act; (b) that the measure complies with the four elements of the "proportionality test"; in other words, that the purpose of the measure must be

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161 *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. 51, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 76.

162 *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. 55, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 77.

163 *Cf. Case of Pollo Rivera et al. v. Peru. Merits, reparations and costs*. Judgment of October 21, 2016. Series C No. 319, para. 98, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 77.

164 *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. 57, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 77.

165 *Cf. Case of Gangaram Panday v. Surinam. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 91.

166 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 91.

legitimate (compatible with the American Convention),[167] suitable to comply with the purpose sought, necessary, and strictly proportionate,[168] and (c) that the decision imposing the measure includes sufficient justification that permits an evaluation of whether it is in keeping with the elements indicated.[169]

104. With regard to the first element mentioned above, the Court has indicated that, to comply with the requirements to restrict the right to personal liberty by a precautionary measure such as preventive detention, sufficient evidence must exist that permits a reasonable supposition that a wrongful act has occurred and that the accused could have taken part in that wrongful act.[170] It should be stressed that this supposition does not constitute, in itself, a legitimate purpose for applying a precautionary measure that restricts liberty, nor is it an element that can affect the principle of presumption of innocence contained in Article 8(2) of the Convention. To the contrary, it is additional to the other requirements related to the legitimate purpose, suitability, necessity and proportionality, and acts as a supplementary guarantee when proceeding to apply a precautionary measure that restricts liberty.

105. This should be understood taking into account that, in principle and in general, this decision should not have any effects on the court's decision regarding the responsibility of the accused, because it is usually taken by a different judge or judicial authority from the one that finally takes the decision on the merits of the case.[171] Also, regarding these suppositions, the Court has considered that the suspicion or the sufficient evidence that permits a reasonable supposition that the accused could have taken part in the wrongful act investigated must be substantiated and demonstrated based on specific facts; in other words, not on mere conjectures or abstract intuitions. From this it can be inferred that the State should not detain to then investigate; to the contrary, it is only authorized to deprive an individual of his liberty when it has sufficient information to be able to prosecute him.[172]

106. Regarding the second element, the Court has indicated that the judicial authority must make a decision on proportionality when imposing a measure of deprivation of liberty. The Court has considered that preventive detention is a precautionary and not a punitive measure,[173] that should be applied exceptionally, since it is the harshest measure that can be imposed on the

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167 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 92.

168 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 92.

169 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 92.

170 *Cf. Case of Servellón García et al. v. Honduras. Judgment of September 21, 2006.* Series C No. 152, para. 90, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 93.

171 *Cf. Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 95, and *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.

172 *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, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 96.

173 *Cf. Case of Pollo Rivera et al. v. Peru. Merits, reparations and costs.* Judgment of October 21, 2016. Series C No. 319, para. 122, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 97.

person accused of an offense who enjoys the principle of presumption of innocence.[174] The Court has also indicated in other cases that the deprivation of liberty of a person accused of an offense cannot be based on general or special preventive purposes related to the punishment.[175] Consequently, it has indicated that the rule should be the liberty of the accused while a decision is taken on his criminal responsibility.[176]

107. Based on the foregoing, the judicial authority should only impose measures of this nature when it has verified that: (a) the purpose of the measures that deprive or restrict liberty is compatible with the Convention; (b) the measures adopted are suitable to achieve the purpose sought; (c) they are necessary, in the sense that they are absolutely essential to achieve the desired purpose and that there is no measure that has a lesser effect on the right curtailed among all those that are similarly suitable to achieve the proposed purpose, 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 obtained through this restriction and achievement of the purpose sought.[177]

108. Regarding the first point, the Inter-American Court has indicated that the measure should only be imposed when it is necessary to achieve a legitimate purpose, namely: that the accused will not hinder the proceedings or evade the action of justice.[178] It has also stressed that procedural risks are not presumed, but must be verified in each case based on the objective and real circumstances of the specific case.[179] This requirement is based on Articles 7(3), 7(5) and 8(2) of the Convention. 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." This provision means that measures that deprive an individual of liberty in the context of criminal proceedings are in keeping with the Convention, provided they have a precautionary nature; that is, that they are a means of neutralizing procedural risks; this refers, in particular, to the purpose of appearance for trial.

109. For its part, Article 8(2) contains the principle of the presumption of innocence according to which a person is innocent until his guilt has been proved. This guarantee reveals that the elements that substantiate the existence of the legitimate purposes cannot be presumed; rather, the judge must justify his decision based on the objective and true circumstances of the specific

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174 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 97.

175 *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. 103, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 97.

176 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 67, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 98.

177 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 98.

178 *Cf. Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 77, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 99.

179 *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, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 99.

case,[180] which must be proved by the person prosecuting the case rather than the accused,[181] who should also be able to exercise the right of rebuttal and to be duly assisted by a lawyer. In addition, the Court has indicated that the gravity of the offense is not, in itself, sufficient to order preventive detention.[182]

110. Consequently, the Court considers that only those purposes directly related to the effective evolution of the proceedings should be considered legitimate purposes; in other words, those that are linked to the risk of flight of the accused, directly established in Article 7(5) of the American Convention, or that seek to prevent the accused from hindering the proceedings.

111. In the instant case, the Court recalls that, on February 14, 1989, the ruling ordering preventive detention was issued following the arrest of Mr. Hernández. In his ruling, the trial judge considered it proved that "at around 7.30 p.m. on February 7, 1989, […] two men intercepted Alejandra Retemozo and after threatening her with a weapon […] they stole her vehicle […] and escaped in it." He also considered that "the preceding act constitutes *prima facie* the offense of aggravated robbery owing to the use of a weapon, as established and penalized in art. 166.2 of the Criminal Code." He therefore concluded that "in this case there is *prima facie* evidence of the authorship and criminal responsibility of José Luis Hernández […]." Consequently, he decided "to convert the current detention of José Luis Hernández and […] into preventive detention supposing them *prima facie* co-authors criminally responsible for the offense of robbery aggravated by the fact that it was committed with a weapon, an offense that is established and penalized in art. 166.2 of the Criminal Code."[183]

112. The Court reiterates that the Convention prohibits the detention or imprisonment in ways that may be legal but that, in practice, turn out to be unreasonable or disproportionate. Consequently, the Court will proceed to determine whether the preventive detention complied with the standards established in the Convention and developed by this Court.

113. First, the Court recalls that the deprivation of liberty of the accused must comply with the requirement of legality, so that the imposition of preventive detention must be "for the reasons and in the conditions previously established by the Constitutions of the States Parties or by the laws enacted pursuant to those Constitutions." In this regard, the Court observes that the ruling of the trial judge was based on the application of articles 183 and 184 of the Code of Criminal Procedure of Buenos Aires province (Law 3,589), which was the law in force at the time of the facts.[184] These provisions read as follows:

> ARTICLE 183. Detention will be converted into preventive detention when the following requirements concur: (1) That the existence of the offense has been justified. (2) That the detainee's statement has been taken or he has refused to provide this. (3) That there is *prima facie* evidence or strong indications to consider him responsible for the act.

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180 *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, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 101.

181 *Cf. Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 101, and ECHR. Case of Ilijkov v. Bulgaria, Judgment of July 26, 2001, application No. 33977/96, para. 85

182 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 101.

183 Decision of the Lomas de Zamora No. 4 Criminal Court of February 14, 1989 (merits file, folios 169 to 174 and helpful evidence, folios 427 to 432).

184 *Cf.* Argentina. Code of Criminal Procedure of Buenos Aires province, Law 3,589 of March 6, 1986. Official Gazette of April 18, 1986.

> ARTICLE 184. The order declaring that the requirements set out in the preceding article are present concurrently in the case shall indicate: (1) The evidence that proves the existence of the offense and of its author in the form described in paragraphs 1 and 3 of Article 183. (2) If the *prima facie* evidence results from the confession of the accused, the pertinent part shall be extracted. (3) If it results from testimonial evidence, a summary of this should be included, and the same in the case of the expert opinion. (4) If from presumptions, these shall be described, and how they have been verified.

114. The Court notes that the trial judge reached his conclusion concerning the existence of the offense and Mr. Hernández's possible participation in the incident based on the following evidence: the statement to the court made by the presumed victim of the offense, the statement made by a witness, "the seizure of the stolen moped from the aforenamed individuals," "the seizure of the caliber .22 firearm from the co-accused José Luis Hernández," and "the flight attempted by the accused before being arrested." These probative elements were in the records of the investigation, the record of the seizure, the site inspection record, the tests carried out on the seized weapon, the testimonial statements of two individuals, and the statement of Mr. Hernández. The Court considers that the ruling ordering preventive detention complied with the requirement of legality, because it was reasoned and founded on articles 183 and 184 of the Code of Criminal Procedure of Buenos Aires province. This analysis permitted the trial judge to verify the existence of evidence that led to the reasonable supposition of the criminal conduct of Mr. Hernández and, on this basis, to order preventive detention.

115. Second, the Court recalls that the only legitimate purpose for depriving the accused of his liberty should be to ensure that he will not hinder the proceedings or evade the action of justice.[185] Procedural risk is not presumed, but must be verified in each case based on the objective and true circumstances of the specific case.[186] In this regard, the State argued that the purpose of the preventive detention was to avoid Mr. Hernández again trying to escape and, consequently, to ensure the purpose of the proceedings. The Court notes that the trial judge did, indeed, refer to Mr. Hernández's attempt at flight as one of the elements to order preventive detention, concluding that "the flight attempted by the accused before being arrested […], given the moment and the probative context […], can only be considered to refute their innocence." Nevertheless, the Court notes that there are no indications that would allow it to be understood that this ruling was taken considering the existence of a risk of the possible flight of Mr. Hernández. This can be verified based on the fact that the trial judge's arguments were always addressed at proving the responsibility *prima facie* of the presumed perpetrators of the offense, as required by the laws at that time, and Mr. Hernández's attempted flight was assessed "in a way that was unfavorable to his innocence."

116. The Court considers that the purpose of verifying the existence of indications that permits a presumption of responsibility for the conduct is to prevent an individual from being detained based on mere suspicion or personal perception of his responsibility and, in this way, constitutes another guarantee for the individual when proceeding to apply preventive detention. However, the verification of these indications does not constitute *per se* a legitimate purpose for adopting the measure of preventive detention because this would constitute prejudgment of the guilt of the accused and a violation of the principle of presumption of innocence. Determination of the purpose of preventive detention requires an independent analysis in which the judge bases his decision on objective and true circumstances of the specific case,[187] which corresponds to the prosecutor and

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185 *Cf. Case of Servellón García*. Judgment of September 21, 2006. Series C No. 152, para. 90, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 99.

186 *Cf. Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, para. 115, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 99.

187 *Cf. Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April

not to the accused,[188] who must also have the possibility of exercising the right of rebuttal and be duly assisted by a lawyer.[189] In the instant case, the Court considers that the preventive detention ordered against Mr. Hernández did not have a legitimate purpose protected by the Convention, because the trial judge never mentioned that this measure was needed to avoid the obstruction of the proceedings or that Mr. Hernández might evade the action of justice and, to the contrary, focused his arguments on proving the existence of evidence of his possible criminal responsibility.

117. Based on the above, the Court considers that, even though the preventive detention of Mr. Hernández complied with the requirement of legality, and the trial judge verified the existence of indications of responsibility in the perpetration of the offense he was accused of, it did not seek a legitimate purpose and constituted a prejudgment of the criminal responsibility of the accused. Consequently, the precautionary measure constituted an arbitrary detention and a violation of the presumption of innocence. Therefore, the Court finds that the State is responsible for the violation of the right to personal liberty and judicial guarantees pursuant to Articles 7(1), 7(3) and 8(2) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of José Luis Hernández.

VII-3
RIGHTS TO JUDICIAL GUARANTEES[190] AND JUDICIAL PROTECTION[191]

A. Arguments of the Commission and of the parties

118. The ***Commission*** argued that while Mr. Hernández was detained he did not have access to an effective judicial remedy because the trial judge merely ordered medical care when his mother had reported his health problems but failed to follow up on the medical treatment. It also indicated that after the trial judge was informed of Mr. Hernández's severe headaches, he delayed two weeks before ordering special and specific medical care. The Commission argued that the trial judge received constant information on the status of Mr. Hernández's health; nevertheless, there was no adequate remedy for these deficiencies. The Commission also argued that, in the context of the request for special release, the judge merely stated that Mr. Hernández was receiving adequate medical care in order to deny this request, without duly justifying this assertion. In relation to the action for damages, the Commission concluded that there had not been a violation of Articles 8(1) and 25 of the American Convention.

119. The ***representatives*** argued that Mr. Hernández did not have an effective remedy to file a complaint regarding his disease and its aftereffects because when the authorities were informed of the impairment of his health they failed to take effective measures to ensure he received timely care. They alleged that it was not sufficient for the trial judge to issue orders without verifying that they were complied with because it converted such orders into mere formalities. They also argued that the court had not followed up on the case effectively. Furthermore, the representatives argued that Law 10,484 established exceptional situations for release from prison that would have allowed Mr. Hernández to be granted release because he met the requirements for one of those situations. Accordingly, the refusal to release him was an unreasonable decision that also reversed the burden of proof regarding the procedural purposes and was contrary to the Convention. Lastly,

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25, 2018, para. 357, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 99.

188 *Cf. Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 101, and ECHR. Case of Ilijkov v. Bulgaria, Judgment of July 26, 2001, application No. 33977/96, para. 85.

189 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 101.

190 Article 8 of the American Convention.

191 Article 25 of the American Convention.

the representatives argued that the calculation of the statute of limitations on the civil action for damages was erroneous because it should have been considered that it was filed on April 2, 1993, since it could not have been filed previously because the presumed victim was under the exclusive control of those who had caused him the harm and filing an action could have placed him at greater risk with the possibility of suffering reprisals. They argued that it was not until April 4, 1991, that the Prison Service entered the definitive diagnosis on the criminal record, so that it was fully aware of the harm suffered and the consequences.

120. The ***State*** argued that the trial judge responded to the requests of Mr. Hernández's mother concerning her son's health and followed up adequately, as shown by the orders of August 2 and August 14, 1990, as well as the records on the treatment and favorable evolution of December 12, 1990, and April 12, 1991. Regarding the remedy of special release from prison, the State argued that this was in keeping with the norms in force at the time of the facts and that the situation should not be assessed in light of current norms and case law. Lastly, with regard to the action for damages, the State argued that, pursuant to article 4037 of the Civil Code in force at the time of the facts, the action on the extra-contractual civil liability of the State prescribed in two years calculated from the date of the harmful event. It added that this action was the appropriate remedy for the petitioner to have obtained reparation of the rights alleged by the Commission but it was used incorrectly because it was filed belatedly, so that on September 12, 1996, the Appellate Court confirmed the judgment and, subsequently, the Supreme Court of Justice rejected the special appeal and remedy of complaint that were also filed.

B. Considerations of the Court

121. Regarding to Article 25(1) of the Convention, the Court has indicated that this provision establishes the obligation of the States Parties to ensure to all persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental rights.[192] This effectiveness means that, in addition to existing formally, such remedies must provide results or responses to the violations of the human rights established either in the Convention, the Constitution or the laws.[193] This means that the remedy must be suitable to combat the violation and enforced effectively by the competent authority.[194] The Court has also established that an effective judicial remedy means that the analysis of a judicial remedy by the competent authority cannot be reduced to a mere formality; rather, this competent authority must examine the arguments of the petitioner and rule on them explicitly.[195] This does not signify that the effectiveness of a remedy is evaluated based on whether it produces a favorable result for the petitioner.[196]

122. In addition, the Court has indicated that the obligation to provide the reasoning is one of the

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192 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 134.

193 *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights),* Advisory Opinion OC-9/87, October 6, 1987. Series A No. 9, para. 24, and *Case of Rico v. Argentina. Preliminary objection and merits.* Judgment of September 2, 2019. Series C No. 383, para. 88.

194 *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights),* Advisory Opinion OC-9/87, October 6, 1987. Series A No. 9, para. 24, and *Case of Rico v. Argentina. Preliminary objection and merits.* Judgment of September 2, 2019. Series C No. 383, para. 88.

195 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 267.

196 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 67, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 135.

due guarantees included in Article 8(1) to safeguard the right to due process.[197] The reasoning is the externalization of the methodical justification that allows a conclusion to be reached.[198] The obligation to provide the reasoning for decisions is a guarantee related to the proper administration of justice that guarantees to the citizens the right to be tried for the reasons established by law, while providing credibility to judicial decisions in a democratic society.[199] The reasoning for a ruling should reveal the facts, grounds and legal provisions on which the organ that issued it based itself. In addition, it should show that the arguments of the parties have been duly taken in account and that all the evidence has been examined.[200]

123. In the instant case, the Court will now determine whether the State's judicial actions constituted a violation of the judicial guarantees and judicial protection of Mr. Hernández. Based on the arguments of the parties and the observations of the Commission, the Court will examine the dispute as follows: (a) the absence of an effective judicial remedy to respond to the complaints filed by Mr. Hernández's mother concerning the status of his health; (b) the failure to provide the grounds in relation to the request for special release from prison owing to the status of the presumed victim's health, and (c) the alleged violation of due process owing to the inadmissibility of the civil action for damages.

B.1. The complaints filed by Mr. Hernández's mother

124. First, the Court notes that article 141 of the Penal Enforcement Code[201] reveals that the trial judge was the competent authority for the whole proceedings up until their conclusion, and for the issue of the pertinent orders. Those orders could include safety measures, the principal and accessory penalties, conditional release, and other orders within the indicated time frames. Consequently, the Court considers that the petitions presented to the trial judge constituted the appropriate remedy to ensure the right to health and the personal integrity of Mr. Hernández. Mr. Hernández was under the control of the trial judge, so that the latter was empowered to order procedures and evaluations, to request reports and to issue all decisions regarding Mr. Hernández's health and his admittance to hospitals, either *motu proprio* or at the request of the presumed victim, his family, his lawyers or state authorities.

125. Second, the Court must determine whether the complaints filed by Mr. Hernández's mother were effective. In this regard, the Court has established that the control of the legality of the acts of public administration that affect or could affect rights, guarantees or benefits recognized to persons deprived of liberty, and also the judicial control of the detention conditions and the supervision of the execution of, or compliance with, sentences, must be carried out periodically and by competent, independent and impartial judges or courts. Regarding the role played by judges in the execution of sentences to protect the rights of persons who require medical care, the Court has established that "they must act with diligence, independence and humanity in cases

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197 *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. 78, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 268.

198 *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. 107, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 268.

199 *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. 77, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 268.

200 *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. 78, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 187.

201 Article 141. "In general, the trial judge shall be responsible for the situation of the accused, and any act of significance for the latter's situation shall be communicated to him immediately."

where it is duly attested that there is an imminent risk to the life of the individual owing to the deterioration of his health or the presence of a life-threatening illness."[202]

126. The Court recalls that Mr. Hernández's mother filed her first complaint on July 6, 1989, informing the trial judge that her son suffered from a "very severe influenza-like condition and also an ear infection that requires medical care that, at that date, it has not been possible to provide, so that the intervention of the court is required to ensure that he is provided with the appropriate treatment." In response to this request, the same day, the trial judge ordered a medical examination to discover if he had any illness. However, this order was not executed. The Court recalls that this complaint was made after the same trial judge had issued the order of March 29, 1989, in which he had required that Mr. Hernández be transferred to Prison No. 1 because the Monte Grande Police Station did not have sufficient physical space to accommodate the prison population, as the Police Chief had indicated on March 20, 1989. This order had not been executed either.

127. Regarding the second complaint by Mr. Hernández's mother, the Court recalls that, on August 1, 1990, she informed the trial judge that her son had been suffering from severe headaches for about a week and asked that he be examined and receive the corresponding medical treatment; she also requested verification of the conditions of hygiene of the Monte Grande Police Station. That same day, the trial judge order that Mr. Hernández receive medical care and that a possible outbreak of hepatitis among the prison population be verified. On August 2, 1990, the Chief of the Police Station telephoned to report that Mr. Hernández had been examined and had been diagnosed with a presumed case of hepatitis; accordingly, the same day, the trial judge ordered his immediate transfer to the hospital of the Provincial Prison Service. On August 3, 1990, the order to transfer Mr. Hernández from the Monte Grande Police Station to Prison No. 1 was executed, but he was not transferred to the hospital. Consequently, on August 14, 1990, the trial judge ordered that the prisoner receive medical care and that the prison inform him about Mr. Hernández's health status and the treatment he would be receiving. As a result of this decision, on August 15, he was advised that Mr. Hernández had been transferred to the San Juan de Dios Hospital in La Plata, where he was diagnosed with probable tuberculous meningitis

128. Regarding the allegations that the health status of Mr. Hernández had not been monitored satisfactorily once his disease had been diagnosed, the Court recalls that, on December 6, 1990, the trial judge ordered the Head of Prison No. 1 to advise him of the evolution of Mr. Hernández's health. In this order, he indicated that he should be informed of the presumed victim's health on a weekly basis, and of the different measures being taken based on the criteria of the medical professionals. In response to this requirement, on December 12, the Head of Prison No. 1 reported on the actions taken and the health status of Mr. Hernández. On February 22, 1991, Mr. Hernández's lawyer asked that he undergo medical tests for HIV. On February 27, 1991, the trial judge ordered that he be informed of the prisoner's health status and of his situation *vis-a-vis* HIV, noting that, since December 1990, he had not received the reports on Mr. Hernández's health that he had ordered the prison authorities to transmit to him. In the absence of a response to the said order, on April 1, 1991, the trial judge issued a new order for a report to be presented within 24 hours. As a result of this, on April 3, he receive an official communication from the Provincial Prison Service on the neurological effects suffered by Mr. Hernández up until that time.

129. Based on the above, the Court considers that the trial judge responded promptly and provided adequate follow up to the requests for medical attention made by Mr. Hernández's mother or his representatives, issuing orders requiring his medical care. This is verified by the orders issued on July 6, 1989, and August 1, 1990, which provided an immediate response; that

[202] *Cf. Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 236, and IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, December 31, 2011, para. 300.

is, the same day that his mother presented her complaint, he ordered that Mr. Hernández be examined to find out if he had any illness that might require medical treatment. It is also verified by the diverse orders issued required that the presumed victim be given access to medical treatment: on August 2, 1990, following the telephone report of the Chief of the Police Station that Mr. Hernández had been transferred and had a possible case of hepatitis, the trial judge ordered that the presumed victim be given medical care and requested reports on this care on August 14, 1990, while again, on September 27, 1990, he requested information on the prisoner's health status. On October 17, 1990, he issued another order for medical care to be provided and, on October 30, 1990, he required a weekly report on Mr. Hernández's health. Therefore, the Court notes that there is no evidence to conclude a lack of diligence on the part of the trial judge in response to the complaints relating to the presumed victim's health.

130. The Court has indicated, pursuant to Article 25(2)(c) of the Convention, that the State's responsibility does not end when the competent authorities issue a decision or judgment, but also requires the State to ensure the means to execute final decisions so that they truly protect the rights that have been declared.[203]

131. However, although the trial judge responded promptly to the mother's complaints regarding her son's need for medical care, and issued orders that Mr. Hernández be given medical treatment and that he should be informed about his health, the State failed to comply with its duty to execute those orders. This non-compliance is especially evident in relation to the orders issued on July 6, 1989, and August 1, 1990. Regarding the former, the trial judge ordered that Mr. Hernández be examined and provided with adequate medical treatment following his mother's complaint about the severe influenza-like condition and earache suffered by her son. However, this order was never executed. Regarding the latter, that of August 2, 1990, the trial judge ordered that Mr. Hernández undergo a medical examination and that the conditions of hygiene of the Police Station be verified owing to the possible existence of an outbreak of hepatitis. But this order was not executed until August 15, 1990, after the trial judge had issued a new order for his immediate admittance to hospital on August 14, 1990.

132. In addition, there were two further occasions when the prison authorities failed to comply with orders issued by the trial judge, specifically to ensure that he received information on Mr. Hernández's health status. The first was in relation to the order he issued on December 6, 1990, when he required Prison No. 1 to provide weekly reports on Mr. Hernández's health, which was not complied with. The only report from this prison authority noted is that of December 12, 1990. The second occasion, was on February 27, 1991, when he ordered the same Prison Unit to provide information on the prisoner's health and his possible situation in relation to HIV; an order that was not complied with either. As a result of this non-compliance, on April 1, 1991, the trial judge again ordered Prison No. 1 to provide a report on Mr. Hernández's health and it was only on April 3 that the Provincial Prison Service advised the trial judge on the effects that Mr. Hernández had suffered up until that time.

133. The Court considers that it has been proved that, on the four occasions described, the prison authorities did not comply satisfactorily with the decisions of the trial judge that required them to take specific actions related to providing Mr. Hernández with health care. The facts of the case reveal that there were prolonged periods during which those orders, or some of them, were not executed. The Court considers that the remedies filed by individuals who have an illness that requires medical care to avoid serious effects on their health, personal integrity or life, entail an enhanced obligation to respect and to ensure their rights. The Court has indicated that the

[203] *Cf. Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348. para. 208, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 125.

responses to remedies that are filed requires that the vulnerability of the presumed victim and the risk of violating his rights are taken into account.[204] Therefore, the Court concludes that the State did not comply satisfactorily with its position of guarantor in relation to the detention conditions of Mr. Hernández by failing to execute the orders of the trial judge, especially when it became aware that the presumed victim's health was constantly deteriorating and that he was deprived of liberty.

134. Based on the above, the Court considers that the State is responsible for the violation of the procedural guarantees and judicial protection pursuant to Article 25(2)(c) of the American Convention in relation to Article 1(1) of this instrument, to the detriment of José Luis Hernández.

B.2. The request for release on special grounds

135. The Court recalls that on October 17, 1990, the trial judge denied the request made by Mr. Hernández's defense for his release on special grounds. The representatives requested his release based on the special grounds for its admissibility established in article 2 of Law 10,484[205] because "the judgment was not final as it has been appealed by this defense" and because he "did not have adequate medical care."[206] They also indicated that the administrative body called on by the law to ensure medical treatment was "unable to provide this." The trial judge denied the request arguing that "the assessment of the acts attributed to the accused, and for which he has been sentenced, and considering the severity of the sentence imposed and since José Luis Hernández has adequate medical care, it must be considered that it is not admissible to grant this benefit."[207] On October 29, 1990, the Appellate Chamber confirmed the refusal to release Mr. Hernández because "a judgment has been delivered against him and, although this is not yet final, it makes the benefit of release on special grounds inadmissible."[208] Regarding his health status, the Chamber indicated that the trial judge should "order the pertinent measures, pursuant to his authority to ensure that the accused is provided with the medical care that his current health situation requires."

136. The Commission argued that the trial judge had merely indicated that Mr. Hernández was receiving adequate medical care without duly substantiating this assertion.[209] The representatives argued that Law 10,484, in force at the time of the facts, established special grounds for release

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204 *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 185

205 Law 10,484 entitled Law on Prison Release and Waiver was promulgated in 1987, and the same year some amendments were introduced by Law 10,594; in 1990, other amendments were made by Law 10,933 including to article 2 in force at the time of the facts which established the following: "In cases that meet the requirements of paragraphs (a) and (b) of the preceding article and of article 4, release shall not be admissible; the judge or court may grant release when, based on the objective assessment of the characteristics of the fact or facts attributed to the accused, his personal conditions, and other circumstances that may be considered relevant, it may be presumed that he will not try to escape or hinder the investigation, or evade the action of justice. In those cases, the judge or court may, based on the circumstances and the personality of the detainee, subject him to compliance with special surveillance rules and/or custodial care, without prejudice to the provisions of article 13."

206 Motion for special release filed by Mr. Hernández's defense in October 1990 (helpful evidence, folio 614).

207 Decision of the trial judge on the motion for special release issued on October 17, 1990 (helpful evidence, folios 614 and 634).

208 Decision of the First Chamber of the Criminal and Correctional Appellate Chamber of Buenos Aires province of October 29, 1990 (helpful evidence file, first part, folios 640 and 641).

209 *Cf.* Communications of October 2 and 8 issued by the Head of Prison No. 1 reporting, among other matters, the impossibility of Mr. Hernández being re-admitted to the hospital of Prison No. 1 owing to a lack of beds and of an ambulance to transfer him, and also providing information on the medical reports referring to Mr. Hernández's poor health owing to the meningitis from which he was suffering.

that permitted this to be granted,[210] such as the fact that there was no risk that Mr. Hernández would escape or hinder the investigation; therefore, the refusal to release him was an unreasonable decision.

137. The Court recalls that the right to an effective judicial remedy includes the obligation of the competent authority to examine the grounds cited by a petitioner, to explicitly rule on them, and to verify compliance with its rulings. However, this obligation does not mean that the effectiveness of a remedy is measured by the fact that it produces a favorable result for the petitioner. The State's obligation to ensure this right is an obligation of means or conduct so that, in the instant case, the fact that the trial judge did not reach the legal conclusion that the plaintiffs desired does not constitute, *per se,* a violation of the right of access to justice. Nevertheless, the Court recalls that, pursuant to Article 8(1) of the Convention, the competent authorities have the obligation to substantiate their decisions. Moreover, the substantiation of a ruling should reveal, clearly and explicitly, the facts, reasons and legal provisions on which the authorities based themselves to take their decision, in order to rule out any indication of arbitrariness. The obligation to provide the reasons for a ruling does not require a detailed response to all the arguments of the parties, but may vary based on the nature of the decision so that, in each case, it is necessary to analyze whether this guarantee has been fulfilled.[211]

138. The Court recalls that, on September 28, 1990, the trial judge handed down a judgment against Mr. Hernández, sentencing him to five years' imprisonment for the offense of aggravated robbery because it was committed with a firearm. In addition, the Court notes that the motion for release on special grounds was filed by Mr. Hernández's defense in October 1990 and that, on October 17 that year, the trial judge issued his decision denying the request for release considering the gravity of the offense of which Mr. Hernández had been convicted and the fact that he was being provided with adequate medical care. The Court points out that, under Law 10,484, the purpose of release it referred to was to ensure the release on bail of the accused whose offenses did not merit a prison sentence and, exceptionally, the judge was granted the authority to order the release[212] when, based on the objective assessment of the characteristics of the fact or facts attributed to the accused, the personal situation of the latter, and other circumstances that were considered relevant, it could be presumed that the accused would not try to avoid or obstruct the investigation, or evade the action of justice.

139. The foregoing reveals that the benefit of release could be requested so that those accused of an offense could attend the criminal proceedings without being confined; generally when the offense was not serious. Also, this benefit could be requested in certain circumstances pursuant to article 2 of Law 10,484. This allows the Court to conclude that the admissibility of this legal mechanism was possible prior to the delivery of a guilty verdict, because its purpose was to permit the accused to be free while his proceedings continued, but not after a judgment had been issued against him. Therefore, from the information that the Court has it is possible to conclude that, once a guilty verdict had been delivered, the request for release on special grounds was no longer relevant because the legal situation of the accused had been defined by either a conviction or an acquittal. In the instant case, the trial judge's decision to deny Mr. Hernández's release is

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[210] These grounds refer to when the assessment of the facts, the personal conditions of the accused, and other relevant circumstances, may lead to the presumption that he will not try to escape or hinder the investigation, or evade the action of justice, pursuant to article 2 of Law 10,484.

[211] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 94, and *Case of Rico v. Argentina. Preliminary objection and merits.* Judgment of September 2, 2019. Series C No. 383, para. 75.

[212] *Cf.* Article 2 of Law 10,484. Law on Prison Release and Waiver (text according to Law 10,933). See also, article 166.2 of Law 11,179, Criminal Code of the Argentine Nation, 1984, in force at the time of the facts, which established a penalty of 5 to 15 years' imprisonment for the offense of armed robbery, which immediately prevented ordinary release, because, according to article 1 of the said Law 10,484, this required that the offense be penalized with a maximum of 6 years' imprisonment.

explained by the procedural status of the presumed victim and the very nature of this remedy, which was no longer applicable when it was requested because he had already been convicted. A judgment convicting Mr. Hernández had already been delivered as a result of the corresponding criminal proceedings, so that it is reasonable to conclude that the remedy was inadmissible.

140. The Court notes that the justification given by the trial judge was not inadequate because, given the circumstances, it was sufficient for him to rule on the applicability of the law on release in force and to note that the medical treatment continued. Therefore, it was not necessary to specify that there was no risk to Mr. Hernández's health or any other details, because this would only have been appropriate and necessary to justify if he had denied this release before the guilty verdict had been delivered. Accordingly, the Court considers that the State did not fail to comply with the obligation to substantiate the ruling denying the application for release adequately to the detriment of Mr. Hernández. Consequently, the State is not responsible for the violation of Article 8(1) of the American Convention in relation to Article 1(1) of this instrument.

B.3. The civil action for damages

141. In its Merits Report, the Commission observed that the representatives had alleged the violation of judicial guarantees and judicial protection to the detriment of Mr. Hernández on the basis of the erroneous calculation of the two-year statute of limitation for the civil action for damages. The representatives indicated that Mr. Hernández's defense had filed the civil action for damages on April 2, 1993, and that this could not be done previously because the presumed victim was under the exclusive control of those who had caused him the harm and because he was not fully aware of the harm he had suffered until after recovering his freedom. Consequently, they argued that the State should take these circumstances into consideration when calculating the statute of limitations.

142. The Court recalls that, on April 2, 1993, José Luis Hernández filed a civil action for damages against the Chief of Police of Buenos Aires province owing to the disease he contracted while he was detained, and due to the lack of adequate care, and the consequences. On October 10, 1995, the judgement was delivered in which the first instance judge decided to reject the action by applying the two-year statute of limitations established in the Civil Code, considering that the time frame for filing the civil action should be calculated starting in October 1990 when the plaintiff had already contracted the harm [meningitis]. Accordingly, he considered that, by April 2, 1993, the civil action had already prescribed.[213] On September 12, 1996, the Appellate Court confirmed this judgment and, subsequently, the Supreme Court of Justice rejected the remedy of complaint and the special appeal that were filed in this regard on December 17, 1996, and April 8, 1997, respectively.

143. The Court has indicated that, based on legal certainty, to ensure the proper and functional administration of justice and the effective protection of human rights, States may and should establish presumptions and criteria for the admissibility of domestic remedies of a judicial or any other nature. Therefore, although these domestic remedies should be available to the interested parties and decide the matter filed effectively and credibly, as well as eventually providing adequate redress, it cannot be considered that always, and in every case, the domestic organs and courts must decide the merits of a matter filed before them, without verifying the formal requirements for the admissibility and appropriateness of the particular remedy filed.[214] The Court

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[213] El judge rejected the statement of Mr. Hernández's defense that it was not until April 3, 1991 – the date on which the trial judge received the report of the Provincial Prison Service with the diagnosis and consequences of the disease that Mr. Hernández was suffering from – that he became aware of the physical consequences of his disease.

[214] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, para. 126.

has also determined that the application of admissibility requirements for a remedy is compatible with the American Convention; moreover, the effectiveness of the remedy means that, potentially, when those requirements are met the judicial organ must evaluate its merits.[215]

144. In the instant case, the Court notes that the arguments made by the judicial authorities in relation to the expiry of the legal time frame are reasonable and in keeping with the rule of the admissibility of the action on the extra-contractual civil liability action established by law.[216] Also, the representatives did not prove that it was not possible for Mr. Hernández to be aware of the disease he contracted while deprived of his liberty, or that he could have been at risk of suffering reprisals if he had filed an action for civil damages. The Court emphasizes that, at least as of October 8, 1990, Mr. Hernández, his family or his representatives, could have known the effects that meningitis had on the presumed victim's health, because these were established in the medical report cited in the remedy of appeal filed by Mr. Hernández's defense on October 19, 1990, against the decision to deny his release on special grounds issued on October 17 that year.

145. Consequently, there is no evidence to conclude that the fact that the action was declared inadmissible because the time frame for filing it had expired pursuant to the laws in force at the time of the facts entailed a violation of the judicial guarantees established in the Convention. Therefore, the State is not responsible for the violation of Article 8(1) in relation to Article 1(1) of this instrument.

B.4. Conclusion

146. The Court concludes that the State obligation to ensure an effective judicial remedy in the terms of Article 25 of the Convention does not conclude with the issue of decisions, but requires the guarantee that they will be executed. Therefore, the failure to execute the orders of the trial judge aimed at ensuring adequate medical care for Mr. Hernández constituted non-compliance with the right to an effective judicial remedy. However, the substantiation of the judgment deciding the request for Mr. Hernández's release did not constitute non-compliance with the right to judicial guarantees. Lastly, the inadmissibility of the action for damages did not constitute a failure to comply with the right to procedural guarantees of Mr. Hernández. Consequently, the State is responsible for the violation of the right to judicial protection in the terms of Article 25(2)(c) of the American Convention in relation to Article 1(1) of this instrument, and is not responsible for the violation of the right to judicial guarantees pursuant to Article 8(1) of the American Convention in relation to Article 1(1) of this instrument.

VII-4
RIGHT TO PERSONAL INTEGRITY OF THE MEMBERS OF THE PRESUMED VICTIM'S FAMILY[217]

A. Arguments of the Commission and of the parties

147. The ***Commission*** argued that Raquel San Martín de Hernández should also be considered a victim in this case because the State had violated Article 5(1) of the Convention to her detriment. It indicated that Mr. Hernández's deprivation of liberty without access to medical treatment for several years caused particular anguish to his mother and, therefore, violated her right to integrity. The ***representatives*** indicated that Raquel San Martín de Hernández had also been a victim owing to the moral anguish she suffered because of her son's disease, and also because she had to maintain him for more than 29 years owing to the consequences. The ***State*** indicated

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215 *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 94.

216 *Cf.* Article 4037 of the Argentine Civil Code in force at the time of the facts.

217 Article 5 of the American Convention.

that Mr. Hernández's family could not be considered victims in this case because the recommendations made by the Commission in the Merits Report were only addressed at Mr. Hernández. The State also indicated that the condition of victim before the inter-American system was not verified merely due the relationship to the petitioner, but by the effective proof of the violation of a right established in the Convention that had prejudiced the said family members. Moreover, the family members who were not named in the Merits Report should not be considered victims in this case.

B. Considerations of the Court

148. The Court has considered that the members of the family of victims of human rights violations may, in turn, be victims.[218] The Court has found that the right to mental and moral integrity of family members of victims has been violated as a result of the additional suffering they have endured due to the particular circumstances of the violations perpetrated against their loved ones, and also to the subsequent acts or omissions of the State authorities in relation to the facts,[219] taking into account, among other matters, the steps taken to obtain justice and the existence of close family ties.[220] The Court has understood that, in certain cases of gross human rights violations, it is possible to presume the harm caused to some of the members of the victim's family owing to the suffering and anguish resulting from the facts of such cases.[221] In the instant case, which does not correspond to a gross violation of human rights pursuant to its case law, the Court considers that the violation of the personal integrity of the members of Mr. Hernández's family must be demonstrated.[222]

149. The facts established in Chapter VI of this judgment reveal, first, the existence of a close relationship between Mrs. San Martin de Hernández and her son. This element is verified not only by the first degree of consanguinity between Mr. Hernández and his mother, but also because it is possible to observe how she assumed responsibility for the care of her son's health problems. This is revealed in the letter Mrs. San Martín de Hernández addressed to the trial judge on October 23, 1990, to request the release of her son, in which she stated the following: "The author of this letter is pleased to address you and hereby is respectfully contacting you to describe the serious problem that I face as a mother […]. I have a 23-year old son who is detained in the Olmos Prison; his name is José Luis Hernández, and he had been admitted to the hospital of that unit with an infectious disease that has left my son in a situation from which he will be almost unable to recover […]."[223]

150. In addition, in the proceedings before the trial judge it is possible to note the constant

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218 *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, fourth operative paragraph, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 10, 2019. Series C No. 385, para. 188.

219 *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 10, 2019. Series C No. 385, para. 188.

220 *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 191.

221 *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 204.

222 *Cf. Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, para. 158, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 204.

223 Letter addressed to the judge by Raquel San Martín de Hernández on October 23, 1990 (helpful evidence, folios 621 and 622).

involvement of Mrs. Hernández in the actions of the court and the prison authorities. This aspect can be verified owing to the numerous reports filed by the presumed victims' mother to inform the trial judge of her son's health status and request him to ensure that her son be provided with adequate medical care, as well as owing to the request to release him of October 23, 1990. Indeed, from these requests, the Court notes that Mrs. San Martín de Hernández was closely monitoring her son while he was kept deprived of liberty and that it was she who provided impetus to the complaints based on which the State accepted to grant medical care to Mr. Hernández. In addition, it is possible to note Mrs. Hernández's suffering due to the State's acts and omissions in the medical care. The feelings of anguish and helplessness suffered by Mrs. San Martín de Hernández are revealed in the letter of August 23, 1990, that she addressed to the trial judge and in which she stated that the reason for her request was that: "I am so desperate and I cannot wait until it is too late to take important decisions, especially since this involves my son."[224]

151. Owing to the foregoing elements and the particular circumstances of the instant case, the Court finds that the violation of the personal integrity of Mrs. San Martín de Hernández has been sufficiently demonstrated owing to the pain, anguish and uncertainty she suffered because of the progressive deterioration of her son's health while he was detained, added to the feelings of frustration and powerlessness due to the lack of medical care despite the orders that the trial judge had issued in this regard. Based on the foregoing, the State is responsible for the violation of the right to personal integrity of Raquel San Martín de Hernández in the terms of Article 5(1) of the Convention, in relation to Article 1(1) of this instrument.

VIII
REPARATIONS

152. Based on the provisions of Article 63(1) of the American Convention,[225] the Court has indicated that any violation of an international obligation that has caused harm entails the duty to repair this adequately, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.

153. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoration of the previous situation.[226] If this is not feasible, as in most cases of human rights violations, the Court will determine measures to ensure the violated rights and to redress the consequences of the violations.[227] Therefore, the Court has found it necessary to grant diverse measures of reparation in order to redress the harm integrally, so that in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction as well as guarantees of non-repetition have special relevance for the harm caused.[228]

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224 Letter addressed to the judge by Raquel San Martín de Hernández on October 23, 1990 (helpful evidence, folios 621 and 622).

225 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 176.

226 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 177.

227 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 177.

228 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 177.

154. This Court has established that the reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must observe the concurrence of these factors to rule appropriately and pursuant to law.[229]

155. Taking into account the violations declared in the preceding chapter, the Court will now examine the claims presented by the Commission and the representatives, as well as the State's arguments, in light of the criteria established in the Court's case law with regard to the nature and scope of the obligation to make reparation in order to establish measures to redress the harm caused to the victims.[230]

156. International case law and, in particular, that of the Court has established repeatedly that the judgment constitutes, *per se*, a form of reparation.[231] Nevertheless, considering the circumstances of this case and the suffering that the violations committed caused to the victims, the Court finds it pertinent to establish other measures

A. Injured party

157. The Court reiterates that, pursuant to Article 63(1) of the Convention, the injured party is considered to be anyone who has been declared a victim of the violation of any of the rights recognized therein. Therefore, this Court considers that José Luis Hernández and Raquel San Martin de Hernández are the "injured party" and, in their capacity as victims of the violations declared in Chapter VII, they will be beneficiaries of the reparations ordered by the Court below.

B. Measures of satisfaction and rehabilitation and guarantees of non-repetition

B.1. Measure of satisfaction

158. As it has in other cases,[232] the Court deems it pertinent to order the State, within six months of notification of this judgment, to publish: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette and in another national newspaper, in an appropriate and legible font, and (b) this judgment in its entirety, available for at least one year, on an official website of the State accessible to the public from the initial webpage. The State must advise the Court immediately when it has made each of the publications ordered, regardless of the one-year time frame for presenting its first report established in the tenth operative paragraph of this judgment.

B.2. Measure of rehabilitation

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229 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 178.

230 *Cf. Case of Andrade Salmón v. Bolivia. Merits, reparations and costs*. Judgment of December 1, 2016. Series C No. 330, para. 189, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 179.

231 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 180.

232 Even in the absence of an explicit request (*Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Villaseñor Velarde et al. v. Guatemala. Merits, reparations and costs.* Judgment of February 5, 2019. Series C No. 374, para. 157). In the instant case, the representatives referred to the publication of the judgment in their final written arguments, so the request was time-barred.

159. The ***Commission*** asked that the State provide, free of charge, immediately and for as long as necessary, medical treatment for the physical or mental health of the victim in this case, provided he requests this and by mutual agreement. The ***representatives*** did not refer to this measure. The ***State*** argued that the measures of reparation concerning the petitioner's health had become abstract because he was now deceased. It also stressed that this circumstance could not be attributed to the State and bore no relationship to the facts being examined, because these had occurred almost three decades previously. The Court notes that Mr. Hernández is deceased, so that it is not appropriate to order any measure of rehabilitation.

B.3. Guarantees of non-repetition

160. The ***Commission*** asked that the State order the measures of non-repetition required to ensure that persons deprived of liberty in Buenos Aires province are able to obtain timely diagnoses of their health problems, as well as the special treatment and care they require pursuant to the standards established in its Merits Report, particularly the principle of equivalence.

161. The ***representatives*** indicated that, during the friendly settlement procedure, they had suggested a series of measures with regard to health care that should be introduced into the prison system of Buenos Aires province, and these included, in particular, measures in relation to the disease contracted by José Luis Hernández while he was deprived of his liberty. In their brief with final arguments, they specified the content of such measures, which included the implementation of a permanent preventive system consisting of doctors on call in the police stations and that these doctors on call should examine the prisoners thoroughly at regular intervals; the existence of basic inputs, equipment and medicines; the existence of adequate means for emergency transfers; the existence of intramural health centers to provide preventive and curative health care to detainees; the existence of means for the immediate treatment of especially complex diseases, and the provisions of sufficient doctors and paramedical personnel based on the number of inmates.

162. The ***State*** argued that the guarantees of non-repetition requested by the representatives were unrelated to the events that had occurred 24 years previously. It indicated that this was evident in the case of the request to review the health care system of the prison system of Buenos Aires province because anyone can become ill. In addition, it argued that this case was not related to complaints concerning numerous cases and, also, that it had reported on the health care provided to Mr. Hernández from August 2, 1990, until his disease was detected. Consequently, it asked that the Court declare the representatives' request inappropriate.

163. The Court takes note of and welcomes the legislative measures and public policies adopted by the State to ensure timely and appropriate medical care for persons deprive of liberty,[233] as well as the initiatives designed to reduce the transmission of tuberculosis, and to provide adequate medical assistance to those suffering from this disease and reduce their mortality.[234] Nevertheless, the Court finds it pertinent to order the State, as a guarantee of non-repetition of the violations

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[233] Argentina. National Law on Execution of the Prison Sentence, No. 24,660. Promulgated on July 8, 1996; Buenos Aires Law on Execution of Sentences, No. 12,256. Official Gazette of January 25, 1999; Governor of Buenos Aires province. Decree No. 950 of May 10, 2005 (helpful evidence, folio 955); Ministry of Health. Ministerial decision No. 1009/2012 of July 4, 2012 (helpful evidence, folios 1608 and 1609).

[234] Argentina. Ministry of Health. Ministerial decision No. 678/08 of July 1, 2008; Argentine Federal Prison Service. Decision D.N. No. 1944 of October 4, 2011 (helpful evidence, folios 1579 and 1580); Ministry of Health. National Tuberculosis Control Program: *Normas Técnicas 2013*, 4th edition. Santa Fe, Argentina: National Institute of Respiratory Diseases (INER) "Dr. E. Coni," 2013. ISBN 978-987-29970-0-7 (helpful evidence, folios 1300 to 1541); Ministry of Health. Ministerial decision No. 583/2014 of May 6, 2014. Official Gazette of May 13, 2014; Government Health Secretariat and Ministry of Health. National Strategic Plan for the Control of Tuberculosis in Argentina, 2018-2021.

recognized in this judgment, to design and implement a training program for public officials and employees working in the detention centers of Buenos Aires province, during which medical personnel specialized in the treatment of tuberculosis provide them with training on: (a) early warning signs and symptoms of tuberculosis in its initial stages; (b) precautions and measures to take in the presence of symptoms that, although associated with infections, viruses and more common and less severe illnesses, can also be attributed to tuberculosis, including access to medical examinations and tests that allow a diagnosis to be made or that rule out that disease, and (c) measures of hygiene to prevent, reduce and contain the transmission of the disease among the prison population.

164. The Court also orders that, six months after notification of this judgment, the State present a report describing the measures taken – from the time the facts described in the case occurred – to improve the conditions of Prison No. 1 of the prison system of Buenos Aires province. The State must demonstrate that these actions have been compatible with human dignity, the standards mentioned in this judgment regarding the right to personal integrity and health of persons deprived of liberty, and the other rights established in the American Convention. In particular, the State must describe the measures taken to prevent the occurrence of tuberculosis and other similar diseases among the prison population, as well as those addressed at providing timely and adequate diagnoses and treatment to those suffering from them.

165. The Court will not refer specifically to the guarantees of non-repetition requested by the representatives in their final written arguments, because these were not proposed at the appropriate procedural moment.

C. Compensation

166. The ***Commission*** asked that the State make integral reparation to the victim in this case by pecuniary compensation and measures of satisfaction that included the pecuniary and non-pecuniary harm caused to the victim as a result of the violations declared in its Merits Report.

167. The ***representatives*** referred to the harm caused to Mr. Hernandez's physical integrity and to his loss of earnings. They argued that the consequences on the presumed victim's health had made it completely impossible for him to continue his studies and restricted him from obtaining employment of any kind, even "at the lowest level," so that he had to perform cleaning work, without any kind of employment record or social security. Regarding mental harm, they indicated that he was totally deprived of having any social life or establishing a long-term relationship. As regards the calculation of the amount that should be paid, they indicated that this should be calculated based on the minimum living wage and on the way in which it should be paid pursuant to domestic law. They also indicated that his mother should also receive this compensation because she, in turn, had suffered non-pecuniary harm.

168. The ***State*** argued that none of the pecuniary reparations requested conformed to criteria of reasonableness; they were exorbitant and were not supported by reliable evidence. In addition, the State indicated that the fact that Mr. Hernández had suffered serious health problems after the time during which he was deprived of liberty was a factor unconnected to the purpose of the analysis made in these proceedings because no causal nexus had been proved between the effects of the care provided for his health and the alleged subsequent ailments that had not been substantiated in any way. The State also argued that there was no evidence to prove that he was almost totally unable to work and that he had been prevented from forming a family. Regarding his mother, it argued that the request to compensate Mr. Hernández's mother for the pecuniary and non-pecuniary damage caused to her son – who died 25 years after the facts – and based on matters that, in their arguments, the representatives themselves indicated related to her private life, were disproportionate in relation to the issues discussed in the proceedings.

169. Regarding pecuniary damage, in its case law, this Court has indicated that this supposes the loss of, or detriment to, the victims' income, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus to the facts of the case.[235] In the instant case, the Court has determined that the State violated Mr. Hernández's rights to health, personal integrity, personal liberty, judicial guarantees and judicial protection. Even though the representatives did not provide specific evidence that would have allowed the Court to determine the amount of the loss of earnings derived from the violations recognized in this judgment, or to establish with certainty the minimum wage in force at the time of the facts, life expectancy, or the level of incapacity suffered by Mr. Hernández as a result of the disease he suffered while in the State's custody, the Court notes the permanent effects that the omissions that can be attributed to the State had on Mr. Hernández's health and physical integrity, and the consequent alterations that this entailed on his material living conditions.

170. Consequently, the Court deems it pertinent to order, in equity, as it has in similar cases,[236] the payment of US$20,000.00 (twenty thousand United States dollars) for the concept of pecuniary damage, a sum that must be delivered to Mrs. San Martín de Hernández, in her capacity as Mr. Hernández's heir, within the time frame established below in this judgment.

171. With regard to non-pecuniary damage, this Court has determined that this may include both the suffering and affliction caused to the direct victims and their families, the impairment of values of great significance to the individual, and also the alterations of a non-pecuniary nature in the living conditions of victims or their families.[237] Therefore, considering the circumstances of this case, the distress that the violations committed caused to Mr. Hernández, and the other consequences of a non-pecuniary nature that he suffered, the Court deems it pertinent to establish, in equity, for the concept of non-pecuniary damage, compensation of US$30,000.00 (thirty thousand United States dollars) in favor of Mr. Hernández. This sum must be delivered to Mrs. San Martín de Hernández as Mr. Hernández's heir.

172. In addition, owing to the violation proved to the detriment of the victims' mother that resulted in impairment of her personal integrity, the Court establishes, in equity, the sum of US$15,000.00 (fifteen thousand United States dollars) in favor of Raquel San Martín de Hernández, for non-pecuniary damage.

D. Costs and expenses

173. The ***representatives*** indicated that "[t]he costs claimed correspond to the professional work of two lawyers who intervened before both the Inter-American Commission and the Inter-American Court." Also, in their brief with final written arguments, they asked the Court to take into account that "the case before the Commission was lodged in 1998" and that, following that date, […] the petitioner had incurred different types of expenses, including the professional fees of his legal representatives." The State did not refer to this measure.

174. The Court reiterates that, pursuant to its case law,[238] costs and expenses form part of the

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[235] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 189.

[236] *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2005. Series C No. 160, para. 425, and *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of May 19, 2011. Series C No. 226, para. 131.

[237] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 190.

[238] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C

concept of reparation because the activity deployed by the victims in order to obtain justice at both the national and the international level entails disbursements that must be compensated when the international responsibility of the State has been declared in a judgment. Regarding reimbursement of costs and expenses, it is for the Court to prudently assess their scope which includes the expenses arising before the authorities of the domestic jurisdiction and also those generated during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.[239]

175. This Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the evidence that supports them must be presented to the Court at the first procedural moment granted to them; that is, in the pleadings and motions brief, without prejudice to those claims being updated subsequently in keeping with the new costs and expenses incurred during the proceedings before this Court."[240] In addition, the Court reiterates that "it is not sufficient merely to forward probative documents; rather, the parties are required to include arguments that relate the evidence to the fact it is considered to represent and, in the case of alleged financial disbursements, the items and their justification is clearly established."[241]

176. In the instant case, the Court observes that the case file does not contain any precise evidence to support the costs and expenses incurred by Mr. Hernández or his representatives during the processing of the case before the Commission and the Court. However, the Court considers that these procedures necessarily entailed pecuniary disbursements, and therefore determines that the State must deliver to the representatives the sum of US$10,000.00 (ten thousand United States dollars) for the concept of costs and expenses, a sum that must be divided between the representatives. This sum must be delivered directly to the representatives. At the stage of monitoring compliance with this judgment, the Court may establish that the State reimburse the victim or his representatives any reasonable expenses that they incur at that procedural stage.[242]

E. Method of complying with the payments ordered

177. The State shall make the payments of compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the persons indicated herein, within one year of notification of this judgment.

178. If the beneficiaries are deceased or die before they receive the respective amount, this shall be delivered directly to their heirs, pursuant to the applicable domestic law.

179. Regarding the currency for the payment of compensation and reimbursement of costs and

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No. 39, para. 79, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 196.

239 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 196.

240 *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. 275, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 197.

241 *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 Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 197.

242 *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala. Interpretation of the judgment on merits, reparations and costs*. Judgment of August 19, 2013. Series C No. 262, para. 62 and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 198.

expenses, the State must comply with its monetary obligations by payment in United States dollars or, if this is not possible, by the equivalent in Argentine currency, using the highest and most beneficial rate for the victim allowed by its domestic laws in force at the moment of payment to make the respective calculation. At the stage of monitoring compliance with judgment, the Court may prudently readjust the equivalent of these figures in Argentine currency in order to avoid exchange fluctuations substantially affecting the purchasing power of the amounts.

180. Regarding the currency for the payment of compensation and reimbursement of costs and expenses, the State must comply with its monetary obligations by payment in United States dollars or, if this is not possible, by the equivalent in Argentine currency, using the highest and most beneficial rate for the victim allowed by its domestic laws in force at the moment of payment to make the respective calculation. At the stage of monitoring compliance with judgment, the Court may prudently readjust the equivalent of these figures in Argentine currency in order to avoid exchange fluctuations substantially affecting the purchasing power of the amounts.

181. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be delivered to the persons indicated in full, as established in this judgment, without any deductions derived from possible taxes or charges.

182. If the State should fall into arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Argentine Republic.

IX
OPERATIVE PARAGRAPHHS

183. Therefore,

THE COURT,

DECIDES:

Unanimously,

1. To reject the preliminary objection filed by the State as time-barred, pursuant to paragraphs 15 to 20 of this judgment.

DECLARES:

By five votes to one, that:

2. The State is responsible for the violation of the right to personal integrity recognized in Article 5(1) and 5(2) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of José Luis Hernández, pursuant to paragraphs 54 to 61 of this judgment.

Dissenting Judge L. Patricio Pazmiño Freire.

By four votes to two, that:

3. The State is responsible for the violation of the right to personal integrity and the right to health recognized, respectively, in Articles 5(1), 5(2) and 26 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of José Luis Hernández, pursuant to paragraphs 54 to 96 of this judgment.

Dissenting Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto.

Unanimously, that:

4. The State is responsible for the violation of the rights to personal liberty and the presumption of innocence recognized, respectively, in Articles 7(1), 7(3) and 8(2) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of José Luis Hernández, pursuant to paragraphs 100 to 117 of this judgment.

Unanimously, that:

5. The State is responsible for the violation of the right to judicial protection recognized in Article 25 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of José Luis Hernández, pursuant to paragraphs 121 to 146 of this judgment.

Unanimously, that:

6. The State is responsible for the violation of the right to personal integrity recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Raquel San Martín de Hernández, pursuant to paragraphs 148 to 151 of this judgment.

AND ESTABLISHES:

Unanimously, that

7. The State shall make the publications indicated in paragraph 158 of this judgment.

8. The State shall carry out the training ordered in paragraph 163 of this judgment within six months of notification of the judgment, and shall present the report ordered in paragraph 164, within one year, as established in the said paragraphs.

9. The State shall pay, within one year of notification of the judgment, the amounts established in paragraphs 170, 171 and 172 of this judgment, as compensation for pecuniary and non-pecuniary damage, as established in those paragraphs.

10. The State shall pay, within one year of notification of the judgment, the amount established in paragraph 176 of this judgment, to reimburse costs and expenses, as established in that paragraph.

11. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures taken to comply with it.

12. The Court will monitor full compliance with this judgment in exercise of its authority and in fulfillment of its duties under the American Convention on Human Rights, and will consider this case closed when the State has complied fully with its provisions.

Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo Pérez Manrique informed the Court of their concurring opinions. Judges Eduardo Vio Grossi, Humberto Sierra Porto, and L. Patricio Pazmiño Freire informed the Court of their partially dissenting opinions.

DONE, at San José, Republic of Costa Rica, on November 22, 2019

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

L. Patricio Pazmiño Freire

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF
JUDGE EDUARDO FERRER MAC-GREGOR POISOT

TO THE JUDGMENT OF NOVEMBER 22, 2019
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF HERNÁNDEZ *V.* ARGENTINA

INTRODUCTION

1. A little more than two years ago, the Inter-American Court of Human Rights (hereinafter "the IACtHR" or "the Inter-American Court") considered it opportune to impart a comprehensive perspective to the human right violations submitted to it. Since then, and up until the end of 2019,[1] the Inter-American Court has provided international human rights law with an important source of decisions that address the interdependence and indivisibility of the economic, social, cultural and environmental rights (hereinafter "the ESCER" or "the social rights"), and the civil and political rights.

2. In this context, the judgment in the case of *Hernández v. Argentina* (hereinafter "the judgment" or "the Hernández case")[2] represents one more contribution to this case law on the ESCER as regards their direct justiciability and the interpretative scope of Article 26 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Pact of San José"). The day that this judgment was delivered was exactly the 50th anniversary of the adoption of the American Convention, a living instrument that forms part of the domestic legal systems of most of the countries of the region, the interpretation of which must evolve with the times and current circumstances.

3. The Hernández case represents the third judgment on the issue of health in which the Court has addressed issues concerning individuals who belong to a vulnerable group and in which it declares the violation of Article 26 of the Pact of San José; in this case a person deprived of liberty who contracted tuberculosis.[3] The judgment reiterates and reaffirms the methodology that the IACtHR has used to conclude that the social rights can be directly justiciable via Article 26 of the American Convention, by derivation from the standards

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[1] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340; *Advisory Opinion OC-23/17* of November 15, 2017. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights).* Series A No. 23; *Case of the Dismissed Employees of PetroPerú et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019**.** Series C No. 394.

[2] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395.

[3] See the two previous cases that addressed issues of health of older persons and people living with HIV. See, *infra*, para. 21 of this separate opinion. *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359.

recognized in the Charter of the Organization of American States (hereinafter "the OAS Charter"), taking into account the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration"), as well as the norms of interpretation of Article 29 of the Pact of San José. Additionally, the IACtHR referred to the obligations that may be involved when addressing the ESCER.[4]

4. In the instant case, the IACtHR analyzed the rights involved integrally and jointly declaring the *direct violation of the right to health* (in particular, in its analysis, building a bridge with the right to personal integrity, but differentiating its content, taking into account the detention conditions of the victim who was a person deprived of liberty with tuberculosis). This, in contrast to the traditional case law that did this by connectivity with the civil rights, in which the content of the right to health was subsumed in the rights to life or to personal integrity.

5. Based on the foregoing, as well as on my reasoning on this matter on other occasions,[5] I issue this separate opinion in order to reflect on some relevant aspect that arise from this judgment. To this end, I have divided this opinion as follows: I. Aspects of the judgment to underline concerning the right to health (paragraphs 6 to 15); II. The violation of the right to health in this specific case (paragraphs 16 to 32), and III. Conclusions (paragraphs 33 to 38).

I. ASPECTS TO UNDERLINE CONCERNING THE RIGHT TO HEALTH

6. The Inter-American Court, following the precedent of the case of *Lagos del Campo,* has established in the cases of *Poblete Vilches, Cuscul Pivaral et al., Muelle Flores,* and *the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT)* that "based on a systematic, teleological and evolutive interpretation, the Court has resorted to the national and international *corpus iuris* on the matter to give specific content to the scope of the rights protected by the [American] Convention, in order to derive the scope of the specific obligations relating to each right."[6]

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[4] Obligations of an immediate nature (such as non-discrimination), of progressivity and non-retrogressivity, as well as the Convention-based obligations to respect and ensure rights, and to adoption of domestic legal provisions. See, *infra*, paras. 10 and 11 of this opinion.

[5] See the opinions on this matter that I have issued in the following judgments: *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261; *Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 24, 2015. Series C No. 296; *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329; *Case of Yarce et al. v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2016. Series C No. 325; *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340; *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 341; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375.

[6] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 103; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 98; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 190, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019**.** Series C No. 394, para. 154.

7. In this case, the IACtHR essentially reiterates the methodology that it has used since the case of *Lagos del Campo* to examine possible violations of the ESCER under Article 26 of the Pact of San José.[7] In particular, and given that the case related to the right to health, it recalled that already in the case of *Poblete Vilches et al.* – as well as in other cases after that judgment[8] - it had established the following:

> "[…] it can clearly be interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER), by derivation from the norms recognized in the Charter of the Organization of American States (OAS), and also the rules of interpretation established in Article 29 of the Convention itself; particularly, insofar as they prevent excluding or limiting the enjoyment of the rights established in the American Declaration and even those recognized by domestic law. Furthermore, based on a systematic, teleological and evolutive interpretation, the Court has resorted to the national and international *corpus iuris* on the matter to give specific content to the scope of the rights protected by the Convention, in order to derive the scope of the specific obligations relating to each right."[9]

8. In this way, the judgment reiterates that the right to health is an autonomous and justiciable right protected by Article 26 of the American Convention, and notes that *the content of this right* is derived from Articles 34(1), 34(l) and 45(h) of the OAS Charter, Article XI of the American Declaration, Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," Article 25 of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Economic, Social and Cultural Rights, other regional and international instruments that address the right to health,[10] Article 42 of the Argentina Constitution, and the Constitutions of Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela, that recognized this right.[11]

9. The obligations with regard to the guarantee of the ESCER – and, in particular, the right to health – are the result of a hermeneutic exercise carried out by the IACtHR to specify the content of this right based on an interpretation of the national and international *corpus juris.* The Hernández case reflects that position and, on that basis, reiterates that the general obligation to protect health results in the State's obligation to ensure access to essential health services, guaranteeing effective and good quality medical care, and also to promote the improved health of the population. The judgment also clarifies that the operationalization of this obligation begins with the duty of regulation, and that opportune and appropriate health care must comply with the essential elements of availability, accessibility, acceptability and quality.[12]

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[7] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 141 to 148.

[8] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 73, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 170**.**

[9] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 103; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 98, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 190.

[10] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, paras. 64 to 68.

[11] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, paras. 62 to 75.

[12] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, paras. 76 to 81.

10. The judgment also reiterates the important distinction that has been developed to understand the scope of the obligations derived from the ESCER – such as the immediate obligation and the obligation of progressivity – particularly of the right to health.[13] It stressed that the protection of the right to health included aspects that can be enforced immediately, as well as aspects of a progressive nature. Regarding the former, States must adopt effective measures to ensure access without discrimination to the recognized services for the right to health, ensure that men and women have equal rights and, in general, advance towards the full realization of the ESCER. Regarding the latter, States have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of the ESCER, subject to available resources, by legislative or other appropriate means. It is also essential to underline the considerations of the IACtHR – which it reiterates in this judgment – on the fact that the Convention-based obligations to respect and to ensure rights, as well as to adopt domestic legal provisions (Articles 1(1) and 2 of the American Convention), are fundamental to achieve the full realization of the said right.[14]

11. However, the judgment itself notes that, in this case in particular, the IACtHR analyzed the State's conduct in relation to the "obligations of guarantee" in the case of Mr. Hernández's right to health in relation to the medical care that he received while deprived of his liberty. From this perspective, the judgment reveals that when analyzing violations of social rights it is not necessary to approach the analysis from the perspective of the obligation of progressivity (or else of retrogressivity); rather, the analysis may be based on the possible absence of the enjoyment of the right, a matter that is analyzed under the obligation of guarantee.

12. Another fundamental aspect to consider is the importance of the respective probative elements being submitted; in this case, the "medical record," which *the State failed to provide*.[15] In this regard, the IACtHR has already indicated the importance of the medical record because it constitutes **"**the guiding instrument for medical treatment and a reasonable source of information regarding the patient's situation, the steps taken to control it and, as the case may be, to establish the resulting responsibility."[16] Additionally, the Inter-American Court has shared the opinion of the European Court of Human Rights when it stated that, in situations in which "individuals are deprived of their liberty and the authorities are aware of prisoners suffering illnesses that require supervision and adequate treatment, a full record must be kept of their state of health and treatment during incarceration."[17]

13. In the case of Mr. Hernández, the judgment asserts that, since the State exercises control over the individual who is detained and consequently has control of the evidence concerning his physical condition, detention conditions, and possible medical care, it is the State that has the burden of proof to provide a satisfactory and convincing explanation of what happened and to disprove the allegations regarding its responsibility by valid probative

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[13] *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 81.

[14] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349., para. 103; and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 190**.**

[15] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 23.

[16] *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 22, 2007. Series C No. 171, para. 68.

[17] *Cf. Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312, para. 176. Citing: *Cf.* ECHR, *Kudhobin v. Russia*, No. 59696/00, Judgment of October 6, 2006, para. 83. See also, *Tarariyeva v. Russia*, No. 4353/03, Judgment of December 14, 2006, para. 76, and *Case of Iacov Stanciu vs. Romania*, No. 35972/05, Judgment of July 24, 2012, para. 170.

elements;[18] it must therefore provide information and evidence related to what happened to the detainee.[19]

14. In this type of case, in which the right to health is involved, the medical records become a fundamental element to evaluate whether or not adequate medical care was provided. In this regard, it is not sufficient to argue that the violation of the right to health or the lack of medical care "has not been proven with any type of evidence";[20] rather, the obligation arises to prove that this right has not been violated.

15. In particular, the analysis made in the section on judicial protection in relation to the complaints filed by Mr. Hernández's mother concerning her son's health should be stressed. Although the Inter-American Court indicated that "there is no evidence to conclude a lack of diligence on the part of the trial judge in response to the complaints concerning the presumed victim's health,"[21] it noted that the said judge had responded promptly to the mother's complaints regarding her son's need for medical care, and issued orders that Mr. Hernández be given medical treatment and that he should be informed about his health; however, the State failed to comply with these orders on at least four occasions, which resulted in a violation of Article 25(2)(c) of the Pact of San José.[22]

16. As I have already indicated,[23] international responsibility is not evaded if the decisions of the domestic courts that protect the right in question – in this case, the right to health – are not executed in the specific case, because if this occurs it renders illusory the judicial decision that recognized and protected that right in the domestic sphere.

17. Lastly, it should be emphasized that this is the first occasion on which the IACtHR, in the context of *persons deprived of liberty,* addresses the violation of the right to health directly and how the lack of an initial diagnosis and the absence of opportune medical care can result in international responsibility for the violation of the said right (protected by Article 26 of the American Convention) and also the right to personal integrity (protected by Article 5 of the Pact of San José), with regard to the prison conditions. These issues will be examined more thoroughly in the following section.

II. THE VIOLATION OF THE RIGHT TO HEALTH IN THIS SPECIFIC CASE

18. First, as a starting points it should be considered that the case law of the IACtHR has already extensively developed standards concerning State obligations in relation to persons

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[18] *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 138; *and Case of Isaza Uribe et al. v. Colombia. Merits, reparations and costs*. Judgment of November 20, 2018. Series C No. 363, para. 88.

[19] *Cf. Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 138, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 173.

[20] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 91.

[21] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 129.

[22] In this regard, the judgment concluded that: "The Court considers that it has been proved that, on the four occasions described, the prison authorities did not comply satisfactorily with the decisions of the trial judge that required them to take specific actions related to providing Mr. Hernández with health care. The facts of the case reveal that there were prolonged periods during which those orders, or some of them, were not complied with." *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 133.

[23] In this regard, see my opinion in the case of *Muelle Flores v. Peru,* paras. 36 to 43.

deprived of liberty, which were applicable to both the right to health and the right to personal integrity. However, on previous occasions, this analysis had been made by connectivity with the civil and political rights (above all, subsuming the right to health in the right to personal integrity).[24]

19. It should be recalled that, on reiterated occasions, the IACtHR has established that the State is in a position of guarantor with regard to persons deprived of liberty, because the prison authorities exercise strong control and authority over those who are in their custody.[25] The scope of the protection of the right to health – which served as a key element to determine the State's international responsibility in this case – was addressed in a similar way to that used by the IACtHR in its previous judgments concerning persons deprived of liberty in which it analyzed violations of the right to health; however, Mr. Hernández's case differs from the previous precedents because the right to health is addressed autonomously, directly and in a differentiated manner.[26] Specifically, the IACtHR reiterates the way in which it has concluded that the right to health is protected by Article 26.[27]

20. The determination of the specific actions that the authorities must take to guarantee the right to health depends on the medical condition and the individual who is suffering from this condition. In other words, even though the right to health is – in abstract – a right that is protected in general together with its essential elements (availability, quality, acceptability and accessibility), in each particular case it will be necessary to analyze the type of obligations that the authorities have to protect that right. Thus, for example the content of the right to health will not be the same for a person with a disability as for a woman who is deprived of liberty.[28]

21. In this way, for example, in the case of *Poblete Vilches* the specific standards to be guaranteed in medical emergencies were determined and, in particular, the care that should be provided to older persons in the context of public health institutions.[29] In the case of *Cuscul Pivaral et al.,* the Court specified the standards for the right to health of people living with HIV, and recognized that the intersectional nature of the vulnerability of pregnant women with HIV called for specialized medical care owing to the risk of the vertical transmission of HIV to their children.[30]

22. In this regard, in the Hernández case the Court specifies the State's obligations towards persons deprived of liberty, and establishes that all those with an otherwise unexplained productive cough lasting two–three weeks or more should be evaluated for tuberculosis, that drugs of known bioavailability should be used for the treatment required

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[24] *Inter alia: Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs*. Judgment of April 2, 2012. Series C No. 241, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312.

[25] *Cf. Case of Neira Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60; and *Case of Isaza Uribe et al. v. Colombia. Merits, reparations and costs.* Judgment of November 20, 2018. Series C No. 363, para. 87.

[26] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, paras. 99 to 143, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 72 to 153.

[27] See *supra*, paras. 7 to 9 of this opinion.

[28] In these situation, it is of fundamental importance to take into account the differentiated approach as regards vulnerability in relation to the enjoyment of a specific right.

[29] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, paras. 118 to 132.

[30] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 108 to 117.

by persons with tuberculosis, and that persons who haves been in close contact with patients who have infectious tuberculosis should be evaluated.[31]

23. The specification of the aforementioned measures is not casuistic. The IACtHR had recourse to the International Standards of Tuberculosis Care prepared by the Tuberculosis Coalition for Technical Assistance to determine the basic actions that should be taken in the case of persons with tuberculosis.[32] However, the judgment also recognizes that, as could be expected, "medical science on this matter is advancing continuously and, consequently, the citations included […] as an illustration do not contradict or call into question more recent knowledge; moreover, the Court does not take a position in matters and discussions that belong to the medical and biological sciences."[33]

24. The judgment also takes into consideration different instruments regulating medical care for tuberculosis in the case of persons deprived of liberty that have been adopted by various countries in the region, in particular by Argentina, Chile, Colombia, Ecuador, El Salvador and Mexico.[34] In this way, based on a dialogic process, the Inter-American Court moves from the general to the particular to specify the criteria that it will use to classify the State's actions with regard to the medical treatment that Mr. Hernández received while he was detained. It should be stressed that – as revealed by the judgment – prompt actions by the authorities to provide health care to Mr. Hernández could have been crucial to avoid the serious harm that he suffered and that changed his life long after he had been released.

25. In this specific case, the IACtHR analyzed the aspects relating to the right to health and the right to personal integrity of the victim in a *single chapter*. This type of analysis responded to the particularities of the case – and also to the interdependence and indivisibility of the human rights protected by the American Convention – because it is important to recall that the treatment that José Luis Hernández received from the State related not only to health care, but also to the conditions in which he was detained and the treatment he received during this time. This called for an analysis in light of the right to personal integrity, but also required these aspects to be examined as a whole, because both violations occurred while Mr. Hernández was deprived of his liberty.

26. The analysis of the case commenced with the determination of the State's responsibility for the violation of *right to personal integrity.*[35] The judgment recalled the

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[31] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, paras. 79 and 80.

[32] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 80. See, in particular, footnotes 145 to 148.

[33] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 78.

[34] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 80, footnotes 146 to 148. In this regard, the judgment referred to the following instruments: (1) Argentina: *Atención y Cuidado de la Salud de las Personas Privadas de su Libertad. Plan estratégico de salud integral en el servicio penitenciario federal 2012-2015,* Ministry of Justice and Human Rights of the Nation, 2013; (2) Chile: *Manual de Procedimiento del Programa de Tuberculosis para Poblaciones Privadas de Libertad en Gendarmería de Chile*, Ministry of Health; (3*)* Colombia: *Manual Técnico Administrativo para la atención e intervención en salud pública a la población privada de la libertad a cargo del Instituto Nacional Penitenciario y Carcelario*, December 15, 2015; (4) El Salvador: *Guía para el control de la tuberculosis en población privada de libertad,* Ministry of Health of El Salvador, March 2012; (5) Ecuador: *Guía de Práctica Clínica. Prevención, diagnóstico, tratamiento y control de la tuberculosis,* Ministry of Public Health of Ecuador, March 2018; (6) Mexico: *Norma Oficial Mexicana NOM-006-SSA2-2013 Para la prevención y control de la tuberculosis, Ministry of Health*, November 13, 2013.

[35] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, paras. 55 to 61.

special relationship of subjection between the person deprived of liberty and the State, which is characterized by the particular extent with which the State is able to regulate his rights and obligations and by the circumstances inherent in confinement; where the person deprived of liberty is prevented from satisfying a series of basic necessities for himself. This signifies that, pursuant to Article 5(1) and 5(2) of the American Convention, everyone deprived of liberty has the right to live in detention conditions compatible with his personal dignity. For the same reason, the State must ensure that the manner and method of deprivation of liberty do not exceed the level of suffering inherent in this situation.

27. Based on these standards, the judgment determined that the fact that Mr. Hernández was not examined by a doctor to verify the causes of his influenza-like condition and his earache, that none of the orders issued by the judge of the case for him to receive medical treatment were executed, and that he was detained in a situation of overcrowding, constituted degrading treatment in the terms of Article 5(2) of the American Convention.[36] The analysis made in light of Article 5(1) and 5(2) of the Pact of San José was made specifically to stress how the omissions of the authorities were one of the causes of Mr. Hernández's suffering as a person deprived of liberty and that they even amounted to degrading treatment.

28. On the other hand, the analysis made of the *right to health* is evidently related to the above, but has a specificity and autonomy that the judgment clearly underlines.[37] The analysis of the violation of the right to health does not focus on determining the suffering endured by Mr. Hernández due to his *prison conditions,* but rather on clarifying whether the medical care he received to treat his disease was satisfactory.

29. Accordingly, the central issue was to determine whether the State's actions in this regard complied with the requirements of an adequate regulation of health care, and whether medical care was ensured that complied with the elements of availability, accessibility, quality and acceptability. Consequently, the State's responsibility in relation to Article 26 was declared owing to shortcomings in the medical care, such as the failure to take adequate measures to diagnose Mr. Hernández's health problems and the unavailability of beds on three occasions; a situation that meant that he could not admitted to hospital and receive medical care even though his disease required this – without any justification being given or any measure taken to overcome these shortcomings. The IACtHR also verified that the results of the lack of adequate medical care were extremely serious for Mr. Hernández, because he experienced a reduction of his vision and his motor skills, and memory loss.[38]

30. The specific circumstances of the case warranted a specific analysis of the State's obligations with regard to health care because the principal violation in the case resulted precisely from the lack of medical care for Mr. Hernández while he was detained. This also explains the use of the *iura novit curia* principle to analyze the right to health in this case. This is a deeply entrenched international principle that allows the judge to analyze violations of rights that, although they have not been explicitly invoked, are revealed by the factual

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36 *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, paras. 57 to 59.

37 *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, paras. 62 to 96.

38 *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 94.

framework of the case; a principle that the Inter-American Court has used repeatedly since its first judgment.[39]

31. It is exactly in cases such as this one that the use of this authority is justified because it allows greater precision to be given to the analysis of the central issue of the dispute – which was the medical care of Mr. Hernández while he was detained – and the consequences that this had for his health. It is possible that, in other cases, when this is justified by the specific circumstances, the lack of medical care may be examined as part of the State's obligation to ensure *adequate prison conditions* for detainees in light of Article 5 of the American Convention. Evidently, the IACtHR does not act dogmatically, but is guided by the goal of ensuring a prudent balance between justice in the specific case, the facts contained within the factual framework of the case, the human rights violated, and inter-American standards. This case warranted an analysis of the right to health in order to provide a better response to the victim and clarify the content of the rights concerned.

32. All the foregoing illustrates the indivisibility and interdependence of the economic, social, cultural and environmental rights, and the civil and political rights that coexist in synergy in the American Convention. Proof of this is the result established in the third operative paragraph of the judgment that declares, together, the autonomous violation of the right to health and the right to personal integrity. Moreover, I consider that given this example of coexistence between all the human rights that can be protected by the Pact of San José, it would be sufficient to declare these violations just once in the operative paragraphs of the judgment because, to the contrary, the reference would be redundant. Nevertheless, I fully agree with the meaning and scope of the judgment in this case.

III. CONCLUSIONS

33. The IACtHR has distinguished two aspects of the protection of the ESCER under the inter-American system: those addressed from an *individual perspective* (that allows the Court to identify whether the economic, social cultural and/or environmental rights of a specific person have been violated), and those addressed from a *collective perspective,* that may reveal a systemic problem in a particular context; both situations justiciable before the organs of the inter-American system of human rights, as can be seen from the important precedents of the last two years.

34. The judgment reaffirms the method of analysis essentially followed by the IACtHR since the case of *Lagos del Campo*, both as regards the determination of the content and scope of the ESCER and the type of analysis made in specific cases. The different cases decided that concerned the ESCER have contributed to the discussion and refinement of the doctrine of the Inter-American Court in relation to the autonomous analysis of the ESCER, something that is normal and appropriate with an innovative line of case law. Based on this new horizon and the important social challenges faced by the region, I am convinced that the Inter-American Commission and the representatives of the victims will increasingly invoke the content of Article 26 of the Pact of San José before the Inter-American Court.

35. This is the third time that the Court has declared a violation of Article 26 of the American Convention in relation to the right to health of individuals who belong to vulnerable

[39] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 163; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 204, and *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 54.

groups; in this case, a person deprived of liberty who had contracted tuberculosis.[40] This judgment indicates that persons deprived of liberty have the right to serve their sentences in prisons that ensure decent detention conditions, particularly with adequate medical care. This refers not only to the physical conditions of the place, but at the same time imposes on States the adoption of those positive measures that guarantee the ESCER which, unfortunately, have not been considered a priority. As regards the "*right to health" of persons deprived of liberty,* adequate and opportune medical care plays a fundamental role to prevent greater suffering than the detention conditions, and the violation of other rights such as to personal integrity.

36. The judgment analyzes the violation of the right to health from an *individual perspective.* In the instant case, the Court assessed whether Mr. Hernández had received adequate medical care while he was detained, especially from the moment the State became aware that he had contracted tuberculous meningitis. This analysis also required the Court to explore the specific obligations that arise when providing health care to individuals who suffer from tuberculosis from the perspective of the right to health. Similarly, the judgment considered that, since Mr. Hernández was deprived of his liberty, the State had an enhanced obligation to ensure his rights.

37. In sum, the Hernández case constitutes one more element in the consolidation of the case law on ESCER in the inter-American system and, in general, provides greater clarity on the content of the rights and on the State obligations for the protection of the social rights in our region. It represents an approach adopted by the IACtHR to ensure that all rights (civil, political, economic, social, cultural and environmental) are considered as such, in light of their interdependence and indivisibility, without any ranking among them, and that the States meet and implement their obligations of respect, guarantee and adaptation of their legal provisions in this regard, which is particularly important for the most vulnerable groups, as is the case of persons deprived of liberty.

38. Fifty years after the adoption of the American Convention, we cannot ignore that our region experiences a serious situation of poverty, inequality, inequity and social exclusion, in which "not only has social progress of various kinds slowed or levelled off in a weak economic environment, but there are strong signs that in some respects it has gone into reverse."[41] States must intervene and do everything within their power to achieve the full realization and enjoyment of all human rights, including the social rights,[42] thereby strengthening their constitutional democracies. *Social justice* is urgently claimed by the people in our region. This

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[40] In two recent cases involving individuals belonging to vulnerable groups such as older persons and people living with HIV the Court has declared the violation of Article 26 of the American Convention. See, *supra*, para. 21 of this separate opinion. Also, *cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359.

[41] Economic Commission for Latin America and the Caribbean (ECLAC) *Social Panorama of Latin America, 2019* (LC/PUB.2019/22-P/Rev.1), Santiago, 2019, p. 13. In this report, ECLAC also asserts that: "The struggle against inequality, poverty eradication and the quest for fairer, more inclusive societies with higher levels of well-being are at the heart of the [UN] 2030 Agenda for Sustainable Development. In Latin America and the Caribbean, the challenges associated with these objectives are structural, multifaceted and persistent. However, the current global and regional situation appears to be a more adverse context in which to address them, at least when compared to the first decade and a half of this century."

[42] In the same report, ECLAC indicates that "the deep inequalities between the people of the region in the exercise of economic, social and cultural rights must be addressed once and for all." Economic Commission for Latin America and the Caribbean (ECLAC), *Social Panorama of Latin America, 2019* (LC/PUB.2019/22-P/Rev.1), Santiago, 2019, p. 36.

is one of the major challenges of our time and one that the inter-American system cannot escape.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI

TO THE JUDGMENT OF NOVEMBER 22, 2019 OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF HERNÁNDEZ *V.* ARGENTINA

I. INTRODUCTION

1. This partially dissenting opinion in relation to the judgment in reference[1] is issued owing to my discrepancy with the decision made in the third operative paragraph,[2] in which, based on the provisions of, among other articles, Article 26[3] of the American Convention on Human Rights,[4] it declared that the Argentine Republic[5] had violated the rights to personal integrity and to health.

2. In light of the relevance of this matter, in this opinion, I reiterate and supplement what I have already indicated on other occasions.[6] In this way, after setting out some general considerations, I will address the reasons that explain my disagreement, which relate to the means for the interpretation of treaties, to the interpretation of the said Article 26 and, lastly, to other arguments contained in the judgment.

II. PRELIMINARY GENERAL CONSIDERATIONS

3. The preliminary general considerations relating to this matter related to the function of the Inter-American Court of Human Rights[7] and the role of the separate opinion.

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[1] Hereinafter, the judgment. Also, hereinafter reference to "para." or "paras." shall be understood to refer to the paragraph(s) of judgment.

[2] "The State is responsible for the violation of the right to personal integrity and the right to health recognized, respectively, in Articles 5(1), 5(2) and 26 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of José Luis Hernández, pursuant to paragraphs 54 to 96 of this judgment*."*

[3] *Infra*, para. 22

[4] Hereinafter, the Convention. Also, hereinafter references in the footnotes to articles of the Convention, will be indicated as "Art."

[5] Hereinafter, the State.

[6] *Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Muelle Flores v. Peru, Judgment of March 6, 2019 (Preliminary objections, merits, reparations and costs); Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of San Miguel Sosa et al. v. Venezuela, Judgment of February 8, 2018 (Merits, reparations and costs); Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Lagos del Campo v. Peru, Judgment of August 31, 2017, (Preliminary objections, merits, reparations and costs, and Separate opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of the Dismissed Employees of PetroPerú et al. v. Peru, Judgment of November 23, 2017 (Preliminary objections, merits, reparations and costs).*

[7] Hereinafter, the Court.

A. The Court's function

4. This opinion is based on the fact that the function of the Court[8] is to impart justice in the area of human rights pursuant to law and, more specifically, pursuant to the Convention and, therefore, pursuant to both international human rights law of which it forms part and public international law[9] of which the latter, in turn, forms part.

5. Consequently, strictly speaking, the Court does not have competence to promote and defend human rights because the Convention expressly assigns that function to the Commission,[10] which could be classified as an activist, understanding this word in the most positive sense possible.[11] In contrast, the Court's function is to decide disputes concerning human rights that occur between States Parties to the Convention that can appear before it[12] or, in the case of an individual or a group of individuals or a non-governmental entity[13] that has lodged a petition against one or several States, the other States Parties are represented by the Commission,[14] and they should even be aware of the cases in which the defendant State Party has failed to comply with the rulings made in the proceedings filed against it.[15]

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

[9] Art. 31(3)(c) of the Vienna Convention on the Law of Treaties: "General rule of interpretation.… There shall be taken into account, together with the context:… (c) any relevant rules of international law applicable in the relations between the parties."

[10] Art. 41: "The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:
a) to develop an awareness of human rights among the peoples of America;
b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
c) to prepare such studies or reports as it considers advisable in the performance of its duties;
d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
g) to submit an annual report to the General Assembly of the Organization of American States.

[11] Diccionario de la Lengua Española, Real Academia Española, 2019: "*Activismo: 1. Tendencia a comportarse de un modo extremadamente dinámico. 2. Ejercicio del proselitismo and acción social de carácter público. Activista: 1. Perteneciente o relativo al activismo. 2. Seguidor del activismo.*"

[12] Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

[13] Art. 44: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

[14] Art. 61(1): "Only the States Parties and the Commission shall have the right to submit a case to the Court."
Art.35: "The Commission shall represent all the member countries of the Organization of American States."
Art.57: "The Commission shall appear in all cases before the Court."

[15] Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

6. The function of the Court is, let me repeat, to rule interpreting and applying the Convention; in other words, determining the meaning and scope of its provisions – that, since to some extent they may be perceived as obscure or uncertain, may be subject to several possible applications – and endeavoring to ensure that this results in the effective protection of human rights and, if these have been violated, their prompt restoration.[16]

7. Evidently, to fulfill this mission, the Court does not have the authority to adjudicate outside or disregarding the law expressed, as far as the Court is concerned, in the Convention. In this regard, it is necessary to respect the principle of public law that authorities may only act within the law, so that, whatever is not regulated, is governed by the internal, domestic and exclusive jurisdiction of the State in question.[17]

8. Also, and for the same reason, the Court must, on the one hand, proceed only in accordance with what the Convention effectively establishes and not what it would like it to establish and, on the other hand, avoid modifying it, a power assigned expressly to its States Parties.[18] Consequently, if the Court does not agree with what a provision of the Convention establishes, it should not exercise the international normative function that falls within the competence of the States, but rather advise them of the need to amend the provision in question. Thus, the new provision that eventually arises from the exercise of the said function by the States would clearly enjoy a more solid and widespread democratic legitimacy.

9. In this regard, it should also be indicated that this opinion responds to the circumstance that the Court, as a judicial organ, enjoys extensive autonomy in its work, since there is no higher entity that is able to control its actions,[19] a characteristic that imposes on it the imperative of being extremely rigorous in the exercise of its jurisdiction in order not to denature this and, consequently, so as not to weaken the inter-American system for the protection of human rights. This is why the thesis argued in this text seeks, among other purposes, the broadest possible recognition of the Court by all those who appear before it;

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

[17] "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees issued in Tunisia and Morocco (French zone), Series B No. 4, p.24.
Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, "Art.1: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

[18] Art. 31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."
Art. 76(1): "Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General."
Art. 77(1): "In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection."

[19] Art. 67: "The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."

namely, the presumed victims of human rights violations,[20] the Commission[21] and the States Parties to the Convention that have accepted its jurisdiction,[22] thereby reinforcing the Court's status as a judicial organ and, consequently, the most significant entity of a continental scope that has been established to safeguard human rights, Moreover, for this reason it is necessary to persist in consolidating and improving it, without exposing it to risks that could negatively affect this effort.

10. All the above, also taking into consideration that the Court, on the one hand, should execute its functions abiding by the principles of impartiality, independence, objectivity, political independence, equanimity, full equality before the law and justice, non-discrimination and absence of prejudices, characteristics inherent in all jurisdictional organs and, on the other hand, that the ultimate purpose of its task is to duly and opportunely safeguard the human rights of the presumed victims of violations of those rights. In other words, it should proceed bearing in mind that its functions are similar, for example, to those exercised by juvenile courts and labor courts that are based, the first on the best interests of the child, and the second on the protection of the worker, all within the framework of the administration of justice.

11. Based on the foregoing, and because the Convention is a treaty between States[23] and therefore establishes their obligations – but with regard to the persons subject to their respective jurisdictions[24] – it can be concluded that the Court's function is to fathom the intentions that they incorporated into the said treaty when signing it and, eventually, how those intentions should be understood *vis-à-vis* new situations.

12. This is why, in order to interpret the Convention, the Court has not only its text, but also other sources of public international law; that is, international custom, the general principles of law, and the unilateral legal acts of the States Parties and, if the States that appear before it have agreed, equity, and also, but as subsidiary means, case law, doctrine, and the legally binding resolutions of international organizations.[25]

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[20] *Supra* footnote No. 13.
Art. 25(1) of the Court's Rules of Procedure*:* "Participation of the Alleged Victims or their Representatives*.* Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings.

[21] *Supra* footnote No. 14.

[22] *Supra* footnote No. 12.

[23] Art. 2(1)(a) of the Vienna Convention on the Law of Treaties: "Use of Terms. 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

[24] Art.1: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."
2. For the purposes of this Convention, "person" means every human being."

[25] Art. 38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

13. That said, the principal rule for the interpretation of treaties contained in the Vienna Convention on the Law of Treaties[26] and [27] is that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

14. This provision includes four means of interpretation. One of the methods is based on good faith which signifies that what was agreed by the States Parties to the treaty in question should be understood in accordance with what they really intended to agree on, so that this is applied faithfully and has practical effects. The second is the textual or literal method, which relates to the analysis of the text of the treaty, the vocabulary used and the ordinary meaning of its terms. Another is the subjective method, which seeks to establish the intention of the States Parties to the treaty by also analyzing the *travaux préparatoires* and their impact on the treaty. And the fourth is the functional or teleological method that seeks to determine the object and purpose of the treaty. These four methods should be applied simultaneously and harmoniously in the interpretation of a treaty, without giving preference to any of them.[28]

15. Ultimately, what underlines everything indicated above is, on the one hand, that the inter-American jurisdiction established in the Convention is the peaceful way to resolve the disputes that arise among its States Parties in relation to respect for the human rights of the persons subject to their respective jurisdictions and, on the other, that the Court, when proceeding in conformity with the provisions of the Convention, provides its rulings with the necessary corresponding legal certainty. And, all this considering that the law is the means to achieve justice and justice the means to achieve peace.

B. The role of the separate opinion

16. This partially dissenting opinion is issued with full and absolute respect for the decisions taken by the Court in this case that, consequently, must be complied with. This text cannot,

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2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto." This is the only international treaty-based provision that refers to the sources of public international law. It does not include unilateral legal acts or the legally binding resolutions of international organizations.

[26] Hereinafter, the Vienna Convention.

[27] Art. 31: "General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."
Art. 32: "Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

[28] This is what differentiates the interpretation of a treaty from the interpretation of the law in which, in some countries, such as Chile – according to article 19 of its Civil Code – the literal interpretation prevails: "When the meaning of the law is clear, its literal meaning should not be disregarded, on the pretext of consulting its spirit. However, in order to interpret an obscure expression of the law, it is possible to have recourse to its intention or spirit, clearly expressed in the law, or in the authoritative history of its elaboration."

therefore, be interpreted in any way or under any circumstance as detracting from the legitimacy of the decision adopted in this case.

17. Based on the foregoing consideration, I must, therefore, indicate expressly that the thesis set out in this opinion does not seek, in any way, to weaken or restrict the exercise of human rights, but rather precisely the contrary. Indeed, what I have indicated here responds to a profound certainty that effective respect for human rights is achieved if the States Parties to the Convention are required to comply with what they truly, freely and sovereignly, undertook to fulfill.[29] In this regard, legal certainty plays a fundamental role and, consequently, cannot be understood to limit or restrict the development of human rights, but rather as an instrument that offers the best possible guarantee for their effective respect or, if they have been violated, for their earliest possible restoration by the corresponding State.[30] The purpose, therefore, is not only to deliver judgments that are solidly substantiated and that develop human rights, but above all, when those rights have been violated, to ensure that the State concerned re-establishes them as soon as possible.

18. Moreover, the issue of separate opinions – which may at times lead to misunderstandings and even disapproval or differences – not only constitutes the exercise of a right but, fundamentally, compliance with a duty which is to contribute to a better understanding of the function assigned to the Court.[31] In addition, separate opinions may eventually relate to the exercise of the right to freedom of thought and expression recognized in the Convention.[32]

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[29] *Supra* footnote No. 19.
Art. 33: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:
a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and
b. the Inter-American Court of Human Rights, referred to as "The Court."

[30] *Supra* footnotes Nos. 16 and 24.

[31] Art. 66(2) of the Convention: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."
Art. 24(3) of the Statute of the Court: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."
Art. 32(1)(a) of the Rules of Procedure: The Court shall make public: its judgments, orders, opinions, and other decisions, including separate opinions, dissenting or concurring, whenever they fulfill the requirements set forth in Article 65(2) of these Rules."
Art. 65(2) of the Court's Rules of Procedure: "Any judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

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

19. Furthermore, based on the foregoing, the mechanism of the separate opinion is also established in the international norms of the European Court of Human Rights,[33] the African Court of Justice and Human Rights,[34] the International Court of Justice,[35] the International Criminal Court[36] and the International Tribunal for the Law of the Sea.[37]

20. Consequently, this opinion is issued with the hope that, in future, its contents will be incorporated either in case law or in a new provision of international law. Regarding the former, since the Court's ruling is only binding for the State Party to the case in which it is delivered,[38] the Court – as a subsidiary source of international law that must, consequently, determine the "*rules of law"* established by an autonomous source of international law; in other words, a treaty, custom, general principle of law or unilateral legal act[39] – may in future change when adjudicating another case. And, regarding the latter, since the States have competence for the international normative function and, in the case of the Convention, its States Parties through an amendment to the Convention.[40]

III. INTERPRETATION OF ARTICLE 26

21. That said, in order for the reasons for this dissent to be understood properly, it is necessary to examine the meaning and scope of the said Article 26 based on the means for the interpretation of treaties established in the Vienna Convention.[41]

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[33] Art.74(2) of the Rules of Court: "Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent."

[34] Article 44 of its Statute: « If the judgment does not represent in whole or in part the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion."

[35] Art. 57 of its Statute: "if the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

[36] Art 74(5) of the Rome Statute of the International Criminal Court: "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court."

[37] Art.30(3) of its Statute: "If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion."

[38] *Supra* footnote 24.
Art.68(1): "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."
Art. 46(1) of the European Convention on Human Rights: " The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."
Art. 46. and 3 of the Statute of the African Court of Justice and Human Rights: "Binding Force and Execution of Judgments. 1. The decision of the Court shall be binding on the parties. … 3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution."
Art. 59 of the Statute of the International Court of Justice: "The decision of the Court has no binding force except between the parties and in respect of that particular case ."

[39] *Supra* footnote No. 25.

[40] *Supra* footnote No. 18.

[41] *Supra* footnote No. 27.
Art. 31: "General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

22. Article 26 establishes that:

> "Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means and subject to available resources, the full realization of the rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

A. Good faith

23. The method based on good faith means that what was agreed by the States Parties to the treaty in question should be understood on the basis of what they really had the intention of agreeing on, so that this would be applied faithfully and have practical effects.

24. In the instant case, it is necessary to ask oneself what the reason was for Article 26, entitled "*Progressive Development*," which is also the only article in Chapter III entitled "*Economic, Social and Cultural Rights*" of Part I of the Convention entitled "*State Obligations and Rights Protected."* In other words, we should ask ourselves why those rights were not included in Chapter II of Part I of the Convention entitled "*Civil and Political Rights*."

25. In this regard, it should be recalled that even the Preamble to the Convention refers to two types of rights[42] even though, evidently, they both form part of human rights in general and, therefore, are interconnected. Consequently, the answer to the previous question can only be that, despite their close relationship, they are distinct rights and, in particular, they have been developed differently in international law, so that they should also receive a differentiated treatment.

26. Consequently, the fact that Part I of the Convention refers to "*Rights Protected*" is an insufficient argument to infer that the "economic, social and cultural rights" referred to in the aforementioned Article 26 are also protected by the Convention and, therefore, may be justiciable before the Court. Furthermore, it cannot be assumed that this provision is similar to Article 2 of the Convention,[43] which is in Chapter I entitled "*General Obligations,"* of Part I

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.
Art. 32: "Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

[42] Para. 4: "Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights."
[43] "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the

of the Convention, in other words, both establish the obligation of the States to create mechanisms to ensure that human rights are complied with, but do not establish those rights.

27. Accordingly, good faith leads to considering Article 26 on its own merits and not as an attachment to the rights specifically listed and developed in the Convention.

B. Textual or literal method

28. When interpreting the article in question, it can be concluded that:

a) It establishes an obligation of the States Parties to the Convention for action rather than for results, consisting in the need "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively […] the full realization of the rights" that it mentions;

b) Indeed, and as the title of the article indicates – namely, "Progressive Development" – that obligations consists in gradually realizing the rights to which it refers, precisely because they have not been fully realized;

c) This article refers to "rights derived[44] from the economic, social, educational, scientific and cultural standards set forth in the Charter of the [OAS]," in other words to rights that derive from or that can be inferred[45] from the provisions of the latter; therefore it does not recognized or establish them, leaving their definition to interpretation;

d) Consequently, the said rights are not "recognized" by the Convention;

e) This article conditions compliance with the said obligation for action "subject to available resources" and this is precisely why it indicates how to comply with it; that is, "by legislation or other appropriate means," and

f) Under this article, the States Parties to the Convention could be required not to respect human rights or to ensure their respect, but rather "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively the full realization of the rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the [OAS]."

29. Consequently, it can essentially be asserted that, according to its literal meaning, on the one hand, Article 26 of the Convention does not propose several possibilities for its application – that is, sow doubts about its meaning and scope – and, on the other hand, it does not establish any human right and, especially, one that can be claimed before the Court. Rather, it alludes to obligations assumed by the States Parties to the Convention for actions and not for results.

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provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[44] Diccionario de la Lengua Española, Real Academia Española, 2018. "*Derivar: Dicho de una cosa: Traer su origen de otra."*

[45] *Idem*. "*Inferir: Deducir algo o sacarlo como conclusión de otra cosa*".

C. Subjective method

30. When trying to fathom the intention of the States Parties to the Convention in relation to the article in question, it is necessary to refer – always in keeping with the provisions of the Vienna Convention – to the context of the terms; therefore, it is necessary to refer to the system established in the Convention in which Article 26 is inserted, which means that:

a) This system consists of the obligations and rights that it establishes,[46] the organs responsible for ensuring respect for them and requiring compliance with them, respectively,[47] and provisions concerning the Convention;[48]

b) Regarding the obligations, these are two: namely, "*Obligation to Respect Rights*"[49] and "*Domestic Legal Effects"*[50] and, as regards the rights, they are the "*Civil and Political Rights*"[51] and the "*Economic, Social and Cultural Rights";*[52]

c) In relation to the organs, these are the Commission,[53] the Court[54] and the OAS General Assembly.[55] The first is responsible for the promotion and defense of human rights, the second for the interpretation and application of the Convention, and the third for the adoption of the measures required to ensure compliance with the respective rulings.

31. From the harmonious interpretation of the corresponding norms, it is possible to deduce that, as regards the cases submitted, they refer to two types of rights, some are rights

[46] Part I, "State Obligations and Rights Protected."

[47] Part II "Means of Protection."

[48] Part III, General and Transitory Provisions."

[49] *Supra*, footnote 24.

[50] *Supra* footnote No. 43.

[51] Part I, Chapter II, Arts. 3 to 25. Right to recognition of juridical personality (Art. 3), Right to life, (Art. 4), Right to personal integrity (Art. 5), Freedom from slavery (Art. 6), Right to personal liberty (Art. 7), Right to a fair trial (Art. 8), Freedom from *ex-post facto* laws (Art. 9), Right to compensation (Art. 10), Right to privacy (Art. 11), Freedom of conscience and religion (Art. 12), Freedom of thought and expression (Art. 13), Right of reply (Art. 14), Right of assembly (Art. 15), Freedom of association (Art. 16), Rights of the family (Art. 17), Right to a name (Art. 18), Rights of the child (Art. 19), Right to nationality (Art. 20), Right to property (Art. 21), Freedom of movement and residence (Art. 22), Right to participate in government (Art. 23), Right to equal protection (Art. 24) and Right to judicial protection (Art. 25).

[52] Part I, Chapter III. Art. 26. Progressive Development.

[53] *Supra* footnote No. 10.

[54] *Supra* footnote No. 8

[55] *Supra* No. 15.

"recognized,"[56] "set forth,"[57] "guaranteed,"[58] "protected" [Note: "*consagrada*" in Spanish][59] or "protected"[60] in or by the Convention and the others are, according to the said Article 26, those "derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

32. Regarding the former, it is with regard to these that, according to Article 62(3) of the Convention: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it." Consequently, in the cases submitted to the Court, petitioners can only require from the States that have accepted the Court's contentious jurisdiction due respect for the civil and political rights that the Convention "guarantees" and "protects"; and, also, it may eventually be necessary, pursuant to Article 2 of the Convention, to require them "to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

33. In contrast, in relation to the rights "derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires," the States Parties to the Convention can only be required to adopt "by legislation or other appropriate means" "measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [… their] full realization" and this "subject to available resources."

34. With regard to the supplementary means of interpretation of treaties, these confirm that the States Parties to the Convention did not have the intention of including the economic, social and cultural rights in the protection regime it establishes.

35. In effect, at the Inter-American Specialized Conference on Human Rights during which the definitive text of the Convention was adopted, Colombia proposed specifying the economic, social and cultural rights to be protected by the mechanism established by the Convention, while Mexico indicated that, in that regard, none of them should be included, so that "following a discussion during which some of the previous positions were repeated without reaching a consensus and in none of which it was proposed to include the economic, social and cultural rights in the protection regime established for the civil and political rights, a chapter was drafted

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[56] *Supra* Footnote No. 24.
Art. 48(1)(f): "1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows*:…*
The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."

[57] Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

[58] Art. 47(b): "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:… the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention."

[59] Art. 48(1): "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:…"

[60] *Supra* footnote No. 46.

with two articles,"[61] the first of which, proposed by Brazil in order to reach a compromise, was included in the final text of the Convention as Article 26, by virtue of the corresponding vote.

36. Meanwhile, the second article, which was Article 27 established: "Monitoring Compliance with the Obligations. The States Parties shall transmit to the Inter-American Commission of Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission can verify their compliance with the obligations determined previously, which are the essential basis for the exercise of the other rights enshrined in this Convention." It should be noted that the said Article 27 refers to "reports and studies" for the Commission to verify compliance with the said obligations and therefore distinguished between "the obligations determined previously"- evidently in Article 26 – and the "other rights enshrined in this Convention."

37. Therefore, it can be concluded that at no time were the economic, social and cultural rights "derived" from the standards of the OAS Charter – among them the right to health – included in the protection regime for the civil and political rights "recognized" in the Convention.

D. Functional or teleological method

38. When trying to define the object and purpose of the article of the Convention in question, it appears evident that:

> a) The purpose of the Convention's signatory States was "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;"[62] and
>
> b) The more specific object and purpose, explicitly indicated in this instrument was to "determine the structure, competence, and procedure of the organs responsible for these matters."[63]

39. It is clear that, given this structural framework, the specific object and purpose of Article 26 of the Convention was for its States Parties "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means and subject to available resources, the full realization of the rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

40. Ultimately, therefore, application of the functional or teleological method for the interpretation of treaties to Article 26 of the Convention leads to the same conclusion as was reached by using the other means for the interpretation of treaties; in other words, that the purpose of this article is not to establish any human rights but merely to establish the obligation of the States Parties to the Convention to adopt measures to realize the economic, social and cultural rights "derived" from the OAS Charter.

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[61] Concurring opinion of Judge Alberto Pérez Pérez, *Case of Gonzales Lluy et al. v. Ecuador,* Judgment of September 1, 2015 (preliminary objections, merits, reparations and costs).

[62] Para. 1 of the Preamble to the Convention.

[63] Para. 5 of the Preamble to the Convention.

IV. DISCREPANCY WITH THE JUDGMENT

41. Having established the above, it is necessary to recall that the instant case refers, insofar as this partially dissenting opinion is concerned, to the violation of the personal integrity of José Luis Hernández and to the lack of access to an effective judicial remedy to protect his right to health.[64] It should be recalled that, when submitting the case to the Court, the Commission did not allege the violation of the said Article 26. Neither did the petitioners. It was the Court that incorporated it, under the *iura novit curia* principle,[65] so that, evidently, the parties to the proceedings did not have the opportunity to express an opinion in this regard.

42. In addition, it is extremely relevant to indicate that this opinion does not refer to whether or not the right to health, or the other economic, social and cultural rights exist. The right to health, therefore, is not in doubt, especially when it is recognized in various international instruments as well as in the Constitutions of the States Parties to the Convention.[66] However, what is asserted in this opinion with regard to the right to health is that the Court, contrary to what is indicated in the judgment, does not have competence to examine its violation; in other words, that the said right is not internationally justiciable before the Court. Consequently, this text refers exclusively to that matter.

43. It should also be noted that, in other judgments, the Court has achieved a similar result to the one sought in this case by only applying provisions of the Convention on rights that are recognized – and, logically, within the limits of the respective judgments – such as those that protect the right to personal integrity or property, or judicial guarantees and judicial protection, without needing to resort to Article 26 of the Convention.

44. That said, both the preceding assertions regarding the interpretation of Article 26 and the considerations included in separate opinions that the undersigned has issued on the matter,[67] reveal the discrepancy that underlines this opinion; however, it appears desirable to explain in more detail my dissent with certain aspects explicitly indicated herein.

45. To this end, it is necessary to begin by indicating that the judgment refers back, as regards the interpretation of Article 26 of the Convention, to "the approach adopted by this Court since the case of *Lagos del Campo v. Peru,* which it has continued to adopt in subsequent decisions."[68] Also that, with the exception of the judgment delivered in the *Case of Poblete Vilches et al. v. Chile*, in which I did not take part because I am a national of that State, I have issued separate opinions with regard to the other judgments mentioned,[69] and, for the pertinent effects, I ratify these and consider them reproduced here.

46. Nevertheless, and always in relation to the abovementioned assertion in the judgment, I would like to draw attention to the fact that although the Court appears to allege its own case law to substantiate the position it assumes – which could be admissible – this does not provide a reason or justification for why the rights "derived" from the OAS Charter were not

[64] Para. 1.

[65] Para. 54.

[66] Paras. 69 to 75.

[67] *Supra* footnote No. 6.

[68] Para. 62.

[69] *Supra* footnote No. 6

directly incorporated into the Convention or why those rights are mentioned in a separate chapter, Chapter III of Part I of the Convention, and not in its Part II.

47. Furthermore, the judgment does not explain why the rights mentioned in Article 26 of the Convention are justiciables before the Court. Indeed, all its arguments refer exclusively to the existence of the right to health and even to its content,[70] and to this end it cites various international and even national instruments[71] – incidentally, with different legal effects – with which it seeks to provide this justification but, in reality, what these instruments do is substantiate the existence of the right to health, which has not been called into question.

48. Additionally, it should be recalled that the judgment points to Articles 34(i) and (l)[72] and 45(h)[73] of the OAS Charter as the provisions that recognize the right to health,[74] but these articles establish "*goals*" or "*principles and mechanisms*" from which the right to health cannot necessarily be "*derived*" and, especially, its justiciable nature before the Court.

49. On this point, the judgment indicates that the Court reiterates that "there is a reference with a sufficient degree of specificity to derive the existence of the right to health recognized by the OAS Charter" and that "[c]onsequently, the Court considers that the right to health is a right protected by Article 26 of the Convention."

50. Consequently, it would seem that, for the judgment, it is sufficient that the Convention has mentioned rights that "derive" from the OAS Charter, for them to be justiciable before the Court in circumstances in which none of the norms that it cites in this regard, clearly and without any room for doubt, substantiates this position.

V. CONCLUSION

51. As can be inferred from all the above with regard to how the judgment applies Article 26 of the Convention, this clearly departs from its appropriate interpretation so that, consequently, it leads to a result that was never intended or desired for the Convention.

52. Accordingly, I dissent from the decision taken in the judgment because, while the Convention makes a clear distinction between the civil and political rights and the economic, social and cultural rights, the right to health is not a right "recognized" in the Convention and, consequently, is not safeguarded by the system of protection that the Convention only establishes for the former group of rights. For the economic, social and cultural rights to be justiciable before the Court, the signature of an additional protocol would be necessary and this has not occurred as regards the right to health.

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[70] Paras. 69 to 75.

[71] *Supra* footnote No. 67.

[72] Art. 34(i) and (l) of the OAS Charter: "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals:… (i) Protection of man's potential through the extension and application of modern medical science*;…* (l) Urban conditions that offer the opportunity for a healthful, productive, and full life."

[73] Art. 45(h) of the OAS Charter: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms*:…*(h) Development of an efficient social security policy."

[74] Para. 64.

53. I dissent also because what Article 26 of the Convention establishes are, on the one hand, obligations of conduct by the States and not a recognition of human rights and, in addition, it refers back to the OAS Charter, which, in turn, does not do this, but rather stipulates "goals" or "objectives" or "principles and mechanisms" and, on the other hand, the obligation of the States to achieve or implement them, as applicable.

54. In addition, I do not share the decision taken because, by permitting the provisions of Article 26 to be submitted to the consideration of the Court, this not only renders the provisions of Articles 31, 76(1) and 77(1)[75] of the Convention meaningless, but would also allow all the rights that are "*derived*" from the OAS Charter to be submitted to it, an eventuality that is evidently far removed from what was agreed on and that, without doubt, if the Court continues in this direction, would have unsuspected consequences, not all beneficial, for real respect for human rights.

55. Let me repeat again that, with the above I am not denying the existence of the right to health which, incidentally, does not appear in those terms in the OAS Charter from the provisions of which, according to Article 26 of the Convention, it would derive. I am merely asserting that its eventual violation cannot be submitted to the consideration and adjudication of the Court.

56. Also, this opinion should not be understood to mean that, eventually, the undersigned would not be in favor of submitting violations of the economic, social and cultural rights to the consideration of the Court. In this regard, I consider that, if this occurs, it should be done by the entity that holds the responsibility for the international legislative function; that is, the States through a treaty, international custom, general principles of law or other unilateral legal act. It does not appear desirable that the organ entrusted with the inter-American judicial function should assume the international legislative function, especially when the States Parties to the Convention are democratic and are governed by the Inter-American Democratic Charter which establishes the separation of powers and citizen participation in public affairs,[76] which it would seem should also be reflected in relation to the international legislative function, particularly with regard to those norms that concern the citizen most directly.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

[75] *Supra* footnote No. 18.

[76] Adopted at the Twenty-eighth special session of the OAS General Assembly, Lima, Peru, September 11, 2001.
Art. 3: "Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.
Art. 6: "It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.

PARTIALLY DISSENTING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO

TO THE JUDGMENT OF NOVEMBER 22, 2019
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF HERNÁNDEZ *V.* ARGENTINA

I. Introduction

1. With my usual respect for the decisions of the Inter-American Court of Human Rights (hereinafter "the Court"), I submit this opinion to reaffirm and examine further the various contradictions and logical and legal inconsistencies that invalidate the theory of the autonomous and direct justiciability of the economic, social, cultural and environmental rights (hereinafter "the ESCER") by way of Article 26 of the American Convention of Human Rights (hereinafter "the Convention"), that has been adopted by the majority of the Court's judges since the case of *Lagos del Campo v. Peru.* In particular, I will explain my discrepancies with the analysis of the merits made by the Court in order to determine the international responsibility of the Argentine Republic (hereinafter "the State") for the violation of the right to health declared in the third operative paragraph of the judgment in the case of *Hernández v. Argentina* (hereinafter "the judgment" or "the Hernández case").

2. Therefore, this opinion supplements the line of reasoning in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru,*[1] *the Dismissed Employees of PetroPeru et al. v. Peru,*[2] *San Miguel Sosa et al. v. Venezuela,*[3] *Cuscul Pivaral et al. v. Guatemala,*[4] *Muelle Flores v. Peru,*[5] and the *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru,*[6] and also in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador,*[7] *Poblete Vilches et al. v. Chile,*[8] and *Rodríguez Revolorio et al. v. Guatemala.*[9]

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[1] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

[2] *Cf. Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

[3] *Cf. Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[4] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[5] *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[6] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[7] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[8] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra *Porto.*

[9] *Cf. Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387. Concurring opinion of Judge Humberto Antonio Sierra Porto.

3. I will develop my analysis as follows: (i) the nature of the right to health as a social benefit; (ii) the reversal of the burden of proof in cases of a special relationship of subjection, and (iii) the abrupt change in the way violations are declared in the operative paragraphs.

II. The nature of the right to health as a social benefit

4. In the judgment, the principal legal problem identified by the Court is the scope of the right to health as an autonomous right derived from Article 26 of the American Convention. As I have indicated in the above-mentioned opinions, the thesis adopted by Court, starting with the case of *Lagos del Campo v. Peru*, according to which the economic, social, cultural and environmental rights are directly justiciable via individual petitions has no normative support because it is not included among the competences expressly granted to the Court by both the American Convention and Article 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "the Protocol of San Salvador"), interpreted in light of Articles 30 and 31 of the Vienna Convention on the Law of Treaties.

5. In addition to the limits clearly defined in those treaties with regard to the Court's contentious jurisdiction in relation to the ESCER, first, it is necessary to indicate that, contrary to the Court's reasoning in the judgment and also proposed since the cases of *Poblete Vilches* and *Cuscul Pivaral et al.*, it is not true that Articles 34(i), 34(l) and 45(h) of the Charter of the Organization of American States (hereinafter "the OAS Charter) establish a reference "with a sufficient degree of specificity" to health to derive the existence of a specific right. Those provisions do not make even a general mention of a concept that could assimilate an individual right, but rather contain mere general declarations regarding the "[p]rotection of man's potential through the extension and application of modern medical science,"[10] and the "[u]rban conditions that offer the opportunity for a healthful, productive, and full life."[11] This does not mean that the right to health is not recognized in the international sphere, because the Protocol of San Salvador itself establishes this in its Article 10, but rather that it is not possible "to derive" that right from the OAS Charter.

6. Second, I consider equally questionable the way in which the Court uses Article 29 of the Convention to expand the scope of its competence, particularly as regards the referral to the international *corpus iuris.* Even though the judgment indicates that the international norms "[…] will be used as a supplement to the provisions of the Convention" and that the Court […] is not assuming competence with regard to treaties for which it does not have this, and it is not according conventional rank to provisions contained in other national and international instruments related to the ESCER," in reality, what the Court is doing is to extrapolate the obligations contained in them to Article 26 of the Convention in order to provide it with a content that, explicitly, it does not have. In other words, starting with *Lagos del Campo v. Peru*, the Court has sought to use Article 26 to give it *carte blanche* to transfer to the Convention obligations established in other treaties for which the Court expressly lacks competence.

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[10] Charter of the Organization of American States. Signed at the Ninth International Conference of American States of 30 April 1948, and amended, *inter* alia, by the Protocol of Amendment of the Charter of the Organization of American States (Protocol of Managua) adopted on June 10, 1993, at the Nineteenth Special Session of the General Assembly. Article 34(i).

[11] Ibid. Article 34(l).

7. Similarly, the Court has recourse to the evolutive interpretation, according to which treaties are "living instruments," to justify the creation *ex post* of these rights, when the spirit of Article 26 of the Convention is that "the available resources" of the States should always be directed at expanding the range of protection of the rights already recognized by the Convention, and they may not, except in extraordinary circumstances of social interest, reduce their guarantees after achieving a specific level of protection or completely curtail a particular right after having established it. Based on the Court's most recent precedents with regard to the ESCER, it is reasonable to question the scope of Article 26 of the Convention given that it lacks specific content and that the Court's tendency has been to expand the obligations that presumably are derived from it.

8. Furthermore, with specific reference to the right to health, the judgment reiterates that this "refers to the right of everyone to enjoy the highest attainable standard of physical, mental and social well-being," that "includes prompt and appropriate health care in keeping with the principles of availability, accessibility, acceptability and quality." The judgment also asserts that "the nature and scope of the obligations derived from the protection of the right to health include aspects that can be enforced immediately, and others that are of a progressive nature."

9. Regarding these obligations, the Court considered that Mr. Hernández suffered serious harm to his health as a result of the disease he contracted while he was detained; harm that continued after he had served his sentence. In particular, it indicated that: (i) on at least three occasions, on August 29, September 27 and October 24, 1990, Mr. Hernández could not be admitted to the corresponding hospital because no beds were available; (ii) for prolonged periods of time – considering the nature of his disease – he did not received medical care, and (iii) as a result of his disease he experienced suffering and problems with his health and with his physical and mental capacities.

10. The Court also concluded that the State was responsible for having violated the right to personal integrity recognized in Article 5 of the American Convention. In this regard, the Court indicated that: (i) the State had not complied promptly with the orders issued by the trial judge that Mr. Hernández should be provided with medical care following the complaints filed by his mother concerning his influenza-like condition, earache and headaches in 1989 and 1990, and (ii) he was detained in the Monte Grande Police State from February 7, 1989, to August 3, 1990, even though there was insufficient physical spaces to accommodate the number of detainees.

11. A reading of these extracts of the judgment reveals that, as in other cases,[12] the analysis of the violation of the right to health is closely linked to the violations of personal integrity. In reality, it is quite difficult to discern where the obligations relating to each right – non-compliance with which led to the declaration of the State's international responsibility – begin and end. Thus, it is possible to assert that the considerations contained in the judgment concerning the State's obligations with regard to health acquire a practical meaning when they are reflected in the analysis of Article 5 of the Convention.

[12] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 6, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 5.

12. As in the cases of *Poblete Vilches* and *Cuscul Pivaral*, it was unnecessary to analyze Article 26 autonomously. The futility of this analysis is revealed, for example, in the recent case of *Rodríguez Revolorio v. Guatemala,* in which the standards for the medical care of persons deprived of liberty was subsumed in the examination of Article 5 of the Convention and constituted one of the elements based on which the violation of personal integrity was declared,[13] as had traditionally be done in similar cases.[14] In point of fact, in the instant case, this analysis entails an unnecessary duplication as regards the declaration of the rights violated, which is revealed by the fact that the State's acts and omissions that constituted the violation of the right to health and the right to personal integrity are essentially the same. Indeed, if the considerations on the lack of adequate and timely medical care is eliminated from the analysis of Article 5, this is essentially stripped of the hard evidence that justifies the violation of personal integrity.

13. The foregoing reinforces the prudence of the thesis that maintains that, in its 'individual" aspect, the right to health should be analyzed in relation to the connected civil and political rights that may be affected – in this case, the right to personal integrity and, in its "progressive" aspect, in relation to the adequacy of the health services provided by the State. Approaching the analysis in this way would allow the Court to identify, on the one hand, when it is possible to relate the State's actions concerning the provision of health services to the violation of personal integrity in order to, thereby, declare the violation of that right in relation to Article 26 of the Convention, as it did, for example, in *Poblete Vilches*[15] and *Cuscul Pivaral.*[16]

14. From this perspective, I consider that the analysis of Article 26 is useful to the extent that it allows the scope of the rights expressly recognized in the Convention to be expanded and, in that sense, I find that the formula used in the operative paragraphs of those cases to declare the violation of personal integrity and life in connectivity with the obligation of progressivity is reasonable. Lastly, this approach would also allow the Court to evaluate directly when the State's public policies concerning the ESCER, *per se*, violate the obligations of progressivity established in Article 26 of the Convention.[17]

III. Reversal of the burden of proof in cases of a special relationship of subjection

15. The judgment asserts that, in this case "there is no dispute that there is a causal nexus between the harm that Mr. Hernández suffered to his health and the disease he contracted while he was in the State's custody, and it was for the State to provide evidence to prove that adequate and timely treatment had been provided while the presumed victim was deprived of his liberty, and this did not occur in the instant case."

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13 *Cf. Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 90.

14 *Cf. Case of Vera Vera et al. v. Ecuador*. *Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 26, para. 44, and *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, paras. 188 and 189.

15 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, third and fourth operative paragraphs.

16 *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, fifth and sixth operative paragraphs.

17 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 12, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 6.

I consider it important to emphasize that this reversal of the burden of proof in relation to the international responsibility of the State corresponds to a criteria that has been extensively developed by the Court,[18] and that is only justified given the special relationship of subjection of Mr. Hernández owing to his situation as a person deprived of liberty. This clarification is pertinent, especially because this consideration was, for the first time, used as grounds for the declaration of responsibility for violation of the right to health, and not of the right to personal integrity. This should not obscure the specific purposes of case law development, or have effects in subsequent cases in which the criteria supporting this relationship between the individual and the State are not met.

IV. Abrupt change in the way violations are declared in the operative paragraphs

16. The problems underlined in section II of this opinion – which I have stressed repeatedly in other opinions – have resulted in a multiplicity of ways of declaring the violations in the operative paragraphs that, owing to the absence of reasons justifying the changes in some cases, appear to owe more to the mood of the majority than to an exercise of reflection by the Court. As I indicated in my opinion in the case of *the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru,* on that occasion, all the declared violations were placed together in the same operative paragraph. However, in the Hernández case, the violation of personal integrity and the violation of health were placed in different operative paragraphs, but repeating the violation of the former in the declaration of the latter.

17. In view of the abrupt nature of these changes (it should be recalled that these two judgments were adopted on consecutive days), the question arises as to why, if they both addressed the autonomous violation of Article 26, in *Hernández* the Court declared the violation of the right to health together with the right to personal integrity, twice repeating the declaration of responsibility in relation to the latter. As it was worded, the third operative paragraph appears to suggest that the violation of the right to health cannot subsist alone, but only by connectivity with the violation of the right to personal integrity, which is exactly what was done (but without placing it in the operative paragraphs) in the cases of *Vera Vera et al. v. Ecuador* and *Chinchilla Sandoval v. Guatemala,* to mention just two examples. Once again, it is evident that it is futile to analyze Article 26 of the Convention in the way the Court has done starting with *Lagos del Campo.*

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

[18] *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 138, *and Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 173.

PARTIALLY DISSENTING OPINION OF
JUDGE PATRICIO PAZMIÑO FREIRE

TO THE JUDGMENT OF NOVEMBER 22, 2019
DE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF HERNÁNDEZ *V.* ARGENTINA

I. Introduction

1. In general, the judgment in the case of *Hernández v. Argentina* consolidates the thesis adopted by the Inter-American Court of Human Rights starting with *Lagos del Campo v. Peru*[1] concerning the direct justiciability of the economic, social, cultural and environmental rights, the "ESCER," through Article 26 of the American Convention on Human Rights. The judgment declared that Argentina was internationally responsible for the violation of Mr. Hernández's right to health as a result of the disease he contracted while deprived of liberty, the permanent consequences it caused and the absence of evidence from the State to show that, in its special capacity as guarantor, it had provided Mr. Hernández with timely and adequate medical care as a result of the numerous reports of the deterioration of his health, in keeping with the standards of availability, accessibility, acceptability and quality recognized in General Comment No. 14 of the Committee on Economic, Social and Cultural Rights.[2]

2. To reach this conclusion, the Court followed the reasoning contained in *Poblete Vilches v. Chile*[3] and in *Cuscul Pivaral v. Guatemala*[4] in order to develop the content of the right to health based on Articles 34(i) and 34(l) of the Charter of the Organization of American States, interpreted in light of other international instruments,[5] the domestic laws of the States of the region,[6] and the Argentine Constitution itself.[7] In this way, the judgment reiterates that health

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[1] *Cf. Case of Lagos del Campo v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340.

[2] *Cf.* UN. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: "The right to the highest attainable standard of health," E/C.12/2000/4, August 11, 2000, para. 12

[3] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349.

[4] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359.

[5] The judgment refers, *inter alia*, to Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); Article XI of the American Declaration on the Rights and Duties of Man; Article 25 of the Universal Declaration of Human Rights; Article 12 of the International Covenant on Economic, Social and Cultural Rights; Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 12(1) of the Convention on the Elimination of All Forms of Discrimination against Women; Article 24(1) of the Convention on the Rights of the Child; Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and Article 25 of the Convention on the Rights of Persons with Disabilities.

[6] The judgment mentions that among the Constitutions of the States Parties to the American Convention that establish the right to health, the following stand out: Barbados (art. 17.2.A); Bolivia (art. 35); Brazil (art. 196); Chile (art. 19) Colombia (art. 49); Costa Rica (art. 46); Dominican Republic (art. 61); Ecuador (art. 32); El Salvador (art. 65); Guatemala (arts. 93 and 94); Haiti (art. 19); Honduras (art. 145); Mexico (art. 4); Nicaragua (art. 59); Panama (art. 109); Paraguay (art. 68); Peru (art. 70); Suriname (art. 36); Uruguay (art. 44), and Venezuela (art. 83).

[7] The judgment refers to Articles 10 and 11 of the Constitution, which establish, respectively that: "[t]he State recognizes the universal and progressive right of everyone to social security to protect them from the

is a right protected by the American Convention based on a systematic, teleological and evolutive interpretation of its Article 26, from which immediate and progressive obligations are derived: the former signify effective access, without any discrimination, to health services and social security, while the latter refer to the State's duty to reveal progress towards the realization and full material realization of the said right unequivocally by its public policy decisions, and that it cannot undermine the guarantees already adopted, which constitutes non-retrogressivity.

3. This is the appropriate thesis for continuing to strengthen the protection of the ESCER under the inter-American system for the protection of human rights. And, in this sense, I am in fundamental agreement with the criteria adopted in the judgment to determine the State's responsibility for the violation of the right to health as an autonomous right, justiciable under Article 26 of the American Convention. I do not disagree with either the *ratio decidendi* or the *obiter dicta* of the judgment; rather, I issue this opinion to note an aspect of the operative paragraphs that I find inconvenient insofar as it could lead to unnecessary confusion regarding the scope of the direct justiciability of Article 26 and a possible relationship, through connectivity or intersection, with the violation of other rights recognized in the American Convention. In particular, my reservations are addressed at the way in which the second and third operative paragraphs of the judgment, which I voted against, were adopted. To explain the reasons for my concerns, it is necessary to make some remarks on the evolution of the Court's case law in relation to direct access and the justiciability of the ESCER.

II. Case law development concerning the ESCER

4. It is important to recall that, prior to 2017, the Court had not ruled directly on the violation of Article 26 of the Convention, but had merely stressed the interdependence of the ESCER and the civil and political rights, but always declaring the responsibility of the State for the violation of the latter. For example, in *Five Pensions v. Peru,*[8] a case that, like the *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru,*[9] related to the pension rights recognized by domestic judgments in favor of a group of pensioners of a State entity, the Court did not include any considerations on the right to social security, but merely underscored the individual and collective dimensions of the ESCER and indicated that their progressive development was measured "in function of the increasing coverage of the economic, social and cultural rights in general, and of the right of the whole population to social security and to a pension, in particular, bearing in mind the requirements of social equity."[10]

5. In the *Five Pensioners*, even though the judgments – non-compliance with which had resulted in all the alleged violations – had asserted the right to social security of the five pensioners, the Court did not choose to rule on the obligation of progressivity established in Article 26 of the American Convention and, instead, only declared the violation of Articles 21,

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contingencies established by law and to increase their quality of life," and that "[t]he State guarantees free access to health services and to pensions through public, private and mixed entities […]."

[8] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98.

[9] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394.

[10] *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 147.

25, 1(1) and 2 of this instrument.[11] In the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru,*[12] the Court indicated that Article 26 of the Convention gave rise to both an obligation of the States to act, which supposed "providing the means and elements necessary to respond to the requirements for the realization of the rights in question, based on the available economic and financial resources," and a duty of non-retrogressivity that "was justiciable in the case of economic, social and cultural rights."[13] Even so, the Court did not find reasons to retain the violation of that article and only declared that the right to judicial protection and property had been violated.[14]

6. In *Suarez Peralta v. Ecuador,*[15] a case that related above all to the right to health, although the Court reiterated "the interdependence and indivisibility of civil and political rights, and economic, social and cultural rights, because they must be understood integrally as human rights without any specific ranking between them, and as rights that can be required in all cases,"[16] it subsumed the content of that right to that of personal integrity and did not declare the violation of Article 26 of the Convention. And this occurred in other cases related to one or other of the ESCER,[17] until it heard the case of *Lagos del Campo v. Peru.*[18] In that judgment, the Court used Article 26 of the Convention to refer to the provisions of the OAS Charter and to analyze whether a specific mention of the elements that constituted the right to job security could be found in those provisions with a degree of specificity that allowed this right to be derived from Article 26 itself. The Court then sought the help of the relevant national and international *corpus iuris* to delimit the content of the right to job security and, based on the rules of interpretation of Article 29 of the Convention, decided that this right was included within the sphere of protection of Article 26 of the Convention.

7. The development of this criteria continued in subsequent decisions, such as in the cases of: *the Dismissed Employees of PetroPeru et al. v. Peru,*[19] *San Miguel Sosa et al. v.*

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[11] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C, No. 98, para. 148 and operative paragraphs 1, 2 and 3.

[12] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office) v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198.

[13] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office) v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, paras. 102 and 103.

[14] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office) v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, operative paragraphs 2 and 3.

[15] *Cf. Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261

[16] *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 131.

[17] *Cf. Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of June 24, 2015. Series C No. 296,* and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298.

[18] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340.

[19] *Cf. Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344.

Venezuela,[20] *Poblete Vilches et al. v. Chile,*[21] *Cuscul Pivaral et al. v. Guatemala,*[22] *Muelle Flores v. Peru,*[23] and the *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru.*[24] It should be emphasized that since *Poblete Vilches*, the Court has recognized the following:

> "Thus, it can clearly be interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER), by derivation from the norms recognized in the Charter of the Organization of American States (OAS), and also the rules of interpretation established in Article 29 of the Convention itself; particularly, insofar as they prevent excluding or limiting the enjoyment of the rights established in the American Declaration and even those recognized by domestic law. Furthermore, based on a systematic, teleological and evolutive interpretation, the Court has resorted to the national and international *corpus iuris* on the matter to give specific content to the scope of the rights protected by the Convention, in order to derive the scope of the specific obligations relating to each right."[25]

III. Inconvenient reiteration of violations in this specific case

8. One of the most notable consequences of this change in case law was that violations of the ESCER are now analyzed autonomously and, therefore, the international responsibility of the State is declared for violations of Article 26 of the Convention in relation to Article 1(1) of this instrument. This is what happened in all the above-mentioned cases. For example, in *Cuscul Pivaral* the Court decided that "[t]he State is responsible for the violation of the right to health, […] to the detriment of the 49 persons listed as victims […]," [26] and in *Muelle Flores* it decided that "[t]he State is responsible for the violation of the right to social security […] to the detriment of Oscar Muelle Flores."[27] Bearing in mind the change in case law introduced by *Lagos del Campo v. Peru*, it is noteworthy that, in the judgment in *Hernández v. Argentina* the Court has established the violation of Article 5(1) and 5(2) in the third operative paragraph of the judgment, after having already declared this in the second operative paragraph. In addition to being repetitive, it is inconvenient because the violation in the third operative paragraph is declared jointly with that of Article 26 of the Convention, and not independently, as had repeatedly and clearly been done in previous cases.

9. The Court's reiteration of the violation of the right to personal integrity together with the right to health appears to indicate that the latter cannot be asserted as an autonomous

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[20] *Cf. Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348.

[21] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349.

[22] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359

[23] *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375

[24] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394.

[25] *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 103.

[26] *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, operative paragraph 1.

[27] *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, operative paragraph 5

violation, but only by connectivity with the former. If the right to health is an autonomous right, justiciable by virtue of Article 26 of the Convention, why cannot its violation be declared in a separate operative paragraph, as in *Poblete Vilches* and *Cuscul Pivaral*? In other words, if case law has already advanced beyond the approach of connectivity and interdependence with the civil and political rights as the only way to examine violation of the ESCER under the Convention and, instead their protection has been incorporated into the list of rights protected by this instrument, the concern arises as to why the violation of the right to health is declared together with that of the right to personal integrity, especially if this aspect had already been decided in the preceding operative paragraph of the judgment.

10. From the way in which it appears in the judgment, the placing of both violations in the same operative paragraph may possibly suggest a return to the thesis of connectivity, as if the violation of the right to health could not be declared independently of the violation of the right to personal integrity. Clearly, this possible understanding would entail an evident reverse in the realization of the ESCER before the inter-American system, relegating their direct justiciability to a secondary status, always conditioned to the initial violation of a civil and political right, as in judgments prior to that of *Lagos del Campo v. Peru*. Additionally, and implicitly, this could also denote ranking the civil and political rights over the ESCER when, according to this Court, there should be no ranking of any kind between the obligations pertaining to the two categories because they are both equally binding for the State signatories of the American Convention. These are the reasons why I am obliged to issue my partially dissenting opinion.

IV. Conclusion

11. As a result of the foregoing reasoning, the Court is obliged to be congruent with its consistent precedents, with the rulings and case law that provide the maximum guarantee for the rights as regards direct access to and protection of the right to health as an autonomous right, endeavoring to progressively enhance its specific content, in order to avoid interpretations that introduce retrogressivity into its guarantee-based hermeneutics. Furthermore, in this specific case, it should have stressed the message that the mere gradual adoption of measures to improve the population's access is not sufficient; rather these are obligations that are directly and immediately enforceable via Article 26 of the Convention, underlining that non-compliance results in the international responsibility of the States, a reasoning that, starting with *Lagos del Campo,* has been adopted repeatedly and by the majority of the full Court.

Patricio Pazmiño Freire
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF
JUDGE RICARDO C. PÉREZ MANRIQUE

TO THE JUDGMENT OF NOVEMBER 22, 2019
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF HERNÁNDEZ *V.* ARGENTINA

I. Introduction

1. In my concurring opinion in the Case of *the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* (hereinafter "the ANCEJUB-SUNAT case"), I expressed an initial reflection on the way in which I considered that the Inter-American Court of Human Rights (hereinafter "the Court" or "the IACtHR") should address cases involving violations of the economic, social, cultural and environmental rights (hereinafter "the ESCER or "the social rights"). The ideas presented were the result of the thoughts that I have had on this matter as a judge of the Court, a situation that has allowed me to examine in depth the discussions that have taken place on the different ways in which the Court can address the issue of the violations of the ESCER. The point of view described in that opinion was an evolving idea that sought to contribute a better understanding of the matter and to reinforce future analyses involving the social rights. This opinion seeks the same objective and, therefore, I reproduce the considerations I have referred to in my opinion in the *ANCEJUB-SUNAT case.*

II. The discussion within the IACtHR

2. In my opinion, within the Court there has been a debate concerning what we could call two points of view: the first, that the analysis of individual violations of these rights should be made exclusively as they relate to the rights expressly recognized by Articles 3 to 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), or on the basis of what is expressly permitted by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (hereinafter "Protocol of San Salvador"). In my understanding, this view has been reflected in cases such as the *"Juvenile Re-education Institute" v. Paraguay* (2004) or the *Yakye Axa Indigenous Community v. Paraguay* (2005), to mention just two examples, as well as in the *Case of González Lluy v. Ecuador* (2015).

3. The second point of view is that the Court has competence to examine autonomous violations of the ESCER based on Article 26 of the Convention. Those rights – that would be justiciable individually – are implicitly or explicitly derived from the Charter of the Organization of American States (hereinafter "the OAS Charter"), as well as from numerous national and international instruments that recognize rights, such as the American Declaration on the Rights and Duties of Man, the Protocol of San Salvador, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and even the Constitutions of the States Parties to the Convention. This is the thesis that has prevailed in most of the cases relating to the ESCER since *Lagos del Campo v. Peru*, which referred to job security, as well as in cases of the right to health and to social security. In those cases, the Court has determined the State's international responsibility for violations of the social rights based on Article 26 of the Convention. This change in case law occurred starting in 2017.

III. A third perspective: connectivity-simultaneity

4. Article 26 of the Convention is what could be called a framework article that makes a general allusion to the ESCER without specifying what they are or what they consist of. The article makes a referral to the OAS Charter for their meaning and scope. Meanwhile, the Protocol of San Salvador, an instrument adopted after the American Convention, individualizes and gives content to the ESCER. The Protocol is explicit in indicating that individual cases concerning the ESCER can be submitted to the consideration of the Court only as regards trade union rights and education. There are also other instruments of the inter-American *corpus juris* that mention the ESCER.

5. At the start of this opinion, I indicated my opinion on the indivisibility and interdependence of human rights; this leads me to state that I consider that the IACtHR does have competence to examine and rule on the ESCER. And this allows me to make a systematic analysis of the Convention, the Protocol of San Salvador, the OAS Charter and other instruments of the inter-American *corpus juris*. I will now try to explain my perspective of the grounds on which the IACtHR can examine and rule on the ESCER.

6. Part II of the American Convention, which refers to the means of protection indicates in its Article 44 that: "Any person or group of persons, […] may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." And, Article 48 indicates that: "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, …" (underlining added).

7. The said articles of the Convention are clear as to the fact that any of the rights indicated in the Convention (civil, political, economic, social, cultural and environmental) can be submitted to the consideration of both organs of protection and that they have competence to examine them. These articles make no distinction between civil, political, economic, social, cultural and environmental rights as regards their protection. Moreover, to claim that the inter-American organs of protection can only examine civil and political rights and not the ESCER would be contrary, on the one hand to the indivisibility and interdependence of the rights and, on the other hand, would lead to a fragmentation of the international protection of the individual and of his status as a subject of international law.

8. In this regard, it is interesting to emphasize the contents of Article 4 of the Protocol of San Salvador with regard to the inadmissibility of restrictions of the ESCER. On this point, the said article indicates that: "A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree" (underlining added). In my opinion, this article, read together with the American Convention, permits the conclusion that it is not acceptable to restrict access to inter-American justice in relation to alleged violations of the ESCER citing the American Convention; this would be contrary to the Protocol itself that does not allow restrictions and, as indicated previously, affect the individual as a subject of rights. It would violate the *pro persona* principle of human rights (Art. 29 of the American Convention).

9. Furthermore, we cannot ignore the fact that the adoption of the Protocol of San Salvador, while advancing in providing content to the rights, also expressly delimited the use of the system of individual petitions only to the right to work and to education. I consider that it is only with regard to these two rights (education and work) that the Court may consider an autonomous violation of the ESCER in light of the contents of Article 19(6) of the Protocol of San Salvador.

10. Nevertheless, in order to make a harmonious interpretation of the American instruments, nothing prevents the Court - by considering the interdependence and indivisibility of civil and political rights on the one hand and economic, social and cultural rights on the other – from ruling on the ESCER based on the connectivity and interrelationship between them. Because the same fact, by act or omission, may simultaneously signify both the violation of a civil and political rights and of an ESCER, which could be considered based on its transcendence; and this is what occurred in the instant case, as I will now explain.

IV. The Hernández case

11. In this case it is also possible to make an analysis such as the one I proposed for the *ANCEJUB-SUNAT case*. The judgment reveals that the reason for the violation of the rights to personal integrity and health were the prison conditions endured by José Luis Hernández while he was detained in a prison that did not have sufficient space to accommodate the number of inmates, and owing to the lack of adequate medical care for the disease he acquired and suffered while he was in prison. This situation caused him suffering and had serious consequences on his health and quality of life. In this way, the existence of a causal nexus is verified between the State's acts or omissions relating to the detention conditions and the lack of medical care for Mr. Hernández and the violation of his right to personal integrity and health. Consequently, the State's international responsibility was declared for the violation of Articles 5(1), 5(2) and 26 of the Convention.

12. In essence, I agree with the content of the analysis made in relation to the right to personal integrity and health and, for this reason, I voted in favor of the judgment. However, as in the *ANCEJUB-SUNAT* case, I consider that the most appropriate way of analyzing the case would have been by using the thesis of simultaneity. Thus, it was not necessary to declare a separate and autonomous violation of the right to health based on Article 26 of the Convention (as the judgment did in almost 14 pages, from paragraphs 54 to 96). Rather, it would have been more pertinent to examine Articles 5 and 26 of the Convention together, by making a delimited – and brief – analysis of the violation of the right to health owing to the lack of access to adequate medical treatment in circumstances of deprivation of liberty as it related to the violation of personal integrity. This type of analysis could also have avoided having to invoke the *iura novit curia* principle in the case (with the subsequent attrition this involves) and, instead, would underline the interdependence and indivisibility that exist between the right to personal integrity and the health of persons deprived of liberty.

13. The analysis of simultaneity in this case would have meant that the guiding principle would have been the right to personal integrity, specifically the arguments related to the fact that Mr. Hernández had been detained in overcrowded conditions, and to the consequences he suffered as a result of the disease he contracted while detained. It was in relation to this element of the analysis that the judgment could have addressed the reference to the lack of availability, accessibility, acceptability and quality of the health care. The State's obligations as guarantor of persons deprived of liberty would have an impact not only on aspects related to personal integrity, but also to the right to health. The simultaneous analysis of the rights to personal integrity and to health would have provided greater content and scope to the obligations in this case.

14. In addition, with regard to the method of analyzing cases that involve the ESCER, I consider it pertinent to mention the way in which the European Court of Human Rights has addressed the issue, which in some cases has used Articles 2 (right to life), 3 (prohibition of torture) and 14 (prohibition of discrimination) of the European Convention on Human Rights

as the key for accessing the analysis of violations of the right to health.[1] This occurred in the case on the admissibility of *Zdzislaw Nitecki v. Poland*, in which it examined whether the fact that Mr. Nitecki had to cover 30% of the cost of a medicine constituted a violation of the right to life, concluding that this cost did not violate the Convention, and therefore his petition was inadmissible.[2]

V. Conclusion

15. The Court should not lose sight of the fact that its primary function is to hear cases that require the interpretation and application of the provisions of the Convention when these are submitted to its consideration in order to decide whether there has been a violation of a protected right or freedom, and to order that the injured party be ensured the enjoyment of his violated right or freedom. Thus, the Court's vocation is to deliver justice in specific cases within the limits established by the law of treaties. However, it also has a function of contributing to realize the objectives of the Convention, and this signifies responding to the problems that afflict our societies. Here, it is worth stressing what the United Nations has established in the 2030 Agenda for the Sustainable Development in which the States agreed "to end poverty and hunger everywhere," "to combat inequalities within and among countries," "to build peaceful, just and inclusive societies," "to promote gender equality and the empowerment of women and girls" and "to promote the rule of law" and the need to ensure the broadest possible "access to justice for all." These goals should, doubtless, also inspire the actions of the Inter-American Court.

16. I hope to continue examining this matter in a future opinion.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Secretary

[1] *Cf.* ECHR, *Zdzislaw Nitecki v. Poland*, Judgment of 21 March 2002, Application No. 65653/01, and ECHR, *Case of Oyal v. Turkey*, Judgment of 23 March 2010, Application No. 4864/05

[2] *Cf.* ECHR, *Zdzislaw Nitecki v. Poland*, Judgment of 21 March 2002, Application No. 65653/01, para. 1.