INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF LÓPEZ ET AL. V. ARGENTINA

JUDGMENT OF NOVEMBER 25, 2019

(Preliminary Objections, Merits, Reparations and Costs)

In the *Case of López et al.*

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

Eduardo Vio Grossi, Acting 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"), delivers this judgment, which is structured as follows:

[*] Judge Eugenio Raúl Zaffaroni, an Argentine national, did not take part in the deliberation or signature of this judgment, in accordance with the provisions of Article 19(2) of the Statute and Article 19(1) of the Rules of Procedure of the Court. [*] Judge Eduardo Ferrer Mac-Gregor Poisot did not take part in the deliberation and signature of this judgment for reasons of force majeure that were accepted by the full Court.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* - On January 11, 2018, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court, pursuant to articles 51 and 61 of the American Convention, the *Case of López et al. v. Argentine Republic* (hereinafter "the State," "the Argentine State," or "Argentina"). The case examines the alleged international responsibility of the State for the transfers of Néstor Rolando López, Miguel Ángel González Mendoza, José Heriberto Muñoz Zabala, and Hugo Alberto Blanco to detention centers located between 800 and 2,000 km away from their families, the judicial authorities in charge of sentence execution, and their public defenders. The Commission found that the State violated the right to a sentence with the purpose of resocialization, as well as the right to protection of the family. It also concluded that the State violated the right to treatment with dignity and respect for the psychological and moral integrity of the alleged victims.

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

a) *Petition.*On April 8, 1998, the Inter-American Commission received a petition filed by 13 people against Argentina.[1] Subsequently, the communications of the petitioners were presented by Gustavo Vitale and Fernando Diez (hereinafter "the representatives").

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[1] At the start, the petitioners were Gerardo Nicolás García, Claudia Ramírez, Marcelo Montero, Flavia Piccinini, Maximiliano Sánchez, Milton Hernán Kees, Juan Manuel Kees, Laura Marcela Serrano, Alejandra Coria, Oscar Suárez, Alejandra Marina Luna, Carla Castiglioni, and Julio Helisondo Jara, who identified themselves as residents of the province of Neuquén.

b) *Admissibility Report.* On January 5, 2011, the Commission approved Admissibility Report 3/11[2] (hereinafter the "admissibility report").

c) *Merits Report.* On January 26, 2017, the Commission adopted Merits Report 1/17 (hereinafter "Report on the Merits"), in keeping with Article 50 of the American Convention, in which it reached a series of conclusions [3] and made several recommendations to the State.

d) *Notification to the State.* The Report on the Merits was notified to the State in a communication dated April 11, 2017, giving it two months to report on compliance with the recommendations. Argentina requested three deadline extensions, two of which were granted by the Commission. The State did not provide information indicating whether it had complied with the recommendations.

3. *Submission to the Court.* On January 11, 2018, the Commission submitted the case to the Court regarding the facts and human rights violations described in the Report on the Merits.

II
PROCEEDINGS BEFORE THE COURT

4. *Notification to the State and the representatives.* The case was notified to the Argentine State and to the representatives of the alleged victims on April 24, 2018.

5. *Brief with pleadings, motions and evidence.* On July 7, 2018, the representatives presented their brief with pleadings, motions, and evidence (hereinafter "pleadings and motions brief") pursuant to Articles 25 and 40 of the Court's Rules of Procedure.[4]

6. *Brief of preliminary objections and answer.* On September 28, 2018, the State submitted its brief of preliminary objections and answer to the submission of the case, as well as its observations on the brief with pleadings, motions, and evidence (hereinafter "answer" or "answering brief"), pursuant to the terms of Article 41 of the Rules of Procedure of the Court.[5] The State raised two preliminary objections.

7. *Observations on the preliminary objections.* In briefs received on November 15 and 23, 2018, the representatives and the Inter-American Commission presented, respectively, their observations on the preliminary objections.

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[2] The Commission found admissible only the petition regarding the four alleged victims, that is: Néstor Rolando López, Miguel Ángel González Mendoza, José Heriberto Muñoz Zabala, and Hugo Alberto Blanco. *Cf.* IACHR, Report 3/11, Petition 12.804, Admissibility, Néstor Rolando López *et al.*, Argentina, January 5, 2011.

[3] It concluded that Argentina was responsible for the violation of articles 5(1), 5(2), 5(6), 11(2), 17, and 25(1) of the American Convention, in connection with articles 1(1) and 2 of the Convention, to the detriment of Néstor Rolando López, Miguel Ángel Gonzalez Mendoza, Jose Heriberto Muñoz Zabala, and Hugo Alberto Blanco. The Commission also concluded that Argentina was responsible for the violation of articles 5(1), 5(3), 11(2), and 17(1) of the American Convention, in relation to articles 1(1) and 2 of the Convention, to the detriment of the nuclear families of the transferred prisoners.

[4] The representatives asked that the Court to find the State internationally responsible for the violation of the following: 1) the right to humane treatment (articles 5(1), 5(2), 5(3), and 5(6) of the American Convention); 2) the right to judicial guarantees (articles 8(2)(d) and 8(2)(e) of the American Convention); 3) the principle of legality and retroactivity (Article 9 of the Convention); 4) the right to protection of honor and dignity (Article 11(2) of the Convention); 5) the rights of the family (Article 17 of the Convention); 6) the rights of the child (Article 19 of the Convention); and 7) the right to judicial protection (Article 25 of the Convention), all in relation to articles 1(1) and 2 of the American Convention. The representatives also added a request for a finding of the violation of articles I, V, VI, VII, XVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man; and of articles 1, 3(1), 3(2), 12(1), 12(2), 16(1), and 16(2) of the Convention on the Rights of the Child.

[5] As its agent for this case, the State assigned Alberto Javier Salgado, and as its alternate agent, it assigned Ramiro Cristóbal Badía.

8. *Legal Assistance Fund.* In a letter to the Secretariat of the Inter-American Court of Human Rights of October 11, 2018, the alleged victims' request to access the Victims' Legal Assistance Fund of the Court was declared admissible.[6]

9. *Public hearing.* On February 14, 2019, the President of the Court issued an order[7] calling the parties and the Commission to a public hearing on preliminary objections and eventual merits, reparations, and costs, and to hear the oral pleadings and final observations of the parties and of the Commission, respectively. Also, during the hearing, it ordered the receipt of a statement from an alleged victim (via videoconference), a witness, and two expert witnesses proposed by the representatives and the Commission. The Court likewise ordered receipt of the testimony given before notary public (affidavit) of nine witnesses proposed by the representatives. The public hearing was held on March 12 and 13, 2019, during the 130th regular sessions of the Court, held in San José, Costa Rica.[8]

10. *Final written arguments and observations.* On April 15, 2019, the Commission, the representatives, and the State presented their observations and final written pleadings, respectively.

11. *Disbursements from the Assistance Fund.*On May 6, 2019, the Secretariat, following the instructions of the President of the Court, sent a report to the State on the disbursements made in application of the Victims' Legal Assistance Fund in this case and, as established in article 5 of the Court's Rules for the Operation of the said fund, Argentina was given a deadline for presenting any observations it deemed pertinent. The State said it had no observations.

12. *Deliberation of this case.* The Court began deliberating on this judgment on November 25, 2019.

III
JURISDICTION

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

IV
PRELIMINARY OBJECTIONS

14. In its answering brief, the State presented two preliminary objections arguing that the Court did not have jurisdiction because of a failure to exhaust domestic remedies and failure to comply with the requirements set forth in Article 48(1)(b) of the American Convention on

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[6] *Cf. Case of López Soto et al. v. Argentina, Victims' Legal Assistance Fund.* Order of the Acting President of the Inter-American Court of Human Rights, February 14, 2019, para. 15. Available at: http://www.corteidh.or.cr/docs/asuntos/lopez_y_otros_14_02_19.pdf.

[7] *Cf. Case of López Soto et al. v. Argentina, Victims' Legal Assistance Fund.* Order of the Acting President of the Inter-American Court of Human Rights, February 14, 2019. Available at: http://www.corteidh.or.cr/docs/asuntos/lopez_y_otros_14_02_19.pdf.

[8] This hearing was attended by: a) on behalf of the Inter-American Commission: Silvia Serrano Guzmán and Paulina Corominas Etchegaray, from the Office of the Executive Secretary of the Inter-American Commission; b) on behalf of the representatives of the alleged victim: Fernando Luis Diez, Gustavo Luis Vitale, and Ana Cecilia Carraro; c) on behalf of the State: Alberto Javier Salgado, director of international human rights law litigation of the Ministry of Foreign Affairs and Culture; Siro Luis de Martini, legal advisor of the Ministry of Justice and Human Rights; Martín Recondo, Minister of the Embassy of the Argentine Republic; and Diego Raúl Tames, Consul of the Embassy of the Argentine Republic.

Human Rights, pursuant to the provisions of Article 42 of the Rules of Procedure of the Court and Article 51(1) of the American Convention.

A. Lack of jurisdiction of the Court due to failure to exhaust domestic remedies

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

15. The ***State*** argued that the petitioners did not exhaust all proceedings and did not file the specific proper remedy available to them domestically to resolve the situation alleged: a request to the penitentiary administrative authority requesting exercise of the inmate's right to be transferred to the penitentiary facility closest to the real domicile of his relatives, as set forth in article 44 of Decree 1136/97, establishing the regulations for Law 24,660 on Sentence Execution.[9] It added that should this remedy have been submitted to the administrative authority and denied, the petitioners could have sought judicial review of the administrative act. It also argued that the petitioners did not in any way point out the existence of this invokable right directly to the administrative penitentiary authority.

16. The State also indicated that the special federal remedy had not been exhausted in the cases of Mr. Gómez, Mr. Crespo, and Mr. Blanco. In the cases of Mr. López, González, and Muñoz, the State added that the remedy had been rejected because by focusing the pleadings filed on provincial-level regulations, the argument for the existence of a federal-level matter was not made.

17. The ***Commission*** indicated that, based on the principle of equality of arms, the arguments presented before the Court to support the preliminary objection raised must correspond to the arguments presented before the Commission during the admissibility stage. In this regard, the Commission held that during the processing of admissibility, the State made a generic pleading that did not allow for determining which remedy the alleged victims did not seek. It therefore argued that the State, in its answering brief before the Court, identified an administrative remedy that had supposedly not been exhausted and that would have been able to remedy the impact on human rights in this case. It thus indicated that the terms of the preliminary objection brought before the Court did not match those under which the preliminary objection was raised before the Commission, and therefore, the objection should be rejected on the grounds that it was presented out of time.

18. It also added that the cases of Mr. Gómez and Mr. Crespo were declared inadmissible in the admissibility report; that in the case of Mr. Blanco, the *habeas corpus* remedy had been exhausted and the reason for which his transfer was denied was not the erroneous filing of a remedy but the lack of penitentiary facilities with adequate conditions. It also indicated that in the case of Mr. González, Mr. López, and Mr. Muñoz, the remedy indicated by the State as adequate had been exhausted.

19. The ***representatives*** indicated that the State had recognized that alleged victims López, González, and Muñoz had filed for the remedies provided for under domestic law, and therefore, the Commission's formal declaration of admissibility was correct. They added that

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[9] Decree No. 1136/97 (Regulations of Criminal Execution Act 24,660), Article 44: Inmates shall be transferred to the establishment closest to the real domicile of the aforementioned relatives by request of the inmate or with the inmate's explicit agreement when the request is submitted by a visitor and as long as the inmate meets the following requirements: a) housed in an establishment located more than THREE HUNDRED (300) kilometers from the residence of their relatives; b) has remained at the detention center on a continual basis for no less than SIX (6) months; c) behavior and rating of Good—five (5)—at a minimum over the last quarter; d) has the approval of the Institute of Classification.

Mr. Blanco had exhausted the special federal remedy, which was rejected. They also indicated that the federal remedy was not suitable as regulated and pursuant to what the Court had found in other cases They also noted that Argentina must prove the lack of exhaustion of domestic remedies, indicating the remedies not used and their efficiency and suitability in each case, but that the State only made generic reference to the supposed suitability of the domestic remedies without proving or explaining the reasons for this effectiveness. They added that it is not correct to require the alleged victims to exhaust a prior administrative remedy, as the penitentiary authority, far from being an impartial body, is the same one that ordered the transfers.

A.2 Considerations of the Court

20. The Court has found that Article 46(1)(a) of the Convention stipulates that admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the requirement that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.[10]

21. In this sense, the Court has developed clear guidelines for analyzing a preliminary objection based on an alleged failure to comply with the requirement to exhaust domestic remedies. First, it has interpreted the objection as a defense available to the State, and one that it can decline, either explicitly or tacitly. Second, it has established that in order to be timely and for the State to be able to exercise its right to defense, objections must be raised in the early stages of the proceeding. Third, the Court has found that States that raise this objection must indicate the domestic remedies that are effective and that have not yet been exhausted.[11]

22. Therefore, during this case's admissibility stage before the Commission, the State must clearly describe the remedies that, in its view, have not yet been exhausted in view of the need to protect the principle of procedural equality.[12] As the Court has repeatedly established, it is not the task of either the Court or the Commission to identify *ex officio* the domestic remedies that remain to be exhausted, as international bodies are not responsible for correcting failures of precision in the State's pleadings.[13] Likewise, the arguments that give content to the preliminary objection raised by the State before the Court must correspond to the ones made before the Commission during the admissibility stage.[14]

23. Regarding this matter, it is noted that the State's argument before the Commission focuses on a failure to exhaust the judicial remedies available to challenge administrative decisions. This argument was effectively reviewed by the Commission, leading to the

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[10] *Cf. Case of Velásquez Rodríguez v. Honduras.* Preliminary Objections. Judgment June 26, 1987. Series C No. 1, para. 85, and *Case of Perrone and Preckel v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 8, 2019. Series C No. 385, para. 33.

[11] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*, para. 88, and *Case of Perrone and Preckel v. Argentina*, para. 33.

[12] *Cf.* Case of Gonzales Lluy *et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2015. Series C No. 298, para. 28 and *Case of Herzog et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of March 15, 2018. Series C No. 353, para. 51.

[13] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 23 and *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of March 6, 2019. Series C No. 375, para. 26.

[14] *Cf. Case of Furlan and relatives v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2012. Series C No. 246, para. 29 and *Case of the Nova Brasilia Favela v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 16, 2017. Series C No. 333, para. 78.

inadmissibility of the case with regard to 10 petitioners[15] and the granting of admissibility with regard to the four alleged victims in this case. Additionally, the argument was not substantially developed by the State. For its part, before the Court, the State pointed to new aspects and remedies distinct from the ones it raised before the Commission, such as the Special Federal Remedy.

24. The Court also notes that the State expressed that the victims had not exhausted the administrative action provided for under Argentine law regarding transfer closer to family and special visits (*supra* para. 15). Regarding this, the annexes on the process conducted before the Commission verify that, effectively, the State did not mention during that process the specific remedy provided for under article 44 of Decree 1136/97, regulations of Law 24,660 on Sentence Execution. Therefore, the State's argumentation presented before the Commission is different from what it presented before the Court, and the preliminary objection presented by the State is thus dismissed on being submitted out of time.

B. Failure to comply with the mandate established in Article 48(1)(b) of the American Convention.

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

25. The ***State*** indicated that the situation of the alleged victims had already been resolved as of the moment the Commission declared the petition admissible. It also said that although the Commission included this argument in its admissibility report, it did not formulate any considerations regarding it, simply declaring the petition admissible when, on the contrary, it should have been archived, with the international process in no way moving forward. The State also argued that should it be concluded that the facts alleged could constitute a violation of international law, any reparation for such potential violations should have been pursued domestically, not before the Inter-American system. The State indicated that the Commission ignored a mandate of the Convention requiring it to archive actions when the facts on which the petition is based are no longer current.

26. The ***Commission*** indicated that what is set forth in the Convention and the Rules of Procedure as grounds for archiving a petition is if its subject ceases to exist. The subject matter of the individual petitions and cases system is the determination of whether States are internationally responsible for possible violations of the Convention or other applicable inter-American instruments. In this regard, it argued that in order for a petition to be archived because the grounds no longer exist, not only must the violation cease but the State must recognize it and provide reparations for it. Thus, when violations have taken place in a clear timeframe in which the State was internationally responsible, and they have not been recognized and comprehensive reparations have not been provided, an international process may take place, and therefore, the objection should be declared inadmissible.

27. The ***representatives*** indicated that the State only mentioned the cessation of the alleged victim's situation upon declaration of admissibility. However, it did not explain the reasoning for why such a situation would disqualify the process before the Inter-American system from proceeding, nor did it explain why it would make the human rights violations committed disappear along with the State's obligation to respond to them. They also indicated that as of the moment the Commission received the petition for this case—in 1998—the alleged victims' situation was active, and remained so when the Commission formally declared

[15] The Commission declared two petitions inadmissible for violating the 6-month deadline for presenting the petition; and the other petitions were declared inadmissible based on a lack of information on the exhaustion of domestic remedies.

the petition admissible in 2011. Lastly, they indicated that the State cannot invoke against the alleged victims the time during which it remained passive and not providing a solution to the facts alleged. The State is responsible for providing reparations and preventing the continuation and repetition of acts like the ones alleged.

B.2) Considerations of the Court

28. The Court has found that two obligations emerge with the possible existence of a violation of international law. First, there is an obligation to halt the actions or omissions causing the violation; and second, there is an obligation to provide reparations for the violation. In this regard, the mere fact that the situation has ceased (in this case, that the alleged victims have served their sentences and recovered their freedom) does not prevent determination of any legal consequences that may arise from an act that violated the Convention.[16] Effectively, in such cases, the Court maintains jurisdiction to address the juridical effects of actions that have allegedly ceased and the eventual reparations provided by the State, which may lead it to not issue rulings on certain facts or their consequences.[17] Along these lines, and pursuant to general norms on international State responsibility for violations of international law,[18] the Court must study whether the facts established in this case constituted violations of the American Convention on Human Rights, and if so, determine appropriate measures of reparation. In this case, it is important to note that the alleged victims accuse the State of violating several rights by transferring them to detention centers located far from their families, lawyers, and sentence execution judges. The subject of the case is not the deprivation of liberty in and of itself, and it is clear that the conclusion of the criminal sentences being served by the alleged victims does not mean that the violations alleged disappeared or were redressed.

29. The Court observes that the State has not provided reparations for the human rights violations alleged in this case, and therefore, concluding that the mere passage of time would have the effect of depriving the Court of its jurisdiction to evaluate a States responsibility before the Inter-American system would be contrary to the Convention. This Court finds that admitting the objection would mean denying the alleged victims their access to justice. Therefore, the Court declares the preliminary objection presented by the State inadmissible.

V
PRELIMINARY CONSIDERATIONS

30. The ***representatives*** included two alleged victims additional to the ones identified by the Commission in its Report on the Merits: María Rosa Mendoza, the mother of Miguel Ángel González, and Carina Maturana, ex-wife of Hugo Alberto Blanco. They stated during the hearing that their out-of-time inclusion could not be an impediment to their recognition as victims in this case because, regardless of whether or not they were identified by the

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[16] *Cf. Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations, and Costs.* Judgment of July 8, 2004. Series C No. 110, para. 75, *Case of García Ibarra et al. v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 17, 2015. Series C No. 306, para. 102 and *Case of Andrade Salmon v. Bolivia. Merits, Reparations and Costs.* Judgment of December 1, 2016. Series C No. 330, para. 95.

[17] *Cf. Case of Tarazona Arrieta et al. v. Peru*, paras. 140, 141, 193, 194 and 334 to 336. Along these lines, the Court considers it unnecessary to examine the merits of the specific violations alleged in a specific case when it finds that adequate reparations have been provided domestically, or in view of the actions taken by domestic bodies, forums, or courts when they have ordered or made available reasonable reparations. *Cf. Case of the Santo Domingo Massacre v. Colombia*, para. 171, and *Case of Andrade Salmón v. Bolivia*, para. 95.

[18] *Cf.* UN General Assembly, *Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly*, 8 January 2008, A/RES/62/61. Article. 30; and International Law Commission *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*. Report of the International Law Commission on the work of its fifty-third session. 2001 A/56/10. Commentary on article 30. Pg. 88 to 91.

Commission as victims in its Report on the Merits, in point of fact, the harmful effects that the transfers of Mr. González and Mr. Blanco had on their lives are undeniable.

31. The State objected to the inclusion of certain relatives as alleged victims in the case. Specifically, it said that, as established in the procedural norms and case law of the Court, the victims are the ones recognized in the Report on the Merits issued by the Commission. That said, it specifically addressed Ms. Mendoza and Ms. Maturana, indicating that, because they were not included as victims during the proceeding before the Commission nor in the Report on the Merits it issued, including them at this point in the procedure would change the procedural objective of the case, putting in jeopardy the State's right to defend itself adequately. The possibility the Commission could rule in this regard was therefore eliminated.

32. Regarding the identification of the alleged victims, the ***Court*** recalls that Article 35(1) of the Rules of Procedure of the Court establishes that cases shall be submitted through the presentation of a Report on the Merits, which must identify the alleged victims. It therefore falls to the Commission to identify, precisely and at the proper procedural moment, the alleged victims in a case before the Court,[19] except for in the exceptional circumstances provided for under Article 35(2) of the Rules of Procedure of the Court, according to which, when the justification is that it was not possible to identify them because the cases concern massive or collective violations, the Court shall decide whether to consider individuals as victims in accordance with the nature of the violation.[20]

33. This Court finds that in this case, application of the exception provided for under Article 35(2) of the Rules of Procedure does not apply.

34. Thus, the alleged victims will be Mr. López, Mr. Muñoz, Mr. González, and Mr. Blanco, as well as the relatives recognized in the Report on the Merits: Lidia Mabel Tarifeño (first wife), Silvia Verónica Tejo de López (second wife), Sandra Elizabeth López (sister), Nicolás Gonzalo Tejo López (son), Nicolás López (father) and Josefina Huichacura (mother) (relatives of Néstor Rolando López); and Carina Fernández (sister),[21] Mirta del Carmen Fernández (mother) and Enzo Ricardo Blanco and Camila Andrea Blanco (children) (relatives of Hugo Blanco).

VI
EVIDENCE

35. The Court admits the documents presented at the proper procedural moment by the parties and the Commission (Article 57 of the Rules of Procedure), whose admissibility was neither contested nor opposed, and whose authenticity was not questioned.[22] The Court also finds it pertinent to admit the statements provided during the public hearing and by affidavit, insofar as these are in keeping with the purpose defined by the order that required them and the subject of this case.[23]

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[19] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 1, 2006, Series C No. 148, para. 98, and *Case of Girón et al v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 15, 2019, Series C No. 390, para. 23.

[20] *Cf. Case of the Río Negro Massacres v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 4, 2012, Series C No. 250, para. 48, and *Case of Girón et al. v. Guatemala*, para. 23**.**

[21] Ms. Carina Fernández has passed away. The representatives established that Lucas Antonio Caporaso, Franco Alejandro Caporaso, and Lautaro Damián Sepúlveda are the heirs/representatives of Carina Fernández.

[22] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140 and *Case of Rico v. Argentina. Preliminary Objection and Merits.* Judgment of September 2, 2019. Series C No. 383, para. 21.

[23] They were submitted by: Rolando Néstor Horacio López, Federico Mariano Egea, Marta Monclús Masó, Sandra López, Miguel Ángel González Mendoza, María Rosa Mendoza, Mirta del Carmen Fernández, Enzo Ricardo Blanco, Camila Andrea Blanco, Carina Andrea Maturana, and Magdalena del Carmen Muñoz, proposed by the representatives; and Miguel Sarre, proposed by the Comisión. The subjects of these statements are set forth in the Order of the President of the Court of February 14, 2019.

36. With regard to the procedural moment at which documentary evidence should be submitted, according to Article 57(2) of the Rules of Procedure, it should be presented, in general, with the briefs submitting the case, with pleadings and motions, or answering the submission of the case, as applicable. The Court recalls that any evidence submitted outside the proper procedural opportunities is not admissible, except in the circumstances established in Article 57(2) of the Rules of Procedure, namely, force majeure or serious impediment, or if the evidence concerns an event that occurred after those procedural moments.[24]

37. In its final arguments, the State presented the documents[25] requested by the Court during the public hearing on, among other things, the regimen established by article 280 of the Argentine Procedural Code. Consequently, these documents are admitted.

VII
FACTS

A. Relevant legal framework

38. The Court notes that for the purposes of its analysis of this case, domestic law is a fact that should be analyzed together with the other elements that form part of the factual framework. Following is an overview of the law regulating the transfers of persons deprived of liberty in the Province of Neuquén and the Republic of Argentina.

39. Provincial Constitution of Neuquén:

> Article 41 – In penal facilities, individuals cannot be deprived of their natural and cultural needs, in accordance with the law and the regulations established. In no case shall inmates be sent to prison facilities located outside the territory of the Province.

40. Argentine Penal Code:

> Article 18 – Those convicted by provincial courts and sentenced to detention or prison for more than five years shall be admitted to the respective national facilities. The provinces may send them as long as they do not have adequate facilities.

41. Law 23,098 of Argentina:

> Article 3 – Admissibility. The writ of *habeas corpus* will be admissible when an act or omission by a public authority is alleged that involves:
>
> 1. Limiting or threatening freedom without a written order from a competent authority.

[24] *Cf. Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 22, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 14, 2019. Series C No.387, para. 26.

[25] These documents consist of: i) Agreement between the Federal penitentiary service and the Province of Neuquén; ii) Agreement II between the Federal Penitentiary Service and the Province of Neuquén; iii) information on the prison population of women and children deprived of liberty; iv) information on criteria for transferring the prison population of women and children deprived of liberty; v) graphic on women deprived of liberty who are pregnant or have young children; vi) map of units housing women deprived of liberty who are pregnant or have young children; vii) graph showing the 2018-2019 trend in the number of women deprived of liberty who were pregnant or had young children; viii) Public Regulatory Bulletin 65, "Regulations on housing minor children with their mothers detained in facilities that are part of the Federal penitentiary service"; ix) Public Regulatory Bulletin 315, whereby the Nuestra Señora del Rosario de San Nicolás Federal Women's Detention Center (U.31) was ordered to use a vehicle in its fleet that was duly equipped and appropriate to transport pregnant women and women with their children to the respective courthouse; and x) Public Regulatory Protocol 649, "Protocol on providing care to pregnant inmates housed with their children in the event of emergency."

2. Illegitimate worsening of the form and conditions under which the prison sentence is served without approval from the judge handling the process, should there be one.

42. Law 24,660 of Argentina:

Article 72 – The transfer of the inmate from one facility to another, along with the grounds for doing so, shall be communicated immediately to the sentence execution judge or competent judge.

Article 73 – The transfer of the inmate from one facility to another shall be reported immediately to the persons or institutions with which the inmate visits or corresponds or those designated by the inmate.

Article 168 – Relationships between inmates and their families, where convenient for both and compatible with treatment, shall be facilitated and encouraged. Useful connections to official or private individuals or organizations with juridical personality that may improve opportunities for social reintegration shall also be encouraged.

B. Case of Néstor Rolando López

43. Néstor Rolando López was initially convicted and sentenced to four years in prison. He entered the Federal Penitentiary Service on April 25, 1991, and was placed on conditional release on February 17, 1992, He returned again on December 7, 1995, after being convicted and sentenced to 18 years in prison. On December 29, 2007, he left the Penitentiary Service, and there is no record of him reentering subsequent to that date.[26]

44. Although the relatives of Néstor Rolando López live in the city of Neuquén, on January 11, 1997, he was transferred from Unit 9, located in that city, to Unit 6, in Rawson (Province of Chubut), located approximately 800 km from Neuquén. In 2000, he was transferred temporarily for several weeks to the Neuquén Unit for family bonding. In 2002, he was placed in the Federal Unit of Resistencia (province of Chaco), located approximately 2000 km from Neuquén. On September 24, 2003, he was again transferred to Unit 6.[27]

45. On January 16, 1997, Mr. López appeared at a hearing before the Federal Court of Rawson, Chubut, and asked to be transferred to Unit 9. He also asked that a copy of the hearing minutes be sent to his sentence execution judge at Criminal Chamber 2 of Neuquén. The hearing minutes indicated that the hearing was held to correct formal errors found in the writ of *habeas corpus*, that Mr. López dropped the writ, and that he asked that what he requested be processed.[28]

46. On February 10, 1997, Mr. López appeared for a second time before the Federal Court of Rawson. It was noted for the record that he explicitly wished to drop the writ of *habeas corpus* he had filed and was requesting transfer to Unit 9 of the city of Neuquén, as his entire family was located there.[29]

47. On February 11, 1997, Criminal Chamber 2 dismissed Mr. López's request, finding that "for convicts subjected to the Federal Penitentiary Service regimen, it is this service that

[26] Report produced by the General Inmate Records Division (evidence file, folio 1237); Report on Inmate's Legal Status (evidence file, folios 1239-1240).
[27] Report produced by the General Inmate Records Division (evidence file, folio 1237); Report on Inmate's Legal Status (evidence file, folios 1239-1240); Writ of *habeas corpus* filed November 3, 2000 (evidence file, folio 167).
[28] Preliminary hearing of January 16, 1997, before the Rawson Federal Court (evidence file, folio 356).
[29] Preliminary hearing of February 10, 1997, before the Rawson Federal Court (evidence file, folios 155 and 156).

determines where they are to be held based on availability and treatment need, and article 41 of the Provincial Constitution is therefore not applicable to these cases."[30]

48. On March 3, 1997, Mr. López appeared for third time before the Federal Court of Rawson to request, among other things, transfer to be closer to his family and judicial protection (*amparo*).[31] Mr. López's defense later filed a writ of habeas corpus, which was handled by Criminal Chamber 2. That chamber denied the request to be returned to Neuquén, repeating the reasoning used by the court in the February 11, 1997, ruling.[32]

49. Mr. López's defense attorney filed a cassation appeal against this decision. On November 27, 1997, the High Court of Justice of Neuquén rejected the cassation appeal. In its decision, the court noted that, according to article 18 of the Penal Code, persons convicted and sentenced to more than five years in prison by provincial courts could be admitted to national facilities as long as the provinces did not have adequate facilities. Additionally, the court concluded that applying article 41 of the Provincial Constitution "without concessions of any kind" ignored the inmate's right to proper treatment in the penitentiary with an aim to fostering his reintegration into society. To reduce the potential harmful effects that being held outside the provincial jurisdiction could have, the court ordered Criminal Chamber 2 of Neuquén to arrange to receive regular reports from Federal Unit 6 of the city of Rawson on the course of the treatment Mr. López was receiving in the penitentiary.[33]

50. Mr. López's defense attorney filed a special federal appeal against this decision, arguing that the High Court of Justice of Neuquén had acted in a manner that was arbitrary. On April 21, 1998, the High Court of Justice of Neuquén declared the special appeal inadmissible.[34]

51. Mr. López's defense attorney filed a motion for reconsideration of dismissal of appeal against this decision before the Supreme Court of Justice of the Nation. On August 6, 1998, the Supreme Court of Justice of the Nation dismissed the motion for reconsideration of dismissal of appeal, finding that the special appeal that was rejected, leading to the motion, was inadmissible.[35]

52. On March 22, 2000, Mr. López appeared again before the Federal Court of Rawson and requested that Criminal Chamber 2 of Neuquén be asked to transfer him permanently to Unit 9 or to Unit 5 of General Roca, or, should that not be possible, for a special visit. The hearing minutes indicate that the petition was made because Mr. López had filed a writ of habeas corpus, which he had dropped and requested it be processed by request. At that time, Mr. López said he had been at Unit 6 for more than three years without the benefit of a transfer, despite his exemplary behavior. He also described the effects that his transfer had had on his family relationships and said he needed to contact his lawyer who lived in the city of Neuquén.[36]

53. The representatives allege that in 2000, Mr. López was transferred temporarily to Unit 9 as a special visit for family bonding. During that time, on October 11, 2000, he married Ms.

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[30] Order of February 11, 1997, of the Criminal Appeals Chamber (evidence file, folio 1263).
[31] Hearing of March 3, 1997, before the Rawson Federal Court (evidence file, folio 165).
[32] Although the Court does not have the ruling rejecting the writ of habeas corpus, Ruling 67/1997 of November 27, 1997, issued by the High Court of Justice, indicates that it was denied (evidence file, folios 360-361).
[33] Ruling of number 27, 1997, of the High Court of Justice (evidence file, folios 360-371).
[34] Special Federal Appeal of Ruling 67 of December 3, 1997 (evidence file, folios 1291-1299); Interlocutory Order 74 of April 21, 1998 (evidence file, folios 1304-1313).
[35] Order of August 6, 1998 (evidence file, folio 470).
[36] Hearing of March 22, 2000 (evidence file, folios 158 and 159).

Silvia Verónica Tejo. Twenty days later, he was transferred back to the city of Rawson and could not remain in contact with her.[37]

54. On November 3, 2000, Ms. Silvia Verónica Tejo de López and Ms. Sandra Elizabeth López, identified as the wife and sister of Mr. López, respectively, filed a writ of *habeas corpus* on his behalf, asking that he be urgently transferred to Neuquén or General Roca. The writ indicated that Mr. López had been transferred for several months to Unit 9 and was later transferred back to Rawson. It also indicated that Mr. López had begun a hunger strike since he arrived back at the Unit 6 and had been physically and psychologically abused by the penitentiary personnel.[38]

55. On November 3, 2000, the writ was rejected. The decision indicated that "the inmate's claim does not demonstrate the existence of an act or omission of a national public authority that […] amounts to an illegitimate aggravation of the form and conditions in which he is serving the prison term. This is in view of the fact that, according to the writ, his claim is limited to the transfer between penitentiary units." The court also found that "concerning the change in penitentiary units, this is exclusively the prerogative of the Federal Penitentiary Service leadership or, eventually, the corresponding sentence execution courts." Lastly, the court ordered adjudication of "the routine measures in response to the declaration of a hunger strike by the inmate."[39]

56. On January 4, 2001, Néstor López appeared again before the Federal Court of Rawson. The hearing minutes indicate that Mr. López had been called to appear after having withdrawn a writ of *habeas corpus* brought the day before. During the hearing, Néstor López asked that his permanent transfer to Unit 9 be processed for the purposes of family bonding, indicating that it was impossible for his family to visit him because of lack of financial resources. He also requested the opportunity to contact his public defender.[40]

57. On February 8, 2002, Mr. López's public defender filed a writ of *habeas corpus* and writ of *amparo* before Criminal Chamber 2 of Neuquén.[41] That same day, the writ of *habeas corpus* was rejected "*in limine*" and the writ of *amparo* was declared inadmissible.[42]

58. On February 18, 2002, the defense attorney filed a cassation appeal against the resolution.[43] On April 24, 2002, the High Court of Justice of Neuquén declared the cassation appeal admissible.[44] On September 13, 2002, the High Court of Justice issued a judgment rejecting the cassation appeal. In its judgment, it returned to the arguments set forth previously in the ruling of November 27, 1997. The court added that determining that the decision under review was lawful did not mean rejecting that the inmate could enjoy the right to "special visits."[45]

59. Mr. López's defense attorney asked that he be granted regular outings, in view of his score, his conduct, and his current treatment period. On May 16, 2003, Criminal Chamber 2

[37] Brief of pleadings, motions, and evidence (evidence file, folio 106).
[38] Writ of *habeas corpus* of November 3, 2000 (evidence file, folios 167 and 168); note of June 10, 2003 (evidence file, folio 393).
[39] Brief of pleadings, motions, and evidence (evidence file, folio 110); Order of November 3, 2000 (evidence file, folios 384 and 385).
[40] Hearing of January 4, 2001 (evidence file, folios 161 and 162).
[41] Writ of *habeas corpus* and *amparo* of February 8, 2002 (evidence file, folios 1314 and 1315).
[42] Resolution No. 32 of February 8, 2002 (evidence file, folios 1316 and 1318).
[43] Cassation appeal of February 18, 2002 (evidence file, folios 1320 and 1330).
[44] Interlocutory Resolution 36 of April 24, 2002 (evidence file, folios 1334 to 1337).
[45] Ruling No. 23/2002 of September 13, 2002 (evidence file, folios 1338 to 1354).

dismissed this request.[46] On May 19, 2003, Verónica Tejo de López sent a communication to the judge of Chamber 2 of Neuquén describing her husband's situation and constant transfers.[47] On May 27, 2003, Mr. López sent a communication to the same Chamber Judge to request transfer to a provincial unit in Neuquén in order to be near his family. He also stated that he was beginning a peaceful hunger strike for his request to be granted.[48] In decisions issued June 3 and 10, 2003, Chamber 2 of Neuquén ruled in line with the findings in previous decisions on the same case against Néstor Rolando López and ordered the penitentiary unit's leadership and medical services to report regularly on his status as he refused food.[49]

C. Case of Miguel Ángel González Mendoza

60. Miguel Ángel González Mendoza was sentenced to 12 years in prison. Records indicate he first entered the Federal Penitentiary Service on March 12, 1993. On August 26, 1999, he was granted conditional release. Records indicate he entered again on December 15, 2001, with a prison sentence of four years and six months. Finally, he returned to the penitentiary system on May 30, 2004, and was granted parole on November 30, 2006.[50]

61. Although the representatives presented pleadings indicating a greater number of transfers, the following transfers of Mr. González are documented in the casefile before the Court: Starting March 12, 1993, he was serving his sentence at the South Neuquén Regional Prison (Unit 9). On March 18, 1994, he was transferred to the Rawson Security and Resocialization Institute (Unit 6). On August 20, 1996, he was transferred to Unit 9 for family bonding. On April 4, 1997, he was transferred to Unit 6. On April 24, 1997, he was transferred back to Unit 9. On May 5, 1997, he was temporarily transferred to the Capitol Federal Institute (Unit 2). On May 16, 1997, he was transferred to the North Regional Prison (Unit 7, in the province of Chaco). On October 19, 1997, he was temporarily transferred to Unit 2, with Unit 9 as the final destination. On October 24, 1997, he was temporarily transferred to Unit 7, with Unit 9 as the final destination. On November 5, 1997, he was transferred to Unit 6. On August 26, 1999, he was released on parole.[51]

62. On December 15, 2001, he entered Unit 6, from the General Roca (Río Negro) jail. On May 19, 2002, he was again transferred to the General Roca (Río Negro) jail.[52]

63. On May 30, 2004, he entered Federal Penitentiary Complex 1 of Ezeiza, from the Neuquén Penitentiary Service (Unit 11). On June 11, 2004, he was transferred to Unit 7. On December 1, 2004, he was transferred to Federal Penitentiary Complex 2 of Marcos Paz. On December 9, 2004, he was transferred to Unit 6. On March 11, 2006, he was transferred to Unit 9. On March 30, 2006, he was transferred to Unit 6. On November 30, 2006, he was granted parole.[53]

64. On May 9, 1997, Mr. González's public defender filed a writ of *habeas corpus* and asked that he be transferred to the province of Neuquén.[54] On May 14, 1997, Criminal Chamber 2 of Neuquén rejected the writ of *habeas corpus* and the request for a transfer. The chamber found that the ban on transfers established in article 41 of the Provincial Constitution was not applicable to the case because the province did not have its own prison facilities where

[46] Resolution of May 16, 2003 (evidence file, folios 69).
[47] Note of May 19, 2003 (evidence file, folios 71).
[48] Note of May 27, 2003 (evidence file, folios 73 and 74).
[49] Resolutions of June 3 and 10, 2003 (evidence file, folios 76 and 77).
[50] Report produced by the General Inmate Records Division (evidence file, folio 1242 to 1244).
[51] Report produced by the General Inmate Records Division (evidence file, folio 1242 to 1244).
[52] Report produced by the General Inmate Records Division (evidence file, folio 1242 to 1244).
[53] Report produced by the General Inmate Records Division (evidence file, folio 1242 to 1244).
[54] *Habeas corpus* ruling of May 9, 1997 (evidence file, folios 108 to 110).

prisoners can serve the sentences handed down by local courts. It therefore found that by subjecting convicts to the regimen of the Federal Penitentiary Service, it is the latter that determines the location of imprisonment "pursuant to existing availability and the type of prison treatment deemed adequate in each case." It said the National Penitentiary Service could not be required to comply with article 41 of the Provincial Constitution because local law does not prevail over national criminal provisions. It also indicated that Mr. González's transfer was not irrational or arbitrary and did not violate his rights. However, the chamber ordered a copy of the resolution to be sent to the administrative authority in order to request that, in the absence of serious and well-founded reasons for deciding otherwise, it permanently relocate Mr. González to the Neuquén to facilitate his relationships with his relatives.[55]

65. On May 29, 1997, Mr. González's public defender filed a cassation appeal of the decision of Chamber 2 of Neuquén. In the appeal, the defender argued that the substantive law had been erroneously applied.[56] On October 20, 1997, the High Court of Justice of Neuquén rejected the cassation appeal, finding that in accordance with the provisions of article 18 of the Penal Code, those sentenced by provincial courts to more than five years in prison would be admitted to national facilities when the provinces did not have adequate facilities. The court concluded that applying article 41 of the Provincial Constitution without concessions ignored the inmate's right to proper treatment in the penitentiary with an aim to fostering his reintegration into society. To reduce the potential harmful effects on Mr. González of being held outside the provincial jurisdiction, the court ordered Criminal Chamber 2 of Neuquén to arrange "request of regular reports from Federal Unit 7" on the course of treatment in the penitentiary.[57]

66. On November 4, 1997, Mr. González's defense attorney filed a special federal remedy against the judgment of October 20, 1997. The remedy argued that the High Court of Justice of Neuquén had acted arbitrarily in its judgment, in violation of article 41 of the Provincial Constitution.[58] On April 21, 1998, the High Court of Justice of Neuquén declared the special appeal inadmissible.[59]

67. Mr. González's defense attorney filed a motion for reconsideration of dismissal of appeal before the Supreme Court of Justice of the Nation. On August 6, 1998, the Supreme Court of Justice of the Nation dismissed the motion for reconsideration of dismissal of appeal on finding that the extraordinary remedy that was the subject of the motion was inadmissible.[60]

D. Case of José Heriberto Muñoz Zabala

68. José Heriberto Muñoz Zabala entered the Federal Penitentiary Service for the first time on April 28, 1987, on admission to the South Regional Prison (Unit 9) and exited on July 31, 1987. He reentered on April 24, 1989, on admission to the Subprefect Miguel Rocha Penal Colony (Unit 5) and exited on March 23, 1991, after finishing serving his sentence. Later, on August 14, 1996, he reentered Unit 9. On May 6, 1997, given that "he participated in a riot and hostage-taking" in Unit 9, he was transferred to the Security and Resocialization Institute (Unit 6). On May 21, 1998, he was released on parole. On December 2, 1998, he entered Unit 9, and on January 8, 1999, he was transferred to the General Roca (Río Negro) Jail. On April 8, 2001, he entered Unit 9, from Bahía Blanca (Unit 4). On October 20, 2005, "in view of possible attempts at escape and/or evasion, with the use of a firearm," he was transferred

[55] Resolution of May 14, 1997 (evidence file, folios 79 to 81).
[56] Ruling on cassation appeal of May 29, 1997 (evidence file, folios 112 to 121).
[57] Order of October 20, 1997 (evidence file, folios 123 to 135).
[58] Special Federal Remedy of November 4, 1997 (evidence file, folios 83 to 95).
[59] Order of April 21, 1998 (evidence file, folios 97 to 106).
[60] Ruling of August 6, 1998 (evidence file, folio 137).

temporarily to the Federal Penitentiary I complex, with the final destination of the North Regional Prison (Unit 7), located in the capitol city of the province of Chaco, some 2000 km away from the city of Neuquén. On October 21, 2011, he was transferred to Unit 11, under the management of the Neuquén Penitentiary Service, to be close to family. He did not reenter the federal system.[61]

69. On May 9, 1997, Mr. Muñoz's representative filed a writ of *habeas corpus* requesting transfer to the Neuquén jurisdiction.[62] On May 14, 1997, the writ of *habeas corpus* was rejected.[63] On May 29, 1997, the representative filed a cassation appeal asking that Mr. Muñoz be returned immediately to Neuquén jurisdiction.[64] On November 5, 1997, the High Court of Justice rejected the cassation appeal.[65] On November 13, 1997, the representative filed a special federal remedy before the Supreme Court of Justice.[66] On August 6, 1998, the remedy was dismissed on finding that the special remedy that was the subject of the motion was inadmissible.[67]

E. Case of Hugo Alberto Blanco

70. Hugo Alberto Blanco entered the Federal Penitentiary Service on September 4, 2002, admitted to the South Regional Prison (Unit 9). On November 18, 2004, he was transferred to the Security and Resocialization Institute (Unit 6). On December 8, 2004, he was transferred to Unit 9 to appear at court in Neuquén. On January 30, 2005, he was returned to Unit 6. Between March 20, 2005, and April 5, 2005, he was transferred to Unit 9 for a special visit and then later returned to Unit 6. On July 5, 2005, he was transferred to Unit 9 for a special visit, but his sister was ill, and on August 18, 2005, he was returned to Unit 6. On March 11, 2006, he was transferred to Unit 9 for 20 days, and on May 20, 2006, he was returned to Unit 6. On February 5, 2007, he was transferred to Unit 9. On July 20, 2007, he was transferred to the Third Precinct of Neuquén.[68]

71. The representatives allege that Hugo Blanco initially served his sentence in Penitentiary Unit 11 of the Province of Neuquén and that he was beaten and experienced abuse at the hands of the penitentiary service personnel. A criminal investigation was launched into the allegations against one of the officials, leading to his transfer to Unit 9 in order to avoid retaliation in Unit 11. While he was in Unit 9, Mr. Blanco reported having been subjected to threats, punishment, and beatings related to his reporting of the facts that took place in Unit 11.[69]

72. On November 3, 2004, Mr. Blanco's defense attorney filed a writ of *habeas corpus*.[70] On November 20, 2004, upon learning of Mr. Blanco's transfer to Unit 6, the public defender filed a writ of *habeas corpus*, this time asking he be immediately returned to the city of Neuquén.[71] On November 22, 2004, Criminal Chamber 2 of Neuquén ruled to keep Mr. Blanco at Unit 6. The chamber found that the decision of the administrative authority to transfer Mr. Blanco to the unit was made precisely for his safety, in view of the reports of the injuries he had suffered in Unit 9. It also ordered that he be transferred within the Federal Penitentiary

[61] Report produced by the General Inmate Records Division (evidence file, folio 1248 to 1249).
[62] Writ of *habeas corpus* of May 9, 1997 (evidence file, folios 1426 to 1428).
[63] Ruling of May 14, 1997 (evidence file, folios 1430 to 1432).
[64] Cassation appeal of May 29, 1997 (evidence file, folios 1434 and 1444).
[65] Ruling of November 5, 1997 (evidence file, folios 1452 to 1464).
[66] Special Federal Remedy of November 13, 1997 (evidence file, folios 1466 to 1477).
[67] Ruling of August 6, 1998 (evidence file, folio 139).
[68] Report produced by the General Inmate Records Division (evidence file, folio 1254 to 1255).
[69] Brief of pleadings, motions, and evidence (evidence file, folio 118).
[70] Undated *habeas corpus* (evidence file, folios 145 and 146).
[71] *Habeas corpus* of November 20, 2004 (evidence file, folios 145 and 146).

Service, finding that returning him to another provincial unit would clearly be a problem in view of his record of escape, attempted escape, and other incidents that took place during Mr. Blanco's detention at the First Sectional Precinct and Detention Unit 11 in Neuquén. Lastly, the chamber ordered the director of Unit 6 to take "all measures necessary to protect the inmate's physical safety, providing fortnightly reports on his situation."[72]

73. Mr. Blanco's defense asked to expand the writ of *habeas corpus* to include him and once again asked to be transferred back to the provincial penitentiary unit. The defense also filed a writ of *amparo* to the benefit of the inmate's relatives in view of the illnesses of his mother and sister and the loss of contact with his children, ages seven and nine.[73] On November 23, 2004, Chamber 2 of Neuquén rejected the request that Mr. Blanco be transferred. The chamber indicated that article 41 of the Provincial Constitution does not apply to the case "given that the Province still does not have its own adequate facilities for serving the sentence." It also indicated that the family and social relationships of all inmates "are adequately provided for and governed by national law 24,660, a situation that is obviously closely related to the restrictions inherent to the sentence imposed."[74]

74. The public defender filed a cassation appeal, indicating that the transfer "affects, among other rights of anyone serving a sentence, the right to treatment respectful of their human dignity." The defender added that "in view of the specific health situations of both the mother and the sister of the inmate, the transfer affects their legitimate rights (and the rights of the inmate's other relatives) to access to visitation," noting the arbitrary nature of the transfer ordered. On April 25, 2005, the High Court of Justice of Neuquén rejected the cassation appeal.[75]

75. The public defender filed a special federal remedy against the ruling of the High Court of Justice rejecting the cassation appeal, detailing the legal, constitutional, and conventional impacts of the case. Specifically, they argued that the transfer 1) affected his human dignity; 2) prevented him from meeting his natural and cultural needs; 3) amounted to cruel, inhuman, and degrading treatment; and 4) that the agreement between the province of Neuquén and the nation was unconstitutional. The High Court of Justice of Neuquén rejected the special federal remedy based on a ruling of the Supreme Court of Justice of the Nation that "the transfer of convicts from one province to another, done on the basis of the norms of common law and procedural law, falls outside the purview of the special remedy."[76] The court found that "although [attorney Gustavo] Vitale claimed violation of constitutional rights, he did not demonstrate that the relocation of Blanco to Unit 6 of Rawson amounted, in and of itself, to an impact on the federal guarantees cited."[77]

VIII
FONDO

76. This case involves the transfers of four persons deprived of liberty and convicted by the Neuquén, Argentina, provincial courts to serve time in federal prisons around the country. These transfers allegedly affected the right to humane treatment; the right to a punishment whose essential aim is the reform and social re-adaptation of those convicted; the ban on punishments that extend beyond the individual who committed the crime; the ban on interference with family life; the right to protection of the family; the right to judicial

[72] Order of October 22, 2004 (evidence file, folios 141 to 143).
[73] Expansion of *habeas corpus*, no date (evidence file, folios 148 to 150).
[74] Ruling of November 23, 2004 (evidence file, folios 152 to 153).
[75] Order of April 25, 2005 (evidence file, folios 1146 to 1160).
[76] Supreme Court of Justice of the Nation, Rulings, T. 303, pg. 256, "Prosecutor v. Palacio, Vicente, et al."
[77] Resolution of the Supreme Court of Justice of the Nation of November 22, 2005 (evidence file, folios 1162 to 1172).

guarantees; the right to judicial protection; and the rights of the child.

77. The transfers took place in the framework of an agreement between the Province of Neuquén and the Federal Penitentiary Service establishing that until the province had the financial means to build and equip its own prison facilities, the service of guarding and keeping custody of convicts and defendants would be provided by the federal service. Persons deprived of liberty would be subject to national penitentiary law and the orders of the National Penitentiary Service.

78. To address these matters, the Court will conduct its juridical analysis in the following order: i) the rights to humane treatment and to a punishment whose essential aim is the reform and social re-adaptation of those convicted, and the bans on punishments that extend beyond the individual who committed the crime and interference with family life, as well as the right to protection of the family and the rights of the child; and ii) the rights to judicial guarantees and judicial protection.

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RIGHTS TO HUMANE TREATMENT AND TO A PUNISHMENT WHOSE AIM IS SOCIAL RE-ADAPTATION, AND THE BAN ON PUNISHMENTS THAT EXTEND BEYOND THE INDIVIDUAL WHO COMMITTED THE CRIME;[78] THE RIGHTS TO NOT BE A VICTIM OF INTERFERENCE WITH FAMILY LIFE,[79] TO PROTECTION OF THE FAMILY,[80] AND TO THE RIGHTS OF THE CHILD.[81]

A. Arguments of the parties and of the Commission

79. The ***Commission*** held that States are in a special position of guarantor with regard to persons deprived of liberty, in view of the total control that penitentiary officials exercise over them. In this regard, the State is called on to guarantee the right to the humane treatment of persons deprived of liberty, which includes the right to live in detention conditions that are compatible with personal dignity. It also indicated that the State must take on a series of specific responsibilities and undertake a variety of special initiatives aimed at both guaranteeing detained persons the conditions they need for a life with dignity and at contributing to the effective enjoyment of rights that can under no circumstance be restricted, or rights the restriction of which does not necessarily derive from the deprivation of liberty.

80. Additionally, it established that Article 5(6) of the Convention has its own content and scope, compliance with which requires that persons who have been convicted are able to receive support and opportunities to be able to develop their individual potential. Among such measures, contact with family is an important factor in terms of the resocialization aspect of the punishment.

81. Regarding family life, it recalled that States are required broadly to strengthen and develop the nuclear family. In this regard, only restrictions or limitations to this right that meet the ordinary and reasonable requirements of imprisonment are valid. It held that transfer to a location far from one's domicile could be justified, but must be exceptional and clearly regulated to prevent it from being employed arbitrarily, without justification, and disproportionately. Additionally, transferred individuals must have recourse to be able to express themselves should one of their rights be affected by the transfer.

[78] Articles 5(1), 5(2), 5(3), and 5(6) of the American Convention.
[79] Article 11(2) of the American Convention.
[80] Article 17(1) of the American Convention.
[81] Article 19 of the American Convention.

82. It also held that the State must address all structural deficiencies that prevent contact and communication among inmates and their families to ensure such contact and communication can be made safely, with dignity, and with sufficient regularity. States must also adopt the measures necessary to ensure that persons deprived of liberty are not held in facilities located at extreme distances from their communities, families, and legal representatives. Likewise, individual cases of persons deprived of liberty should be examined to facilitate, where possible, their transfer to a penitentiary facility close to the place where their families live.

83. Regarding this specific case, the Commission established that it can be inferred that the transfer of the alleged victims to detention centers located between 800 and 2000 km away from Neuquén impacted their chances of receiving regular visits from their nuclear families and loved ones. It added that the reasons given by the State for the transfer (the lack of facilities that meet international standards in Neuquén) demonstrate that the transfer was not made because of exceptional circumstances but because of a structural problem that has persisted for years. The transfers also impacted the family lives of the alleged victims, as well as the opportunity of judges and defense attorneys to follow their cases.

84. Consequently, the Commission concluded that the State was internationally responsible for the violation of articles 5(1), 5(2), 5(6), 11(2), and 17(1) of the American Convention, in concordance with articles 1(1) and 2 of the Convention, to the detriment of Mr. López, Mr. González, Mr. Muñoz, and Mr. Blanco. It also concluded that the State was responsible for the violation of articles 5(1), 5(3), 11(2), and 17(1) of the Convention, in concordance with articles 1(2) and 2 of the Convention, to the detriment of the nuclear family members identified in the Report on the Merits.[82]

85. The ***representatives*** indicated that the transfers had an enormous impact on the convicted individuals because it prevented them from a regular and consistent regimen of visitation that would have made it possible to maintain, at least minimally, connections—especially emotional ones—with relatives and next of kin. It was also impossible to maintain the necessary contact with their defense attorneys, and prevented the necessary and obligatory judicial oversight of all acts involved in sentence execution that could cause have caused them harm. These rights are crucial for respecting the personal integrity of all convicted individuals. They added that this situation had physical, psychological, and moral impacts on the alleged victims.

86. They indicated that the transfers and their effects constituted cruel, inhuman, or degrading treatment. According to the representatives, the lack of contact with loved ones leads to the deterioration of the convicted person and places them in a situation of abandonment, loss, and collapsing self-esteem. Additionally, the transfer of prisoners to far-away prisons preventing material and emotional support from relatives and next of kin is not compatible with the objective of social reintegration.

87. They also indicated that the transfers violated the right to family protection and to not experience arbitrary interference in family life, as, far from protecting the relatives of the convicted persons, they were prevented from contacting them when they were taken to far-off locations. The situation was made worse by the difficult financial situation of the relatives,

[82] The family members considered to be alleged victims in this case are the following: Lidia Mabel Tarifeño (first wife), Silvia Verónica Tejo de López (second wife), Sandra Elizabeth López (sister), Nicolás Gonzalo Tejo López (son), Nicolás López (father) and Josefina Huichacura (mother) (relatives of Néstor Rolando López); Carina Fernández (sister); Mirta Fernández (mother) and Enzo Ricardo Blanco and Camila Andrea Blanco (children) (relatives of Hugo Blanco). Report on the Merits of the commission (merits file, folios 11 and 19).

who were not able to handle the long trips and costs involved in each visit. They therefore argued that the punishment extended to persons who were not convicted.

88. The ***State*** indicated that the pleading of the Commission and the representatives of the alleged victims regarding the violations of the rights to humane and dignified treatment, to a punishment with the objective of resocialization, and to not suffer arbitrary interference with family life and the rights of the family was flawed. It based its argument on the institutional and legislative structure of the federal sentence execution system, placing special emphasis on Law 24,660 and on Decree 1136/97. It also argued that a transfer ordered by the penitentiary authority cannot per se be considered to amount to a rights violation, especially when ordered in the framework of a sentence execution regimen and subject to full oversight of the courts. It added specific argumentation regarding the transfer processes for each of the four alleged victims, arguing that all the transfers took place in the framework of the "treatment period." It also argued that the alleged victim's rights had been respected through special visitation benefits. Lastly, it noted that Mr. Muñoz's transfer was because of his participation in riots and conduct associated with attempted escape and evasion, with the use of firearms.

B. Considerations of the Court

89. In view of the arguments submitted by the parties, hereinafter the Court will set forth the standards related to the right to humane treatment of persons deprived of liberty, particularly as regards the punishment being prohibited from extending beyond the person who committed the crime (Article 5(3) of the Convention) and the essential objective of reforming and reintegrating the convicted person (Article 5(6) of the Convention). The Court will then address the right to not be subjected to arbitrary or abusive interference in private life or the family (Article 11(2) of the Convention) and the right to family (Article 17(1) of the Convention). Lastly, it will analyze the specific case in view of inter-American standards and international human rights law.

B.1 Right to humane treatment and objective of reintegration of the convicted person

90. The Court recalls that in the context of persons deprived of liberty, "States cannot invoke economic hardships to justify imprisonment conditions that do not respect the inherent dignity of human beings."[83] Also, the State has the special position of guarantor, as penitentiary officials have significant or total control over people in their custody. There is thus a special subordinate relationship and interaction, characterized by the particular intensity with which the State can control the rights and obligations of a person deprived of liberty and by the specific circumstances of imprisonment, in which deprivation of liberty prevents prisoners from meeting, on their own, a series of basic needs that are essential for living dignified life.[84]

91. Because of this relationship and special interaction of subjection between the inmate and the State, the latter must take on a series of specific responsibilities and undertake a variety of special initiatives aimed at both guaranteeing detained persons the conditions they need to live a life with dignity and contributing to the effective enjoyment of rights that can under no circumstance be restricted, or rights the restriction of which does not necessarily

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[83] *Cf. Case of Montero Aranguren et al. (Detention Center of Catia). Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, para. 85, and *Case of Pachecho Teruel v. Honduras. Merits, Reparations, and Costs.* Judgment of April 27, 2012. Series C No. 241, para. 67.

[84] *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004, para. 152, and *Case of Norín Catrimán, Merits, Reparations, and Costs.* Judgment of May 29, 2014. Series C No. 279, para. 406.

derive from the deprivation of liberty and is therefore not permissible. Doing otherwise would mean that the deprivation of liberty dispossesses the person of the ownership of all human rights, which is unacceptable.[85]

92. An unavoidable consequence of deprivation of liberty is that it impacts the enjoyment of human rights other than the right to personal liberty. For example, the rights to privacy and to family intimacy can be restricted. However, the restriction of rights resulting from deprivation of liberty or as a collateral affect of it should be rigorously limited, as any restriction of a human right is only justifiable under international law when it is necessary in a democratic society.[86]

93. Regarding Article 5, the Court has held that, among other guarantees, the State must guarantee visitation at penitentiaries. Imprisonment under a regimen of restricted visitation could violate the right to humane treatment, depending on the circumstances.[87] Thus, restricting visits may impact the humane treatment of the person deprived of liberty and of their relatives. The aim of Article 5(3) is precisely to ensure that the effects of deprivation of liberty do not unnecessarily transcend the convicted person, beyond the essential.

94. Additionally, regarding Article 5.6 of the Convention, in the case of *Mendoza et al. v. Argentina,* the Court established that "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." Thus, punishments imposed on children for committing crimes should pursue the child's reintegration into society.[88] Additionally, the European Court of Human Rights[89] has found that maintaining family bonds has an impact on the social rehabilitation of imprisoned persons.

95. Also, in the case of *Pacheco Teruel v. Honduras*, the Court accepted the recognition of responsibility made by the State regarding the violation of Article 5(6) of the Convention on having failed to allow certain inmates to engage in productive activities.[90] In this regard, the Court established that measures like allowing persons deprived of liberty to work from prison are a means of guaranteeing the rights protected under Article 5(6) and that unjustified or disproportionate restrictions on them may amount to a violation of this article.

B.2 Rights to not be victims of interference with family life and protection of the family

96. As regards the rights protected under articles 11(2) and 17(1) of the Convention, the Court has understood them to provide direct and complementary protection to family life.[91] Thus, arbitrary interference in family life as prohibited by Article 11(2) can have a negative impact on the nuclear family and run contrary to the guarantee of Article 17(1).[92]

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[85] *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay*, para. 153.

[86] *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay*, para. 154, and *Case of Wong Ho Wing v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 30, 2015. Series C No. 279, para. 294.

[87] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 58, and *Case of Pacheco Teruel v. Honduras*, para. 67.

[88] *Cf.* Case of Mendoza *et al. v. Argentina.* Preliminary Objections, Merits, and Reparations. Judgment of May 14, 2013. Series C No. 260, para. 165 and 166, and *Case of Ramírez Escobar et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Series C No. 255, footnote on page 90.

[89] *Cf.* ECHR. *Case of Khodorkovsky and Lebedev v. Russia.* Applications No. 11082/06 and 13772/05. First Section. Judgment of October 25, 2013. 837.

[90] *Cf. Case of Pacheco Teruel et al v. Honduras.* Merits, reparations and costs. Judgment of April 27, 2012. Series C No. 241, paras. 60 and 69.

[91] *Cf. Case of Atala Riffo and girls v. Chile. Merits, Reparations, and Costs.* Judgment of February 24, 2012. Series C No. 239, para. 175, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of March 9, 2018. Series C No. 351, para. 161.

[92] *Cf. Case of Atala Riffo and girls v. Chile*, para. 175, and *Case of Ramírez Escobar et al. v. Guatemala*, para. 162.

97. Regarding Article 11(2), the Court has found that private life is not limited to the right to privacy. Rather, it includes a series of factors related to individual dignity, including, for example, the capacity to develop one's own personality and aspirations, determine one's own identity, and define one's own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the rights to personal autonomy and personal development, and the right to establish and develop relationships with other human beings and with the outside world.[93] Additionally, effective exercise of the right to private life is crucial for being able to exercise personal autonomy with regard to the future course of events relevant to a person's quality of life.[94]

98. In this sense, with regard to Article 17, the Court has found that the family—without defining a particular model for it[95]—is the natural and fundamental group unit of society and is entitled to protection by society and the State. In view of the importance of this right, the Court has found that the State has an obligation to support the development and strengthening of the nuclear family.[96] It is therefore required to take both positive and negative actions to protect persons from arbitrary or illegal interference with their families[97] and foster effective respect for family life.[98] In the Afiuni matter, the Court found that the State must ensure that "in the place she is held, Ms. Afiuni is not affected with regard to her right to gain access to relatives and visitors, her attorneys, and the doctors who come examine her."[99]

99. At the same time, the Court has understood that among the most severe interference that the State could engage in against the family are actions that result in separation or break-ups. This situation is especially grave when the separation affects the rights of children and adolescents.[100]

100. As indicated above, the impacts inherent to prison and to the sentence are not violations of the American Convention. However, suffering that extends beyond such conditions can amount to violations of rights set forth in the American Convention, such as the guarantees provided for in Article 5 of the Convention,[101] among others.

101. The Court recalls that in the case of *Norín Catrimán et al. v. Chile*, it established that unjustified separation of persons deprived of liberty from their families amounts to a violation

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[93] *Cf.* Case of Fernández Ortega *et al. v.* Mexico*.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, para. 129, and *Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 30, 2016. Series C No. 329, para. 152.

[94] *Cf. Case of Artavia Murillo et al. (in vitro fertilization) v.* Costa Rica. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2012. Series C No. 257, para. 143, and *Case of I.V. v. Bolivia*, para. 152.

[95] *Cf. Case of Atala Riffo and girls v. Chile*, paras. 142 and 145.

[96] *Cf. Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2013. Series C No. 270, para. 325, and *Case of Carvajal Carvajal et al. v. Colombia.* Merits, Reparations and Costs. Judgment of March 13, 2018. Series C No. 352, para. 191

[97] *Cf. Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 dated August 28, 2002. Series A No. 17, para. 71; *Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2009. Series C No. 211, para. 188, and *Case of Carvajal Carvajal et al. v. Colombia*, para. 191.

[98] *Cf. Case of the "Las Dos Erres" Massacre v. Guatemala*, para. 189, and *Case of Carvajal Carvajal et al. v. Colombia*, para. 191.

[99] *Cf.* Matter of María Lourdes Afiuni regarding Venezuela. Provisional measures. Order of the President of the Inter-American Court of Human Rights of December 10, 2010, Considering 12 and Operative Paragraph 2; and Order of the Inter-American Court of Human Rights of March 20, 2011, Considering 6.

[100] *Cf. Case of Ramírez Escobar et al. v. Guatemala*, para. 165.

[101] *Cf. Case of Boyce et al. v. Barbados.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, para. 88; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 29, 2016. Series C No. 312, para. 169.

of Article 17(1) of the Convention.[102] Specifically, the Court established that visits to persons deprived of liberty by their relatives constitute a fundamental element of the right to protection of the family, both of the person deprived of liberty and of their relatives, not only because they represent an opportunity for contact with the outside world but because the support of family members for persons deprived of liberty while they serve their sentences is crucial in many respects, from the emotional and relational to financial support. Therefore, to protect the rights of persons in their custody, States are required to adopt the most appropriate measures to facilitate and enable the exercise of contact between persons deprived of liberty and their relatives.[103]

102. Likewise, the Court underscored that "one of the difficulties in keeping up relationships between those deprived of liberty and their family members may be their confinement in prisons that are very far from their homes, or of difficult access because the geographical conditions and communication routes make it very expensive and complicated for members of the family to make frequent visits, which could eventually result in a violation of both the right to protection of the family and other rights, such as the right to personal integrity, depending on the particularities of each case. Therefore, States must, insofar as possible, facilitate the transfer of prisoners to prisons nearer to the place where their family lives. In the case of indigenous people deprived of liberty, the adoption of this measure is especially important given the significance of the ties that these individuals have with their place of origin or their community."[104]

103. The European and universal systems have also ruled on the transfer and relocation of persons deprived of liberty to locations far from their families. In the case of *Morales Tornel et al. v. Spain*, the United Nations Human Rights Committee established that the lack of response to requests and refusal to transfer a terminally ill person deprived of liberty to a prison close to their family amounted to disproportionate interference in family life, in violation of Article 17(1) of the International Covenant on Civil and Political Rights.[105]

104. For its part, the European Court of Human Rights has understood respect for family life to be an essential part of the rights of inmates,[106] and thatStates have an obligation to help convicted persons stay in effective contact with their families as part of the guarantee to maintain family life.[107] Material issues should also be taken into account that could make it difficult for families to see persons deprived of liberty, such as the reality of means of transportation or the distances that relatives have to travel to visit detained persons.[108] It has also found that any restriction on the conventional rights of an inmate must be justified in each specific case. This justification may be based on, among other things, the need and inevitable consequences of deprivation of liberty, or may have to do with the specific characteristics of the person deprived of liberty.[109]

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[102] *Cf. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, paras. 406 to 410.
[103] *Cf. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, para. 407.
[104] *Cf. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, para. 408.
[105] *Cf.* UN. Human Rights Committee. *Case of Morales Tornel et al. v. Spain* Communication No. 14737/2006. CCPR/C/95/D/1473/2006. April 24, 2009.
[106] *Cf.* ECHR. *Messina v. Italy*. No. 25498/94, para. 61; *Kurkowski v. Poland*, no. 36228/06, para. 95; *Vintman v. Ukraine.* No. 28403/05, para. 78, and *Khoroshenko v. Russia [GC]*, No. 41418/04, para. 106.
[107] ECHR. *Case of Khoroshenko v. Russia [GC]*, No. 41418/04, June 30, 2015, paras. 123-126 and *Case of Polyakova et al. v. Russia*, No. 35090/09, 35845/11, 45694/13, and 59747/14, of March 7, 2017, paras. 81, 82, 88, 89, 100, 116-119
[108] ECHR. *Case of Khoroshenko v. Russia [GC]*, No. 41418/04, June 30, 2015, paras. 123-126 and *Case of Polyakova et al. v. Russia*, paras. 81, 82, 88, 89, 100, 116-119
[109] *Cf.* ECHR. *Polyakova et al. v. Russia*, para. 87.

105. In this regard, States must take into account the interests of the convicted individual and their relatives when establishing the visitation regimen or performing transfers. Locating an inmate in a certain prison facility may be a violation if the effects of doing so on privacy and family life extend beyond the difficulties and restrictions inherent to a prison term.[110]

106. Additionally, a variety of international instruments are employed in interpreting the provisions of the Convention with regard to the aforementioned guarantees. In the universal system, the United Nations Standard Minimum Rules for the Treatment of Prisoners, of 1955, (hereinafter the "Minimum Rules 1955") establish a series of guarantees for imprisoned persons and their families.[111] Specifically, they establish the need for families to be involved in the process of rehabilitating and re-adapting convicted persons.[112]

107. The rules cited were updated by the United Nations with General Assembly Resolution 70/175, adopting the new United Nations Standard Minimum Rules for the Treatment of Prisoners, also known as the "Nelson Mandela Rules."[113] Where they apply to the issues under discussion in this case, they establish that:

> Rule 3
> Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.
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> Rule 43(3)
> Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.
>
> Rule 58
> 1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:
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> (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
>
> (b) By receiving visits.

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[110] *Cf. ECHR. Khodorkovsky and Lebedev v. Russia*, para. 837.

[111] UN. The Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the UN Economic and Social Council in resolutions 663C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977, para. 37: "Contact with the outside world 37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits"; para. 44(3): "Notification of death, illness, transfer, etc. Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution."

[112] Ibidem, para. 61: "The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners"; para. 79: "Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both"; and para. 80: "From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation."

[113] UN. *United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules).* Resolution A/RES/70/175, adopted on December 17, 2015, by the General Assembly.

> 2. Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity.
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> Rule 59
> Prisoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation.
>
> Rule 68
> Every prisoner shall have the right, and shall be given the ability and means, to inform immediately his or her family, or any other person designated as a contact person, about his or her imprisonment, about his or her transfer to another institution and about any serious illness or injury. The sharing of prisoners' personal information shall be subject to domestic legislation.
>
> Rule 106
> Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.
>
> Rule 107
> From the beginning of a prisoner's sentence, consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain or establish such relations with persons or agencies outside the prison as may promote the prisoner's rehabilitation and the best interests of his or her family.

108. Additionally, in 1988, the General Assembly of the United Nations adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. These principles address the right of the detainee to notify their family or other person of their transfer;[114] to the guarantee of maintaining family relationships during deprivation of liberty;[115] and, if requested, to the guarantee of being kept, where possible, in a detention facility or prison located a reasonable distance from their normal place of residence.[116]

109. These same perspectives have been taken on by the universal system with regard to the situation of women deprived of liberty, in the form of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, known as the "Bangkok Rules." As concerns the location and transfer of women deprived of liberty, as well as concerns their family relationships, the Bangkok Rules establish the following in their pertinent section: "Women prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman's preference and the availability of appropriate programmes and services,"[117] and "Women prisoners' contact with their families, including their children, and their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to

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[114] UN. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.* Resolution A/RES/43/173 adopted on December 9, 1988, by the General Assembly. Principle 16(1): "Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."
[115] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 19: "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."
[116] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 20.
[117] UN. *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).* Resolution A/RES/65/229, adopted on March 16, 2011, by the General Assembly, Rule 4.

counterbalance disadvantages faced by women detained in institutions located far from their homes." [118] The Bangkok rules likewise indicate that family visits are important for guaranteeing the psychological wellbeing and social reintegration of women deprived of liberty.[119]

110. Additionally, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules") state that every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact, and unrestricted communication with the family and the defense counsel.[120]

111. The regional system takes a similar approach. In the inter-American system, the Principles and Best Practices for the Protection of Individuals Deprived of Liberty in the Americas of the Inter-American Commission on Human Rights establish that "The transfers of persons deprived of liberty shall be authorized and supervised by the competent authorities, who shall, in all circumstances, respect the dignity and fundamental rights of persons deprived of liberty, and shall take into account the need of persons to be deprived of liberty in places near their family, community, their defense counsel or legal representative, and the tribunal or other State body that may be in charge of their case. The transfers shall not be carried out in order to punish, repress, or discriminate against persons deprived of liberty, their families or representatives."[121]

112. The Principles and Best Practices also establish the importance of guaranteeing that persons deprived of liberty maintain contact with the outside world and, through regular visits, with their family members and legal representatives.[122]

113. In the European system, the European Prison Rules—both the original 1987 version and the 2006 revised version—have established guarantees regarding location, transfers and maintaining the family relationships of persons deprived of liberty. First, regarding location,

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[118] *Bangkok Rules*, Rule 26.

[119] *Bangkok Rules*, Rule 43: "Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child"; Rule 23: "Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children"; Rule 27: "Where conjugal visits are allowed, women prisoners shall be able to exercise this right on an equal basis with men"; Rule 28: "Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible"; Rule 45: "Prison authorities shall utilize options such as home leave, open prisons, halfway houses and community-based programmes and services to the maximum possible extent for women prisoners, to ease their transition from prison to liberty, to reduce stigma and to re-establish their contact with their families at the earliest possible stage"; Rule 52: "1. Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws. 2. The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials. 3. After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised."

[120] UN. *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Resolution 45/113 of December 14, 1990, Rule 60.

[121] IACHR. *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.* Adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008. Principle IX.

[122] IACHR. *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.* Principle XVIII, "Contact with the outside world. Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners. They shall have the right to be informed about the news of the outside world through means of communication, or any other form of contact with the outside, in accordance with the law."

the 1983 version of the rules established the need, following assessment of the convicted person's personality, to prepare a treatment program in an adequate institution that takes into account, among other things, proximity to family members.[123]

114. The 2006 updated version establishes that, where possible, detained individuals should be held close to their place of residence. They also indicate the need for them to be consulted each time they are transferred from one prison to another.[124]

115. Regarding the transfers and notification of them to family members, both the 1987 rules and the 2006 document establish the right to immediately inform family members[125] and to communicate with and receive visits from family members as frequently as possible.[126] As regards foreign prisoners, the Council of Europe adopted a recommendation to the effect that special care must be given to maintaining and developing their relationships with the outside world, including contacts with family and friends, consular representatives, conditional release, community agencies, and volunteers.[127]

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[123] Council of Europe. *Recommendation No. R(87)3 of the Committee of Ministers to Member States on the European Prison Rules*, adopted on February 12, 1987, para. 68: "Treatment objectives and regimes. As soon as possible after admission and after a study of the personality of each prisoner with a sentence of a suitable length, a programme of treatment in a suitable institution shall be prepared in the light of the knowledge obtained about individual needs, capacities and dispositions, especially proximity to relatives".

[124] Council of Europe. *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, adopted on January 11, 2006, paras. 17.1: "Prisoners shall be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation"; 17.2: "Allocation shall also take into account the requirements of continuing criminal investigations, safety and security and the need to provide appropriate regimes for all prisoners"; and 17.3: "As far as possible, prisoners shall be consulted about their initial allocation and any subsequent transfer from one prison to another."

[125] *European Prison Rules.* Recommendation No. R(87)3, para. 49.3: "All prisoners shall have the right to inform at once their families of imprisonment or transfer to another institution." See also Council of Europe. *European Prison Rules.* Recommendation Rec(2006)2, para. 24.8: "Prisoners shall be allowed to inform their families immediately of their imprisonment or transfer to another institution and of any serious illness or injury they may suffer."

[126] Council of Europe. *European Prison Rules.* Recommendation No. R(87)3: "43.1. Prisoners shall be allowed to communicate with their families and, subject to the needs of treatment, security and good order, persons or representatives of outside organisations and to receive visits from these persons as often as possible. 2. To encourage contact with the outside world there shall be a system of prison leave consistent with the treatment objectives in Part IV of these rules. […] 65. Every effort shall be made to ensure that the regimes of the institutions are designed and managed so as: […] c. to sustain and strengthen those links with relatives and the outside community that will promote the best interests of prisoners and their families; […] 70.1. The preparation of prisoners for release should begin as soon as possible after reception in a penal institution. Thus, the treatment of prisoners should emphasise not their exclusion from the community but their continuing part in it. Community agencies and social workers should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners particularly maintaining and improving the relationships with their families, with other persons and with the social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners. 2. Treatment programmes should include provision for prison leave which should also be granted to the greatest extent possible on medical, educational, occupational, family and other social grounds". See also Council of Europe. *European Prison Rules.* Recommendation R(2006)2: "24.1 Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons. Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact. [...] 4. The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible. 5. Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so. [...] 7. Whenever circumstances allow, the prisoner should be authorised to leave prison either under escort or alone in order to visit a sick relative, attend a funeral or for other humanitarian reasons."

[127] Council of Europe. Committee of Ministers Recommendation CM/Rec(2012)9 of the Committee of Ministers to member States on mediation as an effective tool for promoting respect for human rights and social inclusion of Roma, September 12, 2012, para. 22.1.

116. In line with this, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "CPT"), in its 2002 Standards, revised in 2015, established the importance of reasonable contact between the convicted person and the outside world, especially the need to maintain relationships with family and close friends.[128] In this regard, the CPT established that "the continuous moving of a prisoner from one establishment to another can have very harmful effects on his psychological and physical well being. Moreover, a prisoner in such a position will have difficulty in maintaining appropriate contacts with his family and lawyer. The overall effect on the prisoner of successive transfers could under certain circumstances amount to inhuman and degrading treatment."[129]

117. In Africa, the Robben Island Guidelines adopted by the African Commission on Human and Peoples' Rights, establish that States must ensure that all persons deprived of liberty have the right to be visited and maintain correspondence with the relatives.[130] Likewise, General Comment No. 1 of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which interprets Article 30 of the African Charter on the rights and welfare of children, established that "prison buildings and regimes are often remote and inaccessible for children visiting detained or imprisoned parents. [...] This can mean that children have to travel very long distances from their home to visit their mother which incurs financial costs and can also take up school time. If a decision is taken to imprison a parent or other primary caregiver then the relevant authorities should first establish where the child is living in order to have the parent or caregiver sent to a facility within suitable travelling distance of the child's home."[131]

118. Therefore, the Court finds that the provision of Article 5(6) that "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners," applied in this case, means that persons deprived of liberty have the right to as much contact as possible with their families, representatives, and the outside world, and States have a consequent obligation to guarantee this. While this is not an absolute right, the administrative or judicial decisions establishing the location where a sentence is to be served or the transfer of a person deprived of liberty must take the following considerations—among others—into account: i) a central objective of the punishment must be the readaptation or reintegration of the inmate;[132] ii) contact with family and the outside world

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[128] This standard was originally developed in the Second General Report of the CPT in 1992. However, it was not consolidated until it was included in the 2002 standards. Additionally, the standard cited is the same as the 2015 revised version. *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.* 2nd General Reporton the CPT's activities CPT/Inf (92) 3: "51. It is also very important for prisoners to maintain reasonably good contact with the outside world. Above all, a prisoner must be given the means of safeguarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world; any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations. The CPT wishes to emphasise in this context the need for some flexibility as regards the application of rules on visits and telephone contacts vis-à-vis prisoners whose families live far away (thereby rendering regular visits impracticable). For example, such prisoners could be allowed to accumulate visiting time and/or be offered improved possibilities for telephone contacts with their families."

[129] *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.* 2nd General Reporton the CPT's activities CPT/Inf (92) "57. The transfer of troublesome prisoners is another practice of interest to the CPT. Certain prisoners are extremely difficult to handle, and the transfer of such a prisoner to another establishment can sometimes prove necessary. However, the continuous moving of a prisoner from one establishment to another can have very harmful effects on his psychological and physical well being. Moreover, a prisoner in such a position will have difficulty in maintaining appropriate contacts with his family and lawyer. The overall effect on the prisoner of successive transfers could under certain circumstances amount to inhuman and degrading treatment."

[130] *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia, para. 31.

[131] African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 on Article 30 of the ACRWC: *Children of Incarcerated and Imprisoned Parents and Primary Caregivers*, 8 November 2013, para. 3.1.6.

[132] *Cf.* Case of Mendoza *et al. v. Argentina*, para. 165 and 166.

is crucial for the social rehabilitation of persons deprived of liberty.[133] This includes the right to receive visits from relatives and legal representatives;[134] iii) restricting visits may be harmful to the personal integrity of persons deprived of liberty and their families;[135] iv) separating persons deprived of liberty from their families without justification is a violation of Article 17(1) of the Convention and, eventually, of Article 11(2) as well; v) if the transfer has not been requested by the person deprived of liberty, the person must, where possible, be consulted about each transfer to one prison or another,[136] and they must be allowed to oppose the decision administratively and, should it be necessary, judicially.

B.3 The specific case

119. In this case, the Commission and the representatives allege that the transfers of the four alleged victims to detention centers located between 800 km and 2,000 km away from their relatives, legal representatives, and sentence execution judge were not justified or proportional, amounting to a violation of articles 5(3), 5(6), 11(2), and 17(1) of the American Convention, with regard to Mr. López, Mr. Blanco, Mr. Muñoz, and Mr. González, as well as their families. The State, for its part, argues that the transfers were legal, that their purpose was to ensure the sentences were served properly, and that they were subject to prompt judicial oversight at multiple levels.

120. Expert witness Marta Monclús explained that persons deprived of liberty must serve their sentences in a different province when provinces do not have sufficient spaces available or their own penitentiary facilities, and when their cases are being handled by federal judges. In this regard, she indicated that a very high percentage (70% in 2017) of persons held in federal prisons are from the Autonomous City of Buenos Aires and its metropolitan area. These individuals deprived of liberty are transferred to different Federal penitentiary units around the country, which increases the occupancy rate of detention centers located in other provinces, with the result that detained persons from those provinces must be placed in locations far from their homes. This "makes clear that on numerous occasions, the [Federal Penitentiary Service] transfer detainees far from their place of residence arbitrarily and unnecessarily, despite having penitentiary facilities available in the detainee's province of origin."[137]

121. The Court must examine the transfers that are the subject of this case and, following the precedents set by its case law, verify if they amounted to a restriction on rights and determine if the restriction was provided for by law, if it was abusive or arbitrary, and if it pursued a legitimate aim and complied with the requirements of suitability, necessity, and proportionality.[138]

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[133] *Cf.* ECHR. *Case of Khodorkovsky and Lebedev v. Russia*, para. 837;

[134] IACHR. *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.* Principle XVIII, "Contact with the outside world. Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners. They shall have the right to be informed about the news of the outside world through means of communication, or any other form of contact with the outside, in accordance with the law."

[135] *Cf. Case of Loayza Tamayo v. Peru*, para. 58, and *Case of Pacheco Teruel v. Honduras*, para. 67.

[136] Council of Europe. *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, adopted on January 11, 2006. Para. 17.3: "As far as possible, prisoners shall be consulted about their initial allocation and any subsequent transfer from one prison to another."

[137] Written expert testimony of expert witness Marta Monclús (evidence file, folios 1495 to 1508).

[138] *Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 35 and 37; *Case of Artavia Murillo et al. (in vitro fertilization) v.* Costa Rica, para. 273, and *Case of López Lone et al. v. Honduras. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 5, 2015. Series C No. 302, para. 168. Likewise, see the basic principles of the European Prison Rules, number

122. In view of the similarity of the factual framework of the four alleged victims, the remedies they filed, and the evidence provided, the Court will examine the four cases simultaneously, making case-specific clarifications where necessary. In particular, the Court observes that it should analyze the grounded administrative acts that determined the transfers that are the subject of this case. However, because the Court does not have that documentation in its case file, it will hereinafter analyze only the transfers subjected to judicial control using the requests for transfer or writs of habeas corpus submitted by the alleged victims and their defense attorneys.

B.3.1 Strict Legality

123. The criteria of legality, set forth in Article 30 of the American Convention,[139] establishes that any measure restricting a right must be provided for by law.[140] Thus, for example, matters like transfers of persons deprived of liberty from one prison to another that impact personal integrity or separate families must be provided for under a State's domestic law.

124. Along these lines, the European Court of Human Rights has found that measures transferring inmates from one prison to another must be regulated so as to keep authorities from using their power to transfer prisoners arbitrarily. It is therefore not enough for the measure to be generically established in domestic law. Rather, it must set forth clear criteria for exercising this discretionary power,[141] but it also must not be so rigid as to make it impossible for authorities to act.[142] In the words of the European Court: "The expression 'in accordance with the law' does not only necessitate compliance with domestic law, but also relates to the quality of that law.[143]

125. In the case of *Polyakova et al. v. Russia*, the European Court examined the impacts on the rights of four persons deprived of liberty and their families due to the convicted persons being placed in and subsequently transferred to prisons far from their nuclear families. In this case, said Court held that the domestic regulation of the Russian Federation regarding the location and transfer of persons deprived of liberty did not meet the criteria of legality. This conclusion was reached upon finding that despite the fact that criteria were established by law on this particular subject, they did not allow persons deprived of liberty and their families to truly anticipate the actions of State authorities. On the contrary, the regulations were not clear enough to limit the scope of action of the State authorities, giving rise to the arbitrary use of transfer authority without taking into account the rights of persons deprived of liberty and their families.[144]

3: "Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed."

[139] Article 30 of the American Convention. Scope of Restrictions: The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

[140] *Case of Kimel v. Argentina.* Merits, reparations and costs. Judgment of May 2, 2009. Series C No. 177, para. 63, and *Case of Ramírez Escobar et al. v.* Guatemala, para. 332.

[141] ECHR. *Case of S. and Marper v. United Kingdom*. Application Nos. 30562/04 and 30566/04. Grand Chamber. Judgment of December 4, 2008, para. 95, and *Case of Polyakova et al. v. Russia*, para. 91.

[142] ECHR. *Case of Al-Nashif v. Bulgaria*. Application No. 50963/99. Fourth Chamber. Judgment of June 20, 2002, para. 119; *Case of Aleksejeva v. Latvia.* Application No. 21780/07. Third Chamber. Judgment of July 3, 2012, para. 55; and *Case of Vintman v. Ukraine.* Application No. 28403/05. Fifth Chamber. Judgment of January 23, 2015, para. 85.

[143] ECHR. *Case of Niedbala v. Poland.* Application 27915/95. First Chamber. Judgment of July 4, 2000, para. 79; *Case of Gradek v. Poland.* Application No. 39631/06. Fourth Chamber. Judgment of June 8, 2010, para. 42; and *Case of Vintman v. Ukraine*, para. 84.

[144] ECHR. *Polyakova et al. v. Russia*, paras. 91 to 101.

126. Additionally, in the case of *Khodorkovsky and Lebedev v. Russia*, the European Court found that given the geographical situation of the penal colonies in question and the realities of the Russian transportation system, the transfer of two convicted persons with life sentences to facilities located thousands of kilometers from their families homes amounted to arbitrary interference in their private and family lives, especially because of the long and exhaustive effort it required from their children. It held that it was the members of their respective families who suffered the consequences, although the applicants themselves also suffered indirectly in the absence of a clear and predictable method for distributing convicted persons amongst the penal colonies.[145]

127. Transfers of persons deprived of liberty in the federal Argentine penitentiary system are regulated by two domestic laws: first, article 72 of National Criminal Execution Law 24,660 establishes that "[t]he transfer of the inmate from one facility to another, and the grounds for doing so, shall be communicated immediately to the sentence execution judge or competent judge." The authority to make decisions on transfers belongs to the general director of the Correctional Regimen of the Federal Penitentiary System. According to expert witness Marta Monclús, "there is no executive branch decree regulating transfers, admissible grounds, procedures for ordering them, content of transfer resolutions, notification of the interested parties, deadlines and routes to contest them, etc.; there are only disparate regulations emanating from the office of the [Federal Penitentiary System] itself that neither judges, nor detainees, nor lawyers, nor public defenders are aware of."

128. Second, there is another type of transfer, established in article 87 of Law 24,660[146] as a punishment for disciplinary infractions. These transfers are regulated by a procedure and rules set forth in articles 79 to 99 of Law 24,660, as well as in the Rules of Discipline for Inmates (Decree 18/97). In this regard, article 91 of Law 24,660 establishes that "the inmate must be informed of the infraction of which they are accused; have an opportunity to present their defense, provide evidence, and receive a hearing by the director of the facility prior to the issuance of the resolution, which in any case must be grounded. The resolution shall be issued by the deadline set in the regulations." Also, Decree 18/97 establishes some criteria for adjusting the punishments set forth in articles 20 to 28 and their proportionality.[147] Likewise, articles 29 through 49[148] establish the sanction procedure, while article 64 sets forth the conditions for executing the sanction of transfer to another establishment.[149]

129. Regarding the rules in both cases, the expert witness report from expert witness Monclús is enlightening:[150]

> The absence of a clear regulation explicitly establishing that courts must exercise reasonable oversight of transfer decisions prior to their execution leads to arbitrary actions by the [Federal Penitentiary System] that lack judicial oversight. Penitentiary

[145] ECHR. *Case of Khodorkovsky and Lebedev v. Russia*, para. 838.
[146] Law 24,660, article 87: "Only the following measures can be applied as punishments, based on the significance of the infraction committed and the individual details of the case, without prejudice to the provisions of article 89; a) admonishment; b) exclusion from recreational or sporting activities for up to ten (10) days; c) exclusion from common activities for up to fifteen (15) days; d) full or partial suspension or restriction on rights under the rules for up to fifteen (15) days; e) confinement to individual housing or in cells whose conditions do not illegally worsen the detention, for up to fifteen (15) days without interruption; f) confinement to individual housing or in cells whose conditions do not illegally worsen the detention, for up to seven (7) weekends, in a row or alternating; g) transfer to another higher-security section of the facility; h) transfer to another facility. The execution of the sanctions shall not amount to the total suspension of the right to visitation and correspondence with a direct family member of the inmate or, in the absence of that, next of kin."
[147] Decree 18/97, articles 20 to 28 (evidence file, folio 45).
[148] Decree 18/97, articles 29 to 49 (evidence file, folio 46 to 48).
[149] Decree 18/97, article 64 (evidence file, folio 50).
[150] Written expert testimony provided by Marta Monclús (evidence file, folio 1498).

administration interprets the article 72 requirement of "immediate communication" of transfers to a judge as an obligation of *post hoc* communication, or at the most, contemporaneous with its execution. And for their part, judges tend to consider transfers the "exclusive prerogative" of the penitentiary administration, and therefore, they do not exercise effective control over them or even require the [Federal Penitentiary System] to provide a rationale for the transfers. The penitentiary administration usually sends the execution judge a simple list containing the names of the detainees transferred and the destination unit, which the courts add to the prison record of each detainee without further processing.

130. She added:[151]

> The [disciplinary] transfer to another unit is provided for as a punishment, and therefore, detainees who had committed a disciplinary infraction would be in a better situation than those who are transferred for other reasons, because the regulations require notification of the alleged act and the opportunity for defense and an opportunity to offer or challenge evidence, to a hearing before the director of the unit or another authority, the requirement that the director notify the resolution containing the decision to sanction and the consequent opportunity to appeal it, and lastly, recourse to a judge if objections raised administratively were rejected. Lastly, effective execution of the disciplinary sanction can be suspended.

131. Moving on to this specific case, the Court must first identify the legal provision applied by Argentine prison and judicial authorities. To do this, the Court must draw distinctions among the facts involved in each case.

132. It is noted that the transfers in this case (5 transfers of Mr. López, 16 transfers of Mr. González, 5 transfers of Mr. Muñoz, and 11 transfers of Mr. Blanco) took place in the framework of the article 72 regimen (*supra* paras. 44, 61 to 63, 68, and 70). Although in some of the cases, it is held that certain transfers were carried out in response to violations of penitentiary rules (*supra* para. 88), it should be underscored that according to the judicial authorities who review them, there is no indication that the disciplinary process set forth in article 79 and following of Law 24,660 was followed.

133. Thus, in the case of Mr. López, the resolution handed down by Criminal Chamber 2 of Neuquén of February 8, 2002, rejecting "*in limine*" the writ of *habeas corpus* filed in response to his transfer to the North Regional Prison in Resistencia, in the province of Chaco (Unit 7), indicates that the transfer was at the request of the Office of Internal Security of the Unit because Mr. López "caused fear among the other inmates housed there [and] had in that Unit committed level two misconduct and level four behavior."[152] However, the subsequent paragraphs of the resolution indicate that the transfer decision made by the Federal Penitentiary Service "aims to ensure better conditions for sentence execution," without referencing the specific disciplinary process set forth in article 79 and following of Law 24,660. In this regard, because there is no indication in the documents provided in the process that the transfer was made in the framework of the disciplinary proceeding, and given that the transfer, as indicated in the cited resolution, was carried out based on the broad authority to ensure better conditions for sentence execution, the Court finds that the transfer of Mr. López must be considered to be discretionary in nature—that is, based on article 72 of Law 24,660.[153]

134. In the case of Mr. Muñoz, the State provided a document indicating that his transfers on May 6, 1997, and October 20, 2005, were carried out because he had committed certain

[151] Written expert testimony provided by Marta Monclús (evidence file, folios 1497 and 1498).
[152] Resolution of Criminal Chamber 2 of Neuquén of February 8, 2002 (evidence file, folio 1316).
[153] Resolution of Criminal Chamber 2 of Neuquén of February 8, 2002 (evidence file, folio 1317).

acts in violation of penitentiary rules.[154] It specifically mentioned orders 396/97 and 4913/2005,[155] but did not add them to the case file in this case.

135. In this regard, the evidence contributed to the case file indicates that Mr. Muñoz's transfer onMay 6, 1997, was based on his alleged participation in an escape attempt, riot, and hostage-taking in Unit 9 that year.[156] However, the decision of Criminal Chamber 2 of Neuquén of May 14, 1997, indicates that the transfer was ordered pursuant to the authorities belonging to the General Office of the Correctional Regimen established in articles 10 and 72 of Law 24,660.[157] It is therefore clear that, although Mr. Muñoz's transfer on May 6, 1997, to Unit 6 in the city of Rawson was justified based on an alleged disciplinary infraction, the special procedures set forth in article 79 and following of Law 24,660 for these cases was not followed. Rather, the transfer was based on the discretionary authority set forth in article 72 of the same law.

136. Also, the transfer of Mr. Muñoz in October 2005 was justified by "penitentiary management" based on a request from Unit 9 due to alleged escape and/or evasion attempts using a firearm.[158] In this case, the evidence is limited to the record produced by the Argentine penitentiary administration, which does not indicate the legal provision on which this transfer was based or whether it was effectively a disciplinary transfer under article 87 and following of Law 24,660 (*supra* footnote 147). The Court therefore finds that the transfer of Mr. Muñoz of October 2005 also must be considered discretionary and based on article 72 of Law 24,660.

137. A reading of the legal framework outlined above, the case files of the judicial proceedings, and the expert witness report of Ms. Monclús finds that the only legal provision regulating transfers between federal prisons as of the time of the facts—disciplinary transfers aside—were article 72 and 73 of Law 24,660. This legal provision has been applied in all the transfers that are the subject of this case.

138. Article 72 only establishes that, when making a transfer, it must be communicated, together with the rationale, to the competent judge; and article 73 establishes that the transfer must be reported to the third parties designated by the person deprived of liberty. Thus, these articles do not establish any parameters to take into account when deciding whether to transfer persons deprived of liberty from one prison to another, nor do they provide criteria to guide authorities in this process. In this regard, the legal provision gives a very broad margin for discretion and does not make it possible for persons deprived of liberty or their relatives or defense attorneys to anticipate the actions of the administration. Likewise, as expert witness Monclús indicated, "it is no accident that the punishment of being transferred to another establishment is almost never formally applied, yet transfers are frequently used as an informal punishment, without providing the detainee with a disciplinary reason but simply ordering their transfer for reasons of "penitentiary management."

139. In this regard, expert witness Monclús indicated that transfers of detainees "are not based on valid reasons of penitentiary procedure and are not subject to judicial oversight," and they are communicated to the judges a day or two before they take place. In many cases, judges are only informed after the transfer. She added that neither the persons deprived of liberty, nor their public defenders, nor their attorneys are notified of the transfer. She stated that the transfers function as "a kind of clandestine punishment of inmates considered 'problematic.'" She noted that the legal framework on the transfers is very deficient, as there

[154] Report produced by the General Inmate Records Division (evidence file, folio 1248 to 1249).
[155] Answering brief (evidence file, folios 245 to 247).
[156] Report produced by the General Inmate Records Division (evidence file, folio 1248).
[157] Resolution of Criminal Chamber 2 of Neuquén of May 14, 1997 (evidence file, folio 1431).
[158] Report produced by the General Inmate Records Division (evidence file, folio 1248) and answering brief, folio 247.

is no executive decree establishing the regulations or a procedure for challenging them. She also commented that it is not taking into consideration whether the transfer involves distancing the person from their nuclear family, and the decisions are limited to noting administrative rationale and available housing space.[159]

140. Likewise, although in this case, it is clear that persons deprived of liberty or their families can challenge the transfers *a posteriori* before administrative or judicial authorities, the truth is, given how the transfer of persons deprived of liberty is regulated under Argentine law, there is no mechanism of prior oversight that takes into account fundamental considerations like the effects that the transfers may have on the rehabilitation of the person deprived of liberty or the impact on their family.

141. Specifically, the Court reiterates that it does not have the official administrative documentation of the Federal Penitentiary Service ordering transfers. However, analysis of the judicial resolutions that are the subject of this case in response to the requests to return to the province of Neuquén or the writs of habeas corpus indicated that almost all of them were justified with the same rationale of "penitentiary management."[160] Based on this argument, the resolutions avoid indicating whether or not there are clear criteria for exercising the discretionary authority established in article 72 of Law 24,660. On the contrary, by assuming that transfer between penitentiary units is the exclusive prerogative of the Federal Penitentiary Service,[161] analysis on the impact of the transfer on the person deprived of liberty or their relatives was generally omitted. Because they materialize the principle of legality, they are presented as the main parameter for evaluation of adherence to the Convention.

142. Based on all this, the Court concludes that the lack of specificity of article 72 of Law 24,660 regarding the scope of action granted to State authorities has enabled an excessive discretionary use of the transfer authority, therefore failing to comply with the legality requirement in the transfers of Mr. López, Mr. Blanco, Mr. González, and Mr. Muñoz. Although it is true that the failure to comply with the requirement of legality is enough to conclude that the measures adopted by the State do not pass the tripartite test regarding the remaining transfers, the Court will proceed to apply the other parts of the test to verify any potential violation of the rights alleged by the Commission and the representatives.

B.3.2 Aim of the measure

143. As regards the legitimate aim sought, the Court notes that the argument employed by the State and by the judges in domestic courts[162] assumes that the Federal Penitentiary

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[159] Written expert testimony provided by Marta Monclús (evidence file, folios 1495 to 1508).
[160] Decisions of Criminal Chamber 2: Nestor Rolando López (evidence file, folios 1263-1264, 1267-1268, 68-69, 75-77), Miguel Ángel González (evidence file, folios 78 to 81), Heriberto Muñoz Zabala (evidence file, folios 1430-1433), Hugo Alberto Blanco (evidence file, folios 142 and 152); Decisions of the High Court of Justice of Neuquén regarding the cassation appeals filed: Néstor Rolando López (evidence file, folios 360-371, 52-67), Miguel Ángel González (evidence file, folios 122-135, 1145-1160), Heriberto Muñoz Zabala (evidence file, folios 1462-1465), Hugo Alberto Blanco (evidence file, folios 1145-1160); Decisions of the High Court of Justice of Neuquén regarding the special remedies filed: Néstor Rolando López (evidence file, folios 372-381), Miguel Ángel González (evidence file, folios 96-106), Hugo Alberto Blanco (evidence file, folios 1161-1173); Decisions of the Supreme Court of the Nation regarding the appeals filed before it: Néstor Rolando López (evidence file, folio 470), Miguel Ángel González (evidence file, folios 136-137), Heriberto Muñoz Zabala (evidence file, folios 138 and 139).
[161] Ruling of the High Court of Justice of Neuquén of November 8, 2000 (evidence file, folio 384).
[162] For Mr. López: Criminal Chamber 2 of the province of Neuquén, ruling of February 11, 1997 (evidence file, folio 1263); High Court of the Province of Neuquén. Ruling No. 67/1997 of November 20, 1997 (evidence file, folios 1284 to 1287); Criminal Chamber 2 of the Province of Neuquén, Interlocutory Resolution 74 of February 8, 2002 (evidence file, folio 1317); Ruling 23/2002 of September 13, 2002 (annexes to the answering brief, evidence file, folios 1344 to 1346). For Mr. González: *Cf.* High Court of Justice of Neuquén, ruling 55/1997 of October 20, 1997 (evidence file, folios 1388 to 1392). For Mr. Muñoz: High Court of Justice of Neuquén, Ruling 58/1997 of November 5, 1997 (evidence file, folios 1457 to 1461). For Mr. Blanco, see: Criminal Chamber 2 of the Province of Neuquén, Interlocutory Record

Service has discretion to establish the best sentence execution conditions, pursuant to their aim of social re-adaptation—central to serving the sentences—because there were not adequate prison facilities in the province of Neuquén.

144. According to the judicial rulings, the authorities held that the transfers were justified based on a lack of prison establishments or infrastructure necessary at the provincial level for the effective rehabilitation of the inmates, which they understood to be a protected right. In the words of the domestic judges in the case of Mr. López:

> In other words: if the court were to apply—as the appellant seeks, without concessions of any kind—the Constitutional requirement he invokes, it would be disregarding the right of the inmate that, pursuant to the historical text of the Constitution (in keeping with the interpretations of its article 31) and now, more decisively, to the incorporation of the aforementioned international treaties, cannot be disregarded. This right is no less than the right to treatment in the penitentiary that is adequate for social re-adaptation; penitentiary treatment that, in this specific case, the court found that the Province, through its detention units, was not capable of providing. Therefore, (...) it had to be concluded to place the inmate in a federal penitentiary service facility.[163]

145. It should be underscored that this argument was reiterated almost word for word by the judges in the cases of Mr. Blanco,[164] Mr. González,[165] and Mr. Muñoz.[166]

146. However, one of the transfers of Mr. Blanco and another of Mr. Muñoz were justified on the grounds of "security." As mentioned by the representatives, Mr. Blanco had been transferred as punishment in retaliation for allegations filed against a prison official.[167] It is noted that the Interlocutory Record of November 22, 2004, of Criminal Chamber 2 of the Province of Neuquén indicates that the reason Mr. Blanco was transferred was to protect his safety, specifically in the framework of incidents that took place in Unit 9, which are related to other incidents that took place in Unit 11.[168] However, in the expansion of the *habeas corpus* to which the court was responding, the representatives of Mr. Blanco indicated that the transfer had been a form of punishment ordered outside the corresponding disciplinary process.[169] Regarding the grounds for this transfer, the domestic court did not take the pleadings of Mr. Blanco into consideration and issued the Interlocutory Record on November 22, 2004. It therefore based its decision on the need to protect his physical safety due to the background of mistreatment that he had reported and the impossibility of transfer to another closer provincial unit (for example, Unit 11 of Neuquén) because of Mr. Blanco's record of escapes and escape attempts.[170] It concluded that "this measure is not arbitrary, as alleged, and is the result of the needs expressed by the Correction Council of the Unit, which also cannot be dismissed as irrational."[171]

329/04 of November 22, 2004 (evidence file, folios 141 to 143), and Interlocutory Record 333/04 of November 23, 2004 (evidence file, folios 152 and 153); High Court of Justice of Neuquén, Ruling 14/2005 of April 25, 2005 (evidence file, folios 1146 to 1160).

[163] High Court of Justice of the Province of Neuquén. Ruling No. 67/1997 of November 20, 1997 (evidence file, folios 1283, 1284, and 1287). In the case of Mr. López, in this same regard, see Ruling 23/2002 of September 13, 2002 (evidence file, folios 1342 and 1343).

[164] High Court of Justice of Neuquén, Ruling 14/2005, of April 25, 2005 (evidence file, folios 1149, 1150 to 1152).

[165] High Court of Justice of Neuquén, Ruling 55/1997 of October 20, 1997 (evidence file, folio 1391).

[166] High Court of Justice of Neuquén, Ruling 58/1997 of November 5, 1997 (evidence file, folios 1460 and 1461).

[167] It should be noted that the relatives mention the injuries and the launch of the investigation. *Cf.* Statement given before notary public by Mirta del Carmen Fernández (evidence file, folio 1484); Statement given before notary public by Carina Andrea Maturana (evidence file, folios 1485 and 1486).

[168] Interlocutory Record of November 22, 2004 of the Criminal Chamber 2 of the Province of Neuquén (evidence file, folios 141 and 142).

[169] Expansion of *habeas corpus* (evidence file, folios 148 to 150).

[170] *Cf.* Ruling of November 22, 2004 (evidence file, folios 142 and 152).

[171] Interlocutory Record of November 22, 2004, folios 152 and 153.

147. As regards the transfer of Mr. Muñoz for security reasons, it took place in May 1997 in response to an alleged attempt at escape.[172] Without prejudice to this, although the alleged reasons for the transfer centered on security criteria and escape attempts (which could have entailed the application of the disciplinary legal provisions), the transfer, as indicated, was effectively based on article 72 of Decree 24,660.

148. In this regard, the Court recalls the expert witness report of Marta Monclús, which indicated that transfers had been used as a means of punishing persons deprived of liberty outside the bounds of the law.[173]

149. Now with clarifications made about the transfers that are the subject of this case, the Court observes that the juridical reason justifying the agreement between the Province of Neuquén and the National Penitentiary Service for transferring persons deprived of liberty was based on concerns about guarding and treating accused and convicted persons.[174]

150. In view of this, the Court finds that the rationale for the transfer from provisional to federal prisons and the rationale used by domestic judges to justify the transfer between federal prisons was precisely the need to provide persons deprived of liberty with "better conditions," "the necessary conditions," or "safety" for serving their sentences, for the purposes, at least formally, of fulfilling the purpose of the re-adaptation of the convicted person, such that the legitimacy of the explicit aim of the transfers is satisfied.

151. Taking this into account, the Court notes that the transfers of Mr. López, Mr. González, Mr.Blanco, and Mr. Muñoz, which were effectively subjected to *post hoc* judicial oversight,[175] at least formally, pursued the legitimate aim of seeking to provide them with better conditions for serving their sentences with a focus on their social re-adaptation, or even to guarantee their safety.

B.3.3 Suitability, necessity, and proportionality

152. Lastly, with regard to the requirement of suitability, necessity, and proportionality of the measure, the Court observes that the decisions in the framework of the requests for transfer and writs of *habeas corpus* filed, as well as the respective cassation decisions, used an argument based on the general conditions for serving the sentence, and even repeated the argumentation of the other decisions, generally without regard to the factual or juridical circumstances of each case.[176] That is, no specific examination was carried out of the prison conditions of each of the victims.

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[172] Report produced by the General Inmate Records Division (evidence file, folio 1248); Resolution of May 14, 1997 (evidence file, folios 1430 and 1431).

[173] Written expert testimony provided by Marta Monclús (evidence file, folio 1497).

[174] Agreement between the National Penitentiary Service and the Province of Neuquén. Article First: The Federal Penitentiary Service will provide to the Province of Neuquén the service of guarding and holding defendants and those convicted in that provincial jurisdiction until it is financially and technically able to build and equip its own prison facilities (evidence file, folio 1230).

[175] On May 5, 1997, Miguel Ángel González Mendoza was transferred to the Federal Capitol Detention Institute (Unit 2) for transitory housing, and later transferred to the North Regional Prison (Unit 7) (evidence file, folio 1242, in relation to folio 108); on October 25, 1997, he entered Unit 9 from the Federal Capitol Detention Institute (Unit 2), in transit from the North Regional Prison (Unit 7) (evidence file, folio 1242 and 1243, in relation to folio 83); Mr. Muñoz Zabala was transferred on May 6, 1997, to the Institute for Security and Resocialization (Unit 6) (evidence file, folio 1248 in relation to folio 1426); in February 1997, Mr. López was transferred to the Rawson Federal Jail (evidence file, folios 1265 and 1269); in February 2002, he was transferred out of the province of Neuquén (evidence file, folio 1314).

[176] The Court notes that the *habeas corpus* rulings for Mr. López and Mr. Blanco justified the transfers based on the "impossibility" of transfer to a provincial unit due to alleged escape attempts, the need to protect their personal

153. These domestic judicial rulings focused on the general authorities of Federal penitentiary administrators to transfer persons deprived of liberty for reasons related to the conditions of sentence execution and for the purposes of the convicted person's re-adaptation. However, they contained no analysis related to the specific situation of the province of Neuquén, the Neuquén prisons, or Federal Unit 9 of Neuquén.

154. Additionally, in response to the alleged violation of the alleged victims' right to humane treatment, some judicial decisions limited themselves to requiring the penitentiary administrators to prepare "regular reports to lessen any possible harmful impacts" of the transfers.[177] That situation was made clear by the minority position of some of the decisions made by the High Court of Justice of Neuquén,[178] which also noted the failure to verify the detention conditions in that province and the threats to personal integrity reported by the persons deprived of liberty. It should also be noted that the State has claimed that the temporary transfers for family visits were sufficient for persons deprived of liberty to be able to maintain relationships with their family members. However, as observed from the evidence submitted,[179] these transfers or visits were very short, and they could be years apart from each other (*supra* paras. 44, 61, 62, 63, 68, and 70). Thus, this measure was absolutely insufficient in this specific case to protect the rights of the alleged victims and of their family members.

155. Another relevant point regarding these judicial resolutions is that none of them contain a real and concrete assessment of the impact on the families of the appellants. At no time were the distances that families must travel addressed; children were not heard in cases in which their rights were affected; and, with some exceptions detailed later on (*infra* para. 158), the possible impacts the transfers could have on family life and the social re-adaptation process of the convicted persons were not examined. The resolutions also did not consider impacts on contact with defense attorneys and with the sentence execution court. All of these issues were raised by the alleged victims in their appeals.[180] After denying the request by the

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integrity (evidence file, folios 141 to 143), that the "inmate caused terror among the inmates house there," and the lack of "suitable and adequate" facilities (evidence file, folios 1316 to 1318).

[177] See High Court of Justice of Neuquén, Interlocutory Ruling 73 of April 21, 1998, in the case against Miguel Ángel González Mendoza (evidence file, folio 1392); High Court of Justice Neuquén, Ruling 58 of November 5, 1997 in the case against Muñoz Zabala (evidence file, folios 1461).

[178] See Ruling No. 23/2002 (evidence file, folios 1349 and 1350) and Ruling No. 14/2005 (evidence file, folios 1157 and 1158): "The argument that the transfer appealed can be based on the grounds that the penitentiaries located in the province are not suitable for the readaptation of the inmate is not convincing. Were it true, which I do not think it is based on my more than 40 years of judicial experience, all the convicted persons would have to immediately be order transferred to other jurisdictions, which is clearly absurd. The prisons are not full of nice young ladies; and it is natural and to be expected that tense and highly alarming and disagreeable situations would take place there, and that is why the personnel in charge must be prepared. Therefore, making decisions without consultation on transfers due to incidents characteristic of the place (unless there is clear danger to life and no other possibility of relocation elsewhere in the province [a hypothesis, to my knowledge, that is unverified] would appear at the least to be an attitude of laziness and naivete on the part of penitentiary authorities, that somehow prevails over the jurisdiction of local judges established by the National Constitution."

[179] Resolution of September 13, 2002 (evidence file, folios 61 to 67). Resolution of November 22, 2004 (evidence file, folios 311 to 313); Report produced by the General Inmate Records Division (evidence file, folio 1248 to 1249); Resolution of February 18, 1997 (evidence file, folios 1273). Resolution of October 9, 1997 (evidence file, folio 1278).

[180] Regarding Néstor Rolando López: minutes of hearing before the Federal Court of Rawson, January 17, 1997, in which transfer is requested for family bonding (evidence file, folio 356); request for transfer before Criminal Chamber 2 of February 11, 1997 due to the distance from place of residence, arguing it had caused "a loss of contact with his family and with all other next of kin" (evidence file, folio 1265); cassation appeal of February 25, 1997, requesting transfer due to distance from place of residence and his family (evidence file, folio 1271); special federal appeal of December 3, 1997, requesting transfer due to distance from place of residence, family, and judicial body supervising sentence execution (evidence file, folio 1293 and 1297); minutes of hearing before Federal Court of March 22, 2000, in which permanent transfer was requested due to distance from his family and lawyer (evidence file, folios 158 and 159); *habeas corpus* before Criminal Chamber 2 of November 3, 2000, requesting transfer for family bonding and for having allegedly been physically and psychologically assaulted by penitentiary personnel (evidence file, folios 167 and

public defender for a permanent transfer to Neuquén, two of the decisions established that the convicted person could eventually enjoy the right to "special visits." This measure could "protect – with certain reasonability – any impacts on the nuclear family that the transfer could entail."[181] Another judgment ordered that a copy of it be sent to the administrative authority so that "in the absence of serious and well-founded reasons for deciding otherwise, and if compatible with the treatment, it order his permanent return to that jurisdiction in order to facilitate the inmate's relationships with his relatives."[182]

156. Additionally, in the case of Mr. Blanco, the Court has found it to be proven that one of his transfers took place as a consequence of complaints he submitted of abuse. Regarding this, this Court notes the arguments presented by the State and the judges domestically. According to these arguments, the aim of this measure was to protect Mr. Blanco's integrity by preventing retaliation from the guards in the two units where he was being held (*supra* para. 71.). The Court notes that, according to the State's argument, although the transfer could be effective at preventing potential harm to Mr. Blanco, it did not constitute a suitable means for protecting the other persons deprived of liberty in Units 9 and 11 from the State agents whose actions were causing harm to their personal integrity. This situation is not acceptable, given the general qualified obligations to respect and guarantee that States have with regard to persons deprived of liberty. That said, under the assumption that Mr. Blanco's transfers sought a legitimate aim, the measure was neither suitable nor necessary, as he was harmed for reporting abuse allegedly at the hands of officials. A more appropriate measure that would have also been less harmful to Mr. Blanco would have been launching an investigation into his allegation and preventatively removing the officials accused of threatening and attacking Mr. Blanco, thereby protecting not only his personal integrity but also that of the other persons held in Units 9 and 11.

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168); minutes of hearing before Federal Court of January 4, 2001, during which permanent transfer was requested for family bonding and so his lawyer could be in contact with him (evidence file, folios 161 and 162); *habeas corpus* before Criminal Chamber 2 of February 8, 2002, requesting transfer for family bonding (evidence file, page 1314); cassation appeal of February 18, 2002, seeking restoration to the jurisdiction of his province of residence due to violation of his right to not serve his sentence far from his family, execution judges, or legal defense. Also alleges direct impact on the rights of relatives to visit him and on the principle of non-transference of punishment (evidence file, folios 1320-1330); letter sent to Chamber Judge, May 27, 2003, requesting transfer for family bonding and for being located far from judge of origin (evidence file, folio 73 and 74); regarding Miguel Ángel González Mendoza: urgent request and *habeas corpus* before Criminal Chamber 2 of May 9, 1997, requesting transfer on the grounds that being held in a prison far from his place of residence has caused loss of contact with family and prevented him from receiving technical assistance from his defense attorney and made it impossible to contact his sentence execution judge. It also alleges impact on the right of his family to visit him (evidence file, folios 109 and 110); cassation appeal, May 29, 1997, arguing that the distance from his place of residence has violated his rights to maintain contact with his relatives and defense attorney, and to be close to his sentence execution court. Also alleges impact on the rights of relatives to visit him and on the principle of non-transference of punishment (evidence file, folios 112 to 121); regarding Heriberto Muñoz Zabala: urgent request for transfer and *habeas corpus* before Criminal Chamber 2 of May 9, 1997, requesting transfer due to loss of contact with family, obstacles to contacting and receiving assistance from defense attorney, and impossibility of contacting sentence execution judge. Also alleges impact on the rights of relatives to visit him and on the principle of non-transference of punishment (evidence file, folios 1426 to 1428); cassation appeal before Criminal Chamber 2 of May 29, 1997, requesting transfer for being totally isolated from his family, his legal defense, and his sentence execution judges. Also alleges impact on the rights of relatives to visit him and on the principle of non-transference of punishment (evidence file, folios 1434 to 1444); regarding Hugo Alberto Blanco: brief of expansion of habeas corpus before Criminal Chamber 2, no date, requesting transfer to the prison in his place of residence, as distance has deprived him of contact with his relatives and made regular contact with his defense attorney difficult. Also alleges impacts on the right of his children and other relatives to visit him (evidence file, folios 149 and 150).

[181] Resolution of the High Court of Justice of September 13, 2002, regarding the writ of cassation filed by Néstor López (evidence file, folio 61) and resolution of the High Court of Justice of April 25, 2005, regarding writ of cassation filed by Hugo Blanco (evidence file, folios 1153 and 1154).

[182] Resolution of Criminal Chamber 2 of May 14, 1997, regarding the petition filed by Miguel González (evidence file, folio 80) and Resolution of Criminal Chamber 2 of May 14, 1997, regarding the petition filed by José Muñoz Zabala (evidence file, folio 1431).

157. Likewise, even if Mr. Blanco's transfer from Unit 9 of Neuquén to the Rawson Security and Resocialization Institute (Unit 6) pursued legitimate aims—those being the need to protect his personal integrity while the corresponding investigations into the abuse reported were conducted and the need to ensure that his sentence was served given the impossibility of transferring him to another unit in Neuquén due to his flight attempts—the measure is not considered to have been proportional. As can be noted from the report issued by the General Inmate Records Division, more than two years and two months passed between the execution of the transfer—that is, November 18, 2004—until his return to South Regional Prison (Unit 9) of Neuquén on February 5, 2007. During that period, he had access to special visits for family reunification on only three occasions, with several months between them and for a total period of 60 days over all three visits.[183] Although to some degree, the transfer could have met the urgent need of protecting Mr. Blanco's personal integrity, its length and lack of timely monitoring by the execution judge to ensure it was temporary and guarantee his right to be close to his family meant that the transfer measure was not proportional in view of its intense impact on contact with his family.[184]

158. Thus, in view of the lack of concrete and objective analysis of the situation of Neuquén provincial prisons, as well as the lack of detailed and specific analysis on the personal and family situations of Mr. Muñoz, Mr. López, Mr. González, and Mr. Blanco at the moment of their transfer to prison facilities located between 800 and 2,000 km away and during judicial review, the Court concludes that these transfers were neither suitable, nor necessary, nor proportional. Without prejudice to this, the Court notes that Néstor López, Miguel González, José Muñoz Zabala, and Hugo Blanco were transferred several times among federal detention

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[183] Report produced by the General Inmate Records Division (evidence file, folio 1254).

[184] Regarding this, the necessarily temporary nature of orders restricting contact with families for reasons of security and order have been addressed by article 43(3) of the Nelson Mandela Rules, which holds that "The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order."

facilities,[185] without the case file indicating, in general,[186] any justification for it and without weighing the effects of those transfers on their relatives, the re-adaptation of the convicted persons, or access to their defense attorneys and the court responsible for supervising sentence execution. Lastly, given the lack of judicial review prior to each transfer, and because subsequent review was insufficient for correcting the violations alleged by the convicted persons, it is concluded that the transfer authority employed by federal prison administrators and approved by the judges was used arbitrarily.

B.3.4 Conclusion of the rights restriction test

159. Therefore, the Court concludes that by transferring Néstor López, Hugo Blanco, Miguel González, and José Muñoz to prisons located far from the province of Neuquén without prior or subsequent evaluation of the impacts on their private lives and family circumstances, the State failed to comply with its obligation to take actions to protect persons from arbitrary or

[185] i) Néstor Rolando López was transferred on January 11, 1997, from South Regional Prison of the province of Neuquén (Unit 9) to the Rawson Security and Resocialization Institute of the province of Chubut (Unit 6). During 2002, he was in the North Regional Prison in Resistencia, in the province of Chaco (Unit 7). On September 24, 2003, he was again transferred to Unit 6. The representatives allege that in 2000, Mr. López was temporarily transferred to Unit 9 for a special visit for family bonding; ii) on March 12, 1993, Miguel Ángel González Mendoza was placed in Unit 9 to serve his sentence. On March 18, 1994, he was transferred to Unit 6. On August 20, 1996, he was transferred to Unit 9 for family bonding. On April 4, 1997, he was transferred to Unit 6. On April 24, 1997, he was transferred back to Unit 9. On May 5, 1997, he was temporarily transferred to the Marcos Paz Federal Institute in the province of Buenos Aires (Unit 2). On May 16, 1997, he was transferred to Unit 7. On October 19, 1997, he was temporarily transferred to Unit 2, with Unit 9 as the final destination. On October 24, 1997, he was temporarily transferred to Unit 7, with Unit 9 as the final destination. On November 5, 1997, he was transferred to Unit 6. On August 26, 1999, he was released on parole. On December 15, 2001, he entered Unit 6, from Unit 5. On May 19, 2002, he was again transferred to Unit 5. On May 30, 2004, he entered Federal Penitentiary Complex 1 of Ezeiza, in the province of Buenos Aires (Unit 1), from the Neuquén Penitentiary Service (Unit 11). On June 11, 2004, he was transferred to Unit 7. On December 1, 2004, he was transferred to Unit 2. On December 9, 2004, he was transferred to Unit 6. On March 11, 2006, he was transferred to Unit 9. On March 30, 2006, he was transferred to Unit 6. On November 30, 2006, he was granted parole; iii) José Heriberto Muñoz Zabala entered Unit 9 on April 28, 1987, and was released on July 31, 1987. He reentered on April 24, 1989, on admission to the Subprefect Miguel Rocha Penal Colony and was released on March 23, 1991, after finishing serving his sentence. On August 14, 1996, he reentered Unit 9. On May 6, 1997, he was transferred to Unit 6 because "he participated in a riot and hostage-taking" in Unit 9. On May 21, 1998, he was released on parole. On December 2, 1998, he entered Unit 9, and on January 8, 1999, he was transferred to Unit 5. On April 8, 2001, he entered Unit 9, from the Bahía Blanca Unit. On October 20, 2005, because of escape and/or flight attempts using a firearm, he was temporarily transferred to Unit 1, with Unit 7 as the final destination. On October 21, 2011, he was transferred to Unit 11 to be close to family. The representatives allege that in 2009, Mr. Zabala was being held in Unit 7; and iv) Hugo Alberto Blanco entered Unit 9 on September 4, 2002. On November 18, 2004, he was transferred to Unit 6. On December 8, 2004, he was transferred to Unit 9 to appear at court in Neuquén. On January 30, 2005, he was returned to Unit 6. Between March 20, 2005, and April 5, 2005, he was transferred to Unit 9 for a special visit and then later returned to Unit 6. On July 5, 2005, he was transferred to Unit 9 for a special visit, but his sister was ill, and on August 18, 2005, he was returned to Unit 6. On March 11, 2006, he was transferred to Unit 9 for 20 days, and on May 20, 2006, he was returned to Unit 6. On February 5, 2007, he was transferred to Unit 9. On July 20, 2007, he was transferred to the Third Precinct of Neuquén and did not return to federal facilities.

[186] In the case of Hugo Blanco, the resolution of Criminal Chamber 2 of November 22, 2004, justified his transfer on the grounds of security, given that he had a background of an escape and an escape attempt. Additionally, the following resolutions do contain some rationale establishing why the interest of family reunification was not to prevail: cassation resolutions of the High Court of Justice of October 20, November 5, and November 27, 1997, in which it indicated that "if the court were to apply—as the appellant seeks, without concessions of any kind—the Constitutional requirement he invokes, it would be disregarding a right of the inmate (...) This right is no less than the right to treatment in the penitentiary that is adequate for social re-adaptation, penitentiary treatment that, in this specific case, the execution court found that the Province, through its detention units, was not capable of providing. Therefore, (...) it had to be concluded to place the inmate in a federal penitentiary service facility (evidence file, folios 131, 1460, and 368); cassation resolution of the High Court of Justice of April 25, 2005, in which it found with regard to potential impacts on the rights of the other relatives of the inmate that "in view of the particular connotations of the case, the inmate could enjoy the right (if all the conditions are met) to "special visits" (not a permanent transfer, as the defense requests herein); visits that are explicitly provided for by article 41 (and related provisions) of decree 1136/1997 (regulations for chapter 11, family and social relationships, of Law 24,600); thereby protecting – with a certain degree of reasonability – any eventual impact the transfer may entail for the nuclear family" (evidence file, folios 1153 and 1154).

illegal interference in their private and family lives,[187] as well as its obligation to foster effective respect for family life.[188] Additionally, the continual transfers impacted the physical and psychological well-being of the persons deprived of liberty (*infra* paras. 187), with impacts on their family members.[189] They also impeded contact with their defense attorneys (infra para. 208). Also, in this case, the separation of Mr. López and Mr. Blanco from their families was particularly grave in view of the fact that the separation impacted the rights of their children, who were minors at that time[190] (*infra* para. 178).

160. Thus, the Court finds that there is no clear legal framework other than the disciplinary one, which left room for arbitrary, improper, unnecessary, and disproportionate transfers, leading to international responsibility for the Argentine State. The State is likewise internationally responsible for the separations caused by those transfers in terms of the rehabilitation process and family life of each of the persons deprived of liberty.

161. Therefore, the Court has concluded that the Argentine State does not have appropriate regulations for the transfers that fall under article 72 of Law 24,660 between prisons at the federal level. The result is that persons deprived of liberty can be transferred arbitrarily. Also, in this case, the practice was approved by judges conducting subsequent review insofar as they repeatedly permitted the National Penitentiary Service absolute discretion to assign the convicted persons to the location where they would serve their sentences, without taking into account or verifying the particular and family circumstances of each person deprived of liberty. Thus, there were no clear criteria for administrative authorities making the transfers to follow, nor was there effective judicial review of the assessments made by these authorities. This practice also resulted in impacts on the relatives of the inmate subjected to arbitrary administrative decisions.

162. The Court therefore concludes that Argentina is responsible for violating the rights to humane treatment, to the essential aim of reform and re-adaptation of the convicted person, to not be subject to arbitrary or abusive interference in one's private and family life, and the family, pursuant to articles 5(1), 5(6), 11(2), and 17(1) of the American Convention, in relation to articles 1(1), 2, and 30 of the Convention, to the detriment of Néstor López, Hugo Blanco, José Muñoz Zabala, and Miguel Ángel González.

B.3.5 The relatives of Néstor López and Hugo Blanco

163. Thus far, the Court has found that Argentina acted in violation of the rights of Mr. López, Mr. Blanco, Mr. Muñoz, and Mr. González with regard to the transfers to prisons far from Neuquén province. It has also been asked to recognize some relatives as victims as a consequence of the same transfers, but from a different approach than what the Court normally takes. This is in view of the effects that the transfers allegedly had on their rights to privacy (Article 11 of the Convention), family life (Article 17 of the Convention), and the ban on punishments extending beyond the person being punished (Article 5(6) of the Convention). Based on the content of the Report on the Merits of the Inter-American Commission on Human

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[187] *Cf. Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, para. 71; *Case of the "Las Dos Erres" Massacre*, para. 188, and *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, para. 404.

[188] *Cf. Case of the "Las Dos Erres" Massacre v. Guatemala*, para. 189, and *Case of Vélez Restrepo and Relatives v. Colombia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 3, 2012. Series C No. 248, para. 225

[189] See the testimony given before a notary public on February 25, 2019, by Mirta del Carmen Fernández, María Rosa Mendoza, Enzo Ricardo Blanco, Camila Andrea Blanco, Carina Andrea Maturana, Magdalena del Carmen Muñoz Zabala (evidence file, folios 1482 to 1487); and testimony given before a notary public on June 18, 2018, by Sandra Elizabeth López (evidence file, folios 1492 to 1494).

[190] *Cf. Case of Ramírez Escobar*, para. 165.

Rights, in this judgment, the Court will only consider the following relatives of Néstor Rolando López and Hugo Alberto Blanco (respectively) as alleged victims: Lidia Mabel Tarifeño (first wife), Silvia Verónica Tejo de López (second wife), Sandra Elizabeth López (sister), Nicolás Gonzalo Tejo López (son), Nicolás López (father) and Josefina Huichacura (mother); and Carina Fernández (sister), Mirta del Carmen Fernández (mother) and Enzo Ricardo Blanco and Camila Andrea Blanco (children) (*supra* para. 36).

164. Additionally, the Court observes that the aforementioned relatives consistently expressed their desire to visit and be close to their relatives deprived of liberty and their desire to obtain from the State the protection of the rights supposedly violated.

165. As indicated above, Mr. López and Mr. Blanco were transferred to units located 800 and 2,000 km away from Neuquén. This meant additional expenditures were required to visit them that their relatives could not cover due to their socioeconomic conditions.[191] As the Court has indicated previously in its case law, this situation can affect the right to family life.[192] Additionally, as described above, in this case, the transfers were made by the Secretary of Penitentiary Affairs using a broad degree of discretion, thereby violating the standards for restricting rights established by this Court (*supra* paras. 161). In this regard, the evidence provided in the case file indicates that the distance amounted to an enormous difficulty and near impossibility for the relatives of Mr. López and Mr. Blanco to be able to maintain minimum contact with them because of their lack of economic resources, their labor commitments, and their health conditions. Also, this case does not indicate any relevant measures taken by the government to facilitate family contact and support the rehabilitation process, in particular with regard to the primary school-age children. The infrequent and brief "special visit" transfers that took place in Mr. Blanco[193] and Mr. López's[194] cases could not substitute for ongoing, physical contact between persons deprived of liberty and relatives that was required, including for the social rehabilitation of the convicted persons.[195]

166. In this regard, expert witness Monclús indicated that the transfers to such faraway places are an obstacle to families visiting persons deprived of liberty, as these families often have few resources and do not have the income necessary for tickets or lodging. Additionally, they lose workdays to make the visits, generally in unstable working conditions. Therefore, she concluded that children and young people visit their parents very infrequently, which impacts their proper physical and mental development.[196]

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[191] See statements given before notary public by Miguel Ángel González (evidence file, folio 1481); Sandra Elizabeth López (evidence file, folio 1492); and the statement given by Néstor Rolando López during the public hearing.

[192] *Cf. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, para. 400.

[193] On December 8, 2004, he was transferred to Unit 9 to appear at court in Neuquén. On January 30, 2005, he was returned to Unit 6. Between March 20, 2005, and April 5, 2005, he was transferred to Unit 9 for a special visit and then later returned to Unit 6. On July 5, 2005, he was transferred to Unit 9 for a special visit, but his sister was ill, and on August 18, 2005, he was returned to Unit 6. On March 11, 2006, he was transferred to Unit 9 for 20 days, and on May 20, 2006, he was returned to Unit 6.

[194] In 2000, he was transferred temporarily to the Neuquén unit as a special visit for family bonding.

[195] UN. Human Rights Committee. *Communication No. 14737/2006*. CCPR/C/95/D/1473/2006. April 24, 2009; UN. Standard Minimum Rules for the Treatment of Prisoners: "Contact with the outside world 37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits [...] 44(3).Notification of death, illness, transfer, etc. Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution"; UN. Nelson Mandela Rules, Rule 43.3; UN. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.* Resolution A/RES/43/173 adopted on December 9, 1988, by the General Assembly. Principle 16.1; UN. *Bangkok Rules.* Rule 4; IACHR. *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.* Principle IX; Council of Europe. *Recommendation No. R(87)3 of the Committee of Ministers to Member States on the European Prison Rules*.

[196] Written expert testimony provided by Marta Monclús (evidence file, folio 1495 to 1508).

167. Added to this are a series of allegations of abuse of the relatives during the few visits they were able to make to their loved ones, along with revictimizing situations to which they were subjected both inside and outside the prisons.[197] As regards the family of Mr. López, the statement of Sandra Elizabeth López is illustrative of what some of his relatives have suffered:

> [...] his wives, Lidia Trifeño and Verónica Tejo, almost never saw him. Verónica wrote a lot of letters to be brought to him. She was in a lot of pain because of this whole situation, the same as their son, Nicolás Tejo López, who went to see him when they could and suffered a lot from the situation, and as a result of which, they both resented each other.
>
> My younger brothers, Pablo, Guillermo, and Lucas, went to see him when he was in Unit 9 of Neuquén. Then they had to pay for a trip and they did not have work. They did not go to see him again. [...]
>
> A month and a half ago, I started therapy for the first time in my life at the Centenario hospital with a psychologist. This was because of my separation from my partner, and that's where I realized the bigger pain I have it is for my brother. I ended up talking about what had happened to my brother and crying. I have no problem with the police, now they're saying 'I knew the bad police' because I was the relative of a prisoner they treated me like a criminal, and they beat my brother every time they transferred him. They denigrated me every time I visited him. We were never able to eat a cake with him. They destroyed it. Both here in Neuquén and in Rawson they made me do squats because I did not let them stick their fingers in my private parts and we had to take off our clothes. I've gotten use to it, and I did it for the sake of seeing my brother, but for my mother it was terrible. One time they made her open her legs and I heard her screaming and I shouted my way in and they stopped.

168. Mirta del Carmen Fernández issued a similar statement when requesting the transfer of Hugo Blanco for visits.

> We could not travel because we didn't have the money and because I had to attend to my daughter Carina Fernández, who was sick with cancer. They sent me and Carina to talk with the head of Unit 9 of the Federal Penitentiary Service here in Neuquén, Commissioner Amarilla. He met with us and asked why we were there, and we said because Hugo Blanco was in Rawson and we wanted to see him. So he said "but not now, on Monday." We told him no, we could not go back because Carina had cancer. Then he said "I don't think you're so sick, look at you, you're all done up and pretty." And then she said to him "what, do you want me to come here dirty and poorly dressed" and "you don't think I look sick," and she lifted up her clothing in the back where she had a catheter and then she lifted up her clothing in front and showed the colostomy bag she had because of the cancer. Then Amarilla covered his face and said "cover yourself woman cover yourself." Then he told the secretary to draw up the papers and that we can sign them on Monday, and we said no, we were not going to leave until he gave us the transfer papers. The following Monday, they transferred Hugo.[198]

169. Another example are the impacts experienced in the case of Enzo Ricardo Blanco, who was severely affected by separation from her father:[199]

> So that's how I suffered every time they transferred him and I could not go see him. I was depressed for a long time when they transferred him, I didn't want to go to school, I spent the time closed up in my room. I missed his presence. The time he was gone was

[197] See, for example, the statement given before notary public of February 25, 2019, by Mirta del Carmen Fernández (evidence file, folio 1483).
[198] Statement given before a notary public on February 25, 2019, by Mirta del Carmen Fernández (evidence file, folio 1483).
[199] Statement given before a notary public on February 25, 2019, by Enzo Ricardo Blanco (evidence file, folios 1484 and 1485).

> too long for me. At school, they sent me to the psychologist. I was in treatment for two years, and they cut the amount of hours I was at school. I had 2 1/2 hours fewer than the other kids. [..] Every time I went to visit the prison, they mistreated me even though I was very young. They took off everything, even my underwear, to search me. The times I went and saw my dad all beaten up broke my heart. I didn't know what had happened. He didn't tell me, he said he fell.

170. Additionally, the record shows that Camila Andrea Blanco and Enzo Blanco, the children of Hugo Alberto Blanco, were under the age of 18 at the time of the facts. In this regard, as established *supra* (paras. 161 and 162), the resolutions of the judges who handled the remedies presented by the lawyer of Mr. López and Mr. Blanco asking the persons deprived of liberty to be transferred back to the Province of Neuquén did not conduct a review of the specific situation of family separation, the minor children, and the serious health problems affecting immediate family, even though the lawyer noted the possible harmful impacts of holding them in prisons far from the province of Neuquén.[200]

171. Without prejudice to this, the Court recalls that interference in the right to family life is more grave when affecting the rights of children. As established in Article 19 of the Convention, and pursuant to the international *corpus juris* on the rights of children, States have an obligation to hear children in processes in which their rights are to be determined or affected and must weigh their best interest against the more restrictive measure to transfer parents to faraway detention centers. In this regard, the Convention on the Rights of the Child establishes in its Article 9 that States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.[201]

172. In this regard, the general objective of protecting the principle of the best interest of the child is, in itself, a legitimate aim, as well as an imperative one. In this regard, it should be noted that in order to ensure, to the degree possible, that the best interest of the child takes precedence, the preamble of the Convention on the Rights of the Child establishes that it requires special protection and assistance, while Article 19 of the American Convention indicates that children must receive "special measures of protection."[202]

173. As regards the separation of the child, the Court has found that children must remain in their nuclear families unless there are decisive reasons—based on their best interest—to separate them from their families. In any event, the separation must be exceptional and—

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[200] Urgent transfer request and habeas corpus of May 9, 1997, for Miguel Angel González Mendoza (evidence file, folios 108 to 110); Expansion of habeas corpus before Criminal Chamber 2 to the benefit of Hugo Blanco (evidence file, folios 148 to 150); Statements of Néstor López before the Federal Court of March 22, 2000, and January 4, 2001 (evidence file, folios 157 to 159 and 161 to 162); Special Federal Appeal of November 4, 1997, for Miguel Ángel González Mendoza (evidence file, folios 83 to 95); Hearing, statement of Néstor López requesting transfer for family bonding and *amparo*, March 13, 1997 (evidence file, folios 163 to 165); Writ of *habeas corpus* for Néstor López (evidence file, folios 167 to 173).

[201] UN. Convention on the Rights of the Child, Article 9(3). Also see Article 9(4): "Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."

[202] *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 146, and *Case of Ramírez Escobar et al. v. Guatemala*, para. 150. See Convention on the Rights of the Child, Article 20: "1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child [...]."

preferably—temporary.[203] In this case, it is clear that separating Mr. López and Mr. Muñoz from their children was initially justified by the criminal conviction and sentence. Therefore, with regard to the later transfers to prison facilities very far from the place of residence and, in particular, from their children, what was needed was for administrative and judicial authorities to consider the effect of such measures on the development, private life, and family life of the children beyond the restriction inherent to the physical separation involved in deprivation of liberty.

174. That is, in the decisions on the transfers and on the remedies seeking the return of the persons deprived of liberty to Neuquén, State authorities needed to explicitly consider and provide a rationale for the decision and how they had weighed the interests of children against other considerations, either general legal concerns or specific cases.[204]

175. These harmful impacts are effectively demonstrated in this case by the testimony of all the relatives who gave statements before notaries public in the process before the Inter-American Court.[205]

176. Additionally, the statements given by María Rosa Mendoza, Enzo Ricardo Blanco, and Carina Andrea Maturana indicated that they were subjected to abuse and mistreatment during the security searches when they entered the prisons for visits.[206]

177. Additionally, several statements from relatives of Hugo Blanco and Néstor López described suicide attempts because of the suffering caused by their inability to see their husbands or fathers.[207]

178. The result of all these abovementioned factors is that the measures adopted by State authorities for Mr. López and Mr. Blanco to serve their sentences in prisons located far from the Province of Neuquén also affected their relatives. This meant that the punishment extended to the relatives of the convicted persons, causing them harm and suffering beyond what would be inherent to a sentence of deprivation of liberty. Therefore, the Court concludes that Argentina is responsible for the violation of the rights to humane treatment, the prohibition that the punishment extend beyond the person being punished, the right to not suffer arbitrary interference in private and family life, and the right to family, set forth in articles 5(1), 5(3), 11(2), and 17(1) of the American Convention, in relation to Article 1(1) of the Convention, to the detriment of Lidia Mabel Tarifeno, Silvia Verónica Tejo de López, Sandra Elizabeth López, Nicolás Gonzalo Tejo López, Nicolás López (father) and Josefina Huichacura (relatives of Néstor López); Carina Fernández, Mirta del Carmen Fernández, Enzo Ricardo Blanco and Camila Andrea Blanco (relatives of Hugo Blanco). Likewise, regarding Nicolás Gonzalo Tejo López, Camila Andrea Blanco, and Enzo Ricardo Blanco, who were children at the time of the facts, the violations indicated *supra* are related to Article 19 of the American Convention.

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[203] *Cf. Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, para. 77. In the same sense, see Committee on the Rights of the Child, General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), paras. 60 and 64.
[204] See Committee on the Rights of the Child, General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), paras. 6, 81, and 84.
[205] See the testimony given before a notary public on February 25, 2019, by Mirta del Carmen Fernández, María Rosa Mendoza, Enzo Ricardo Blanco, Camila Andrea Blanco, Carina Andrea Maturana, Magdalena del Carmen Muñoz Zabala (evidence file, folios 1482 to 1487); and testimony given before a notary public on June 18, 2018, by Sandra Elizabeth López (evidence file, folios 1492 to 1494).
[206] Statement given before a notary public by María Rosa Mendoza, Enzo Ricardo Blanco, and Carina Andrea Maturana on February 25, 2019 (evidence file, folios 1482, 1484, and 1486).
[207] See, for example, the statements given before notary public of February 25, 2019, by Mirta del Carmen Fernández, Enzo Ricardo Blanco, and Carina Andrea Maturana (evidence file, folios 1482 to 1486).

B.3.6 Regarding cruel, inhuman, and/or degrading treatment

179. Article 5(1) of the Convention enshrines in general terms the right to humane treatment, both physical, psychological, and moral. Meanwhile, Article 5(2) specifically enshrines an absolute ban on subjecting persons to torture or to cruel, inhuman, or degrading treatment, as well as the right of all persons deprived of liberty to be treated with respect for the inherent dignity of the human person. Any violation of Article 5(2) of the Convention necessarily results in the violation of its Article 5(1).[208]

180. This Court has found that torture and cruel, inhuman, or degrading punishment or treatment are strictly forbidden under international human rights law.[209] This prohibition remains absolute and irrevocable even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and other crimes, state of siege, or a state of emergency, civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public emergencies or catastrophes.[210]

181. This Court has also indicated that the violation of a person's right to physical and psychological integrity has different connotations of degree and ranges from torture to other types of humiliation or cruel, inhuman or degrading treatment, the physical and psychological aftereffects of which vary in intensity based on factors that are endogenous and exogenous to the individual (such as duration of the treatment, age, sex, health, context and vulnerability) that must be analyzed in each specific situation.[211] That is, the personal characteristics of an alleged victim of torture or cruel, inhuman, or degrading treatment must be taken into account when determining whether the right to humane treatment was violated, as those characteristics can change the individual's perception of reality, thereby increasing the suffering and feeling of humiliation.[212]

182. It is clear to the Court that during these transfers, the persons deprived of liberty are in a situation of greater vulnerability and more exposed to potential human rights violations. Regarding this, in reference to prison conditions and transfers, the European Committee for the Prevention of Torture has established that in some circumstances, the unjustified separation of persons deprived of liberty from their relatives can amount to inhuman or degrading treatment (*supra* para. 116).

183. In this section, the Court will analyze the claim of the alleged victims that, at the time of the transfers and while serving their sentences, they were beaten and abused. The State did not submit pleadings or evidence in this regard.

184. Based on the evidence submitted for the case file, the Court verifies that Mr. López[213] and Mr. González[214] have stated during the Inter-American process that they were the victims

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[208] *Cf. Case of Yvon Neptune v. Haiti. Merits, Reparations, and Costs.* Judgment of May 6, 2008. Series C No. 180, para. 129, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2018. Series C No. 371, para. 177.

[209] *Cf.* Case of Cantoral Benavides *v. Peru. Merits.* Judgment of August 18, 2000. Series C No. 69, para. 95, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, para. 178.

[210] *Cf. Case of Lori Berenson Mejía v. Peru*. Merits, reparations and costs. Judgment dated November 25, 2004. Series C No. 119, para. 100, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, para. 178.

[211] *Cf. Case of Loayza Tamayo v. Peru*, paras. 57 and 58, and *Case of Girón et al. v. Guatemala*, para. 78.

[212] *Cf.* Case of *Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 127, and *Case of Valenzuela Ávila v. Guatemala. Merits, Reparations, and Costs.* Judgment of October 11, 2019. Series C, No. 386, para. 182.

[213] Testimony of Mr. Néstor Rolando López during the public hearing of March 12, 2019.

[214] Statement given before a notary public on February 25, 2019, by Miguel Ángel González (evidence file, folios 1480 to 1482): "During all that time, I experienced all types of abuse, injuries, lack of food, lack of medical care. Right now, I have 19 fractures and I am 89% disabled, broken ribs, twisted spine, because of the beatings I got while I was in prison."

of abuse, attacks, and other harm during the transfers and while serving their sentences. In testimony before domestic courts, Hugo Blanco and Néstor López also stated they were the victims of threats, violence, and abuse.[215] Likewise, matching testimony from relatives corroborated that Mr. López, Mr. Blanco, Mr. Muñoz, and Mr. González were subjected to aggressions, beatings, or violence.[216] In addition, this type of abuse was brought to light in the expert witness report of Marta Monclús before the Court.[217]

185. Additionally, the Court notes that on two occasions, Mr. Néstor López went on a hunger strike to pressure penitentiary authorities to hear his requests to be returned to Neuquén in order to serve his sentence close to his family. This was also reported by Magdalena del Carmen Muñoz regarding José Muñoz Zabala.[218]

186. On other occasions, this Court has found the existence of cruel, inhuman, and/or degrading treatment in situations where persons deprived of liberty were subjected to a combination of diverse factors like lack of communication and separation from families.[219] In this case, it is found to be proven in the case file that Mr. López, Mr. Blanco, Mr. González, and Mr. Muñoz suffered a series of circumstances that, altogether, amount to inhuman or degrading treatment at the very least (*supra* para. 184).

187. In view of the State's lack of defense and of the expert witness report and the matching testimony of Mr. López, Mr. Blanco, and Mr. González, as well as that of their relatives, the Court finds that the sum of the indications of abuse described in this process leads it to conclude that the State violated the right to humane treatment set forth in Article 5(2) of the American Convention, in relation to Article 1(1) of the Convention, to the detriment of Mr. Néstor López, Mr. Miguel González, Mr. José Muñoz, and Mr. Hugo Blanco.

188. Lastly, as regards the representatives' allegation of the violation of the principle of legality of the punishment because of the use of the transfers that are the subject of this case, the Court finds that these allegations were examined pursuant to articles 5(6) and 11(2) of the American Convention and it was not found to be necessary to issue any additional findings.

VIII-2
RIGHTS TO JUDICIAL GUARANTEES[220] AND JUDICIAL PROTECTION[221]

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[215] *Habeas corpus* filed for Hugo Blanco (evidence file, folios 145 and 146): "I suffered terrible beatings and abuse in April 2002 at the hands of the guards, in particular the head of inspections, Jose Segundo Villar, and because of which I lost part of my vision in one eye, among other injuries. [...] In Unit 9, as Villar's trial date approaches, Hugo Blanco has been subjected to beatings, punishments, and threats, with explicit reference to his actions against Villar. [...] dated November 3, expanded on November 11, in light of additional beatings and threats"; Writ of *habeas corpus* of November 3, 2000 (evidence file, folios 167 and 168); note of June 10, 2003 (evidence file, folio 393).

[216] See statements given before a notary public on February 25, 2019, by María Rosa Mendoza, Mirta del Carmen Mendoza, Enzo Ricardo Blanco, Carina Maturana and Magdalena del Carmen Muñoz (evidence file, folios 1480 to 1487).

[217] Written expert testimony provided by Marta Monclús (evidence file, folios 1495 to 1508). According to expert witness Monclús, transfers to prisons that are hundreds or thousands of kilometers away continue to this day as a standard practice, carried out with absolute discretion for persons held in the 31 federal prisons located throughout Argentina. Because some of the facilities are so distant from each other, sometimes it is necessary to do a "layover" in another prison facility on the way, so the transfers often take two or three days. She also noted that the transfers are made under degrading conditions, as inmates are not allowed proper food or sleep and do not have access to sanitary services.

[218] Statement given before a notary public on February 25, 2019, by Magdalena del Carmen Muñoz González (evidence file, folio 1487).

[219] *Cf. Case of Lori Berenson Mejía v. Peru. Merits, Reparations and Costs.* Judgment dated November 25, 2004. Series C No. 119, para. 101, 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. 172

[220] Article 8 of the American Convention.

[221] Article 25 of the American Convention.

A. Arguments of the parties and of the Commission

189. The ***Commission*** recalled that the purpose of judicial protection is to protect persons' rights from the arbitrary exercise of government authority. Remedies must exist, and they must be suitable and effective. Regarding this specific case, it observed that the four alleged victims had filed—directly or through their defense attorneys or family members—judicial remedies to challenge their transfers and ask to be returned to the Province of Neuquén, arguing there was a need to be close to their nuclear families and/or next of kin while serving their sentences. The denials received by the alleged victims in response to these judicial remedies were practically identical, based simply on a preestablished formula and based on the idea that, under domestic law, it was possible to transfer persons convicted by provincial courts to the federal system as long as there were no adequate penitentiary facilities in the respective province. Additionally, the decisions did not include individualized evaluations for each of the victims as a consequence of the transfer, and there was no conventional control with regard to the norms invoked.

190. The Commission therefore concluded that the Argentine State was responsible for the violation of the right to judicial protection established in Article 25(1) of the American Convention, in conjunction with Article 1(1) of the Convention, to the detriment of the four alleged victims and their respective nuclear families.

191. The ***representatives*** indicated that there was a close relationship between the right to a remedy and the right to defense at trial. There can be no effective and timely technical remedy without respect for the right to defense at trial in all its dimensions, and likewise, there can be no effective defense at trial without guarantee of adequate and effective remedies to protect rights during the process. They also argued that the preparation of these remedies and the judicial defense were undermined by the separation of the defendants from their attorneys as a result of the transfer. Along these lines, they added that they had neither effective remedies nor well grounded decisions—rather, they had limited technical remedies, in the form of the writ of cassation and the later federal special appeal, given the narrowness of the grounds on which they can be filed. Additionally, they criticized the application of article 280 of the Civil and Commercial Procedural Code of the Nation in rejecting the special appeals. Specifically, they said the lack of analysis, grounds, and response to the pleadings put forward in the appeals indicated the lack of effectiveness and suitability of the judicial remedies, thereby violating Article 25 of the Convention, as well as article 8(2)(h) of the Convention.

192. Regarding judicial guarantees, the representatives held that the violations of Article 8 were based on the following: i) transfers that did not allow the four alleged victims to meet in private and with adequate time with their defense attorneys to plan their defense in response to the transfers; and ii) the alleged victims could not be heard as guaranteed by law. They therefore indicated that article 8(1), 8(2)(d), and 8(2)(e) of the Convention had been violated.

193. The ***State*** indicated that all the alleged victims faithfully executed their right to petition before the judicial authorities by filing requests for transfer before the judicial sentence execution authority. These were writs of *habeas corpus*, processed in an expedited fashion with full respect for due process. All were well-founded and filed with the proper legal assistance of a legal defense official who took part in each applicable procedural stage. It added that the response to these requests was expedited and well-founded, taking into account situations including infrastructure problems, the physical safety of the alleged victims, and other issues. It indicated that the alleged victims had access to simple, suitable, effective, and efficacious remedies through the writ of *habeas corpus*. Lastly, it added a brief argumentation regarding each of the alleged victims.

194. The State also indicated that allegations of violations of rights other than the ones indicated by the Commission in its Report on the Merits should be flatly dismissed, as it is the Commission's report that limits the factual framework to be considered by the Court.

B. Considerations of the Court

195. Before addressing the alleged violations of articles 8 and 25, the Court must rule regarding the State's objections to the presentation of pleadings by the representatives on rights other than the ones identified as violated by the Commission, particularly regarding Article 8 of the Convention.

196. This Court has found repeatedly in its caselaw that the representatives may invoke rights other than the ones indicated by the Commission in its Report on the Merits. Because the victims are the bearers of the rights enshrined in the American Convention, such a restriction would amount to an undue restriction on their status as subjects of international human rights law.[222] However, the Court reiterates that such pleadings can be submitted only insofar as they are limited to the facts presented by the Commission in its Report on the Merits, as this report is what establishes the factual framework of the litigation before the Court.[223]

197. The Court also observes that the requests for transfer and habeas corpus filed by Mr. López, Mr. Muñoz, Mr. Blanco, and Mr. González and the subsequent appeals of the decisions to deny them must be analyzed as potential violations of criminal due process during the execution stage of the sentence. Normally, the Court addresses *habeas corpus* actions as associated with Article 7(6) of the Convention. However, as this case does not involve the physical liberty of the alleged victims but the application of a specific domestic legal provision that provides for habeas corpus for situations of "[i]llegitimate worsening of the form and conditions under which deprivation of liberty is served without approval from the judge handling the process, should there be one,"[224] the corresponding analysis will fall under the framework of articles 8 (right to judicial guarantees) and 25 (right to judicial protection) of the American Convention.

B.1 Judicial guarantees

198. Although Article 8 of the American Convention is entitled "Right to a Fair Trial" [Note: "Judicial Guarantees" in the Spanish version], its application is not strictly limited to judicial remedies, "but rather the procedural requirements that must be observed"[225] so that a person may defend themself adequately when any type of act of the State affects their rights.[226]

199. The Court has established that "for true guarantees of fair trial to exist in a proceeding,

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[222] *Cf. Case of the "Five Pensioners" v. Peru.* Judgment of February 28, 2003. *Merits, Reparations, and Costs.* Series C No. 98, para. 156; and *Case of Villaseñor Velarde et al. v. Guatemala.* Merits, reparations and costs. Judgment of February 5, 2019. Series C No. 374, para. 76.

[223] *Cf. Case of the "Five Pensioners" v. Peru*, para. 155, and *Case of López Soto et al. v. Venezuela*. Merits, reparations and costs. Judgment of September 26, 2018. Series C No. 362, para. 172.

[224] Law 23,098 of Argentina: Article 3 – Admissibility. The writ of *habeas corpus* will be admissible when an act or omission by a public authority is alleged that involves: 1. Limiting or threatening freedom without a written order from a competent authority. 2. Illegitimate worsening of the form and conditions under which deprivation of liberty is served without approval from the judge handling the process, should there be one.

[225] *Cf.* Judicial Guarantees in States of Emergency (arts. 27(2), 25, and 8 of the American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27.

[226] *Cf. Case of the Constitutional Court v. Peru. Merits, Reparations, and Costs.* Judgment of January 31, 2001. Series C No. 71, para. 69; and *Case of Álvarez Ramos v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 30, 2019. Series C No. 380, para. 143.

pursuant to the provisions of Article 8 of the Convention, it is necessary to observe all the requirements that are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof,"[227] that is, the "prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination."[228]

200. The Court has also established that, according to the provisions of Article 8(1) of the Convention, when determining the rights and obligations of the individual of a criminal, civil, labor, fiscal or any other nature, "due guarantees" must be observed that ensure the right to due process in the corresponding procedure, and failure to comply with one of these guarantee results in a violation of this provision of the Convention.[229] Article 8(2) of the Convention also establishes minimum guarantees that States must provide as part of legal due process.[230] It is a human right to obtain all the guarantees that make it possible to reach just judgments. These minimum guarantees must be respected for administrative procedures as well as in any other procedure in which the decision could impact the rights of persons.[231]

201. The representatives argued that because of the transfers, they were not able to meet privately and for an adequate amount of time with the representatives, impeding the alleged victim's right to defense, amounting to violations of articles 8(1) (right to be heard within a reasonable period of time), 8(2)(d) (right to defend oneself personally or to be assisted by a defense attorney of one's own choice and to communicate freely and privately with one's defense attorney), and 8(2)(e) (the right to be assisted by a defense attorney) of the Convention.

202. In this regard, the Court has found that parts (d) and (e) of Article 8(2) indicate that accused persons have the right to defend themselves personally or to be assisted by a defense attorney of their choice, and that if they do not choose one, they have the revocable right to be assisted by a defense attorney provided by the State, either remunerated or not depending on domestic legislation. In this regard, accused persons may defend themselves, although it must be understood that this is only valid if domestic legislation permits it. Thus, the Convention guarantees the right to legal assistance in criminal proceedings.[232]

203. Additionally, in cases like this one, in which the subject matter is sentence execution, the requirement to have an attorney for legal defense in order to be able to handle adequately the process, means that the defense—whether provided by the State or not—should be able to "adequately compensate for the procedural inequality of those facing the punitive power of the State, who are in a particularly vulnerable situation by being deprived of liberty, and to guarantee their effective access to justice on equal terms."[233]

[227] *Habeas corpus in Emergency Situations* (Arts. 27(2), 25(1), and 7(6) American Convention on Human Rights. Advisory Opinion OC-8/87 of January 30, 1987, Series A, No. 8, para. 25; and *Case of Álvarez Ramos v. Venezuela,* para. 144.

[228] *Cf. Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001, Series C No. 71, para. 69, and *Case of Colindres Schonenberg v. El Salvador*. Merits, Reparations, and Costs. Judgment of February 4, 2019, Series C, No. 373, para. 63.

[229] *Cf. Case of Claude Reyes et al v. Chile. Merits, Reparations, and Costs.* Judgment of September 19, 2006. Series C No. 151, para. 117, and *Case of Valenzuela Ávila*, para. 110.

[230] *Cf. Case of Genie Lacayo v. Nicaragua.* Merits, Reparations, and Costs. Judgment of January 29, 1997. Series C No. 30, para. 74, and *Case of Maldonado Ordoñez v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 3, 2016. Series C No. 311, para. 73.

[231] *Cf. Case of Baena Ricardo v. Panama. Merits, Reparations, and Costs.* Judgment of February 2, 2001. Series C No. 72, para. 127, and *Case of Maldonado Ordoñez v. Guatemala.* Preliminary Objections, Merits, Reparations and Costs. Judgment of May 3, 2016. Series C No. 311, para. 25.

[232] *Cf.* Exceptions to the exhaustion of domestic remedies (art. 46(1), 46(2)(a), and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 25.

[233] *Cf. Case of Ruano Torres v. El Salvador. Merits, Reparations, and Costs.* Judgment of October 5, 2015. Series C No. 303, para. 156, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations and Costs.* Judgment of May 10, 2019. Series C No. 376, para. 82.

204. The evidence contributed to the casefile does not indicate that Mr. López, Mr. Muñoz, Mr. González, and Mr. Blanco were prevented from accessing the judiciary to appeal to be returned to the Neuquén prison, as the writs of *habeas corpus* and request for transfer were submitted by the alleged victims in person. They were also not prevented from selecting defense attorneys to represent them, as they were defended by public defenders *ex officio*. The Court therefore finds that Article 8(2)(e) of the Convention is not in question in this case, as the dispute revolves around the limitation, that being the restriction or obstruction of contact with defense attorneys as a result of the transfers, the difficulty communicating, and the distance between them.

205. In this regard, it is demonstrated that the public defenders who intervened before Argentine courts were able to file remedies and access the judicial branch to request the convicted persons be transferred to the province of Neuquén, despite the difficulties described in the previous chapter. The central matter in this section, therefore, is determining to what degree the distance and communications difficulties arising from the multiple transfers (illegal and arbitrary (*supra* para 158)) made by the National Penitentiary Service amounted to a violation of the right to be assisted by a defense attorney of one's own choosing and to communicate freely and privately with the defense attorney (Article 8(2)(d) of the Convention).

206. The Court has established that one of the concrete consequences of the multiple transfers to which Mr. López, Mr. Muñoz, Mr. González, and Mr. Blanco were subjected is that they were not able to contact their defense attorneys in time and in the proper form, something that was described in their interventions before the Argentine judiciary.[234] Additionally, the transfers were sudden, and they were not able to contact or inform their relatives or lawyers about them. The testimony of Nestor Rolando López,[235] Miguel Ángel Gonzalez, María Rosa Mendoza, Mirta del Carmen Fernández, Camila Blanco, Carina Andrea Maturana, and Magdalena del Carmen Muñoz,[236] as well as the expert witness report of Marta Monclús[237], describe the *modus operandi* for these transfers. Additionally, as the transfers were not consulted with the persons deprived of liberty and they were not subjected to substantive prior judicial control, it is clear that the alleged victims in this case were not given an opportunity to defend themselves or object to their transfers. Contact with and the subsequent intervention of a lawyer was decisive for protecting the rights in play with each transfer. The right to defense means States are required to treat individuals at all times as true subjects of the processes, in the broadest sense of this concept, not simply the objects of them.[238]

207. Additionally, the physical presence of Mr. López, Mr. Blanco, Mr. González, and Mr. Muñoz in prisons very far from the province of Neuquén, where their defense attorneys and their sentence execution court were located, posed an insurmountable obstacle to freely and privately communicating with their attorneys to guide and coordinate their defense. On more than one occasion, the victims in this case asked the judge if they could contact their defense

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[234] See, for example, statement of Néstor López before the First Federal Court of Rawson, hearing minutes of March 22, 2000 (evidence file, folios 158 and 159); urgent transfer request and *habeas corpus* of Miguel González before Criminal Chamber 2 of May 9, 1997 (evidence file, folio 109); urgent transfer request and habeas corpus of José Muñoz Zabala before Criminal Chamber 2 of May 9, 1997 (evidence file, folio 1427); cassation appeal of José Muñoz Zabala before Criminal Chamber 2 of May 29, 1997 (evidence file, folio 1437).
[235] Testimony of Néstor Rolando López during the public hearing of March 12, 2019.
[236] Statement given before a notary public (evidence file, folios 1480 to 1483, 1485, 1486).
[237] Written expert testimony provided by Marta Monclús Masó (evidence file, folios 1497 to 1504).
[238] *Case of J. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 27, 2013. Series C No. 275, para. 194, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 10, 2019. Series C No. 385, para. 151.

attorneys.[239] It is clear that this limited their opportunity to exercise a diligent legal defense and actions to protect the procedural guarantees of their clients and prevent their rights from being violated during the sentence execution phase[240] of the criminal process.

208. The Court therefore concludes that Argentina violated the right to assistance by a defense attorney of one's choice and the right to communicate freely and privately with them, established in Article 8(2)(d) of the American Convention, in relation to Article 1(1) of the Convention, to the detriment of Néstor López, Hugo Blanco, Miguel Ángel González, and José Muñoz Zabala.

B.2 Access to justice and judicial protection

209. This Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure, to all persons subject to their jurisdiction, a simple, prompt and effective judicial remedy to actions that violate their fundamental rights.[241] In view of this, the Court has indicated that, under the terms of Article 25 of the Convention, two specific State obligations can be identified. First, the State must enshrine in law and guarantee due application of effective remedies before competent authorities that protect all persons under their jurisdiction from acts that violate their fundamental rights or that entail the determination of their rights and obligations. Second, they must guarantee the means to execute the respective final decisions and judgments issued by these competent authorities so as to effectively protect the rights declared or recognized.[242] The right established in Article 25 is closely linked to the general obligation in Article 1(1) of the Convention, in that it assigns duties of protection to the States Parties through their domestic legislation.[243] States therefore have a responsibility not only to devise an effective remedy and establish it by law but also to ensure due application of that remedy by judicial authorities.[244]

210. As specifically regards the effectiveness of the remedy, this Court has found that the meaning of the protection granted by this article is the real possibility of access to a judicial remedy so that the competent authority, with jurisdiction to issue a binding decision, determines whether there has been a violation of a right claimed by the person filing the action, and that the remedy effectively restores to the interested party the enjoyment of their right and redress, if it finds there has been a violation.[245] This does not mean that the effectiveness of a remedy is evaluated based on whether it produces a result that is favorable to the person filing the action.[246] A remedy which proves illusory because of the general

[239] Hearing of January 4, 2001 (evidence file, folios 161 and 162); statement of Néstor López before the Federal Court of March 22, 2000 (evidence file, folio 158).
[240] *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 26, 2010. Series C No. 220, para. 155, and *Case of Martínez Coronado v. Guatemala*, para. 83.
[241] *Cf. Case of Mejia Idrovo v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 5, 2011, Series C No. 228, para. 95, and *Case of Colindres Schonenberg v. El Salvador*, para. 101.
[242] *Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, para. 237, and *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 20, 2016. Series C No. 318, para. 393.
[243] *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 83, and *Case of the Hacienda Brasil Verde Workers v. Brazil*, para. 393.
[244] *Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, para. 237 and *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. *Judgment of March 6, 2019.* Series C No. 375, para. 123.
[245] *Cf. Judicial Guarantees in States of Emergency.* Advisory Opinion OC-9/87, para. 24; *Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 100, and *Case of Perrone and Preckel v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 8, 2019. Series C No. 385, para. 122.
[246] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 67, and *Case of Perrone and Preckel v. Argentina,* para*. 122.*

conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.[247] This can occur, for example, when their futility has been revealed in practice, because there is no way of executing decisions, or because of any other situation that constitutes a denial of justice.[248] Thus, the procedure must be aimed at implementing the protection of the right recognized in the judicial ruling by applying the ruling appropriately.[249]

211. As far as admissibility requirements for a judicial action, this Court has found that based on legal certainty, for the proper and functional administration of justice and the effective protection of human rights, the State can and must establish admissibility presumptions and criteria for domestic recourses of a judicial or any other nature. Thus, although these domestic remedies must be available to the interested party and decide the matter raised effectively, stating the grounds, as well as possibly providing appropriate reparation, it cannot be considered that, always and in all cases, the domestic organs and courts must decide on the merits of the matter lodged before them without verifying the formal presumptions of admissibility and the validity of the specific remedy filed.[250]

212. In this case, the arguments of the ***Commission*** and the ***Representatives*** regarding the alleged violation of Article 25 due to the lack of effectiveness and suitability of the judicial remedies point to the responses of the Argentine judiciary to the remedies sought directly by Mr. López, Mr. Blanco, Mr. Muñoz, and Mr. González and by their lawyers, describing them as "identical," based on a "mere preestablished formula," without "an individualized evaluation of each of the victims as a consequence of the transfer," and without responding to the pleadings put forth in the appeals. The representatives also alleged violation of Article 8(2)(h) (right to appeal a ruling to a higher judge or court) in view of the application of article 280 of the Civil and Commercial Procedural Code of the Nation by the Supreme Court, among other reasons.

213. Regarding the remedies available to convicted persons in the same situation as the victims in this case, expert witness Marta Monclús said the usual way of accessing justice is through a habeas corpus, but that the case law is not consistent among the different courts. Some understand the transfers to be "the exclusive prerogative of penitentiary administrators" and not subject to judicial oversight. However, other courts find that any potential judicial oversight should not be conducted through *habeas corpus*. She underscored that most of the people deprived of liberty who are transferred far from their nuclear families have, in practice, no access to habeas corpus.[251]

214. This Court has found that clear explanation of a decision is an essential part of correct justification of a judicial ruling, understood as "the reasoned justification that allows a conclusion to be reached."[252] In this regard, the duty to state grounds is a guarantee linked

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[247] *Cf. Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs.* Judgment of February 6, 2001. Series C No. 74, para. 137; and *Case of Álvarez Ramos v. Venezuela,* para. 184.

[248] *Cf. Case of Las Palmeras v. Colombia. Reparations and Costs.* Judgment of November 26, 2002. Series C No. 96, para. 58, and *Case of Romero Feris v. Argentina*, para. 135.

[249] *Cf. Case of Baena Ricardo et al. v.* Panama. Jurisdiction. Judgment of November 28, 2003. Series C No. 104, para. 73, and *Case of Flor Freire v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2016. Series C No. 315, para. 198.

[250] *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, and *Case of Dismissed Employees of Petroperú et al. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2017. Series C No. 344, para. 153.

[251] Written expert testimony provided by Marta Monclús (evidence file, folio 1495 to 1508).

[252] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez*. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 21, 2007. Series C No. 170, para. 107; *Case of San Miguel Sosa et al. Venezuela. Merits, Reparations, and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 189.

to the proper administration of justice, which gives credibility to the legal decisions adopted in the framework of a democratic society.[253] Therefore, the decisions adopted by domestic courts that can affect human rights must be duly justified, and should this not be the case, they would be arbitrary decisions.[254] In this regard, the reasoning of a judgment and of certain administrative acts must make it possible to learn the facts, motives, and laws on which the authority is basing its decision.[255] It must also show that the pleadings of the parties have been duly taken into account and that the totality of the evidence has been examined. Therefore, the duty to offer grounds is one of the "due guarantees" included under Article 8(1) to protect the rights to due process and access to justice in relation to Article 25 of the Convention.[256]

215. From the argumentation outlined above, it is noted that the alleged violation of Article 25 is concentrated in the lack of or deficient grounds of the judicial rulings that are the subject of this litigation. In this regard, the Court has already noted (*supra* para 158) the similarity between the rulings issued in response to requests for transfer and the rulings on the writs of *habeas corpus* and cassation appeals in the cases of Mr. López, Mr. Muñoz, and Mr. González. With certain exceptions (*supra* footnote 188), the judicial rulings that are the object of analysis in these cases repeated the same considerations and juridical arguments regardless of the specific pleadings made by each of the appellants. In the case of Mr. Blanco, the rulings on his request for return have certain differences that, as will be explored later on, must be addressed separately.

216. First, the Court observes that in the cases of Mr. López, Mr. Muñoz, Mr. Blanco, and Mr. González, the rulings on the writs of *habeas corpus* looked at issues of the legality of the transfers and the discretion of the National Penitentiary Service. They also responded to the pleading regarding the alleged unconstitutionality of the agreement between the province of Neuquén and the National Penitentiary Service, the application (or not) of article 41 of the Constitution of Neuquén, and federal law taking precedence over provincial law. Although they appear formulaic, they are sufficient to adequately and reasonably respond to the pleadings of the petitioners.

217. Without prejudice to this, the Court notes that in the cases of Mr. López, Mr. Muñoz, and Mr. González, the rulings under analysis in this case did not undertake an individual and detailed examination of the personal and family situation and circumstances of the petitioners, a central element of judgment in all the cases.

218. For example, in the case of Mr. López, the case file contains a hearing record of February 10, 1997, in which he requested transfer to Unit 9 of Neuquén because his wife, father, and two children were in that province, adding that they did not have the financial means to visit him.[257] In response to this request, Criminal Chamber 2 of Neuquén responded that in the case of convicted persons subjected to the regime of the Federal Penitentiary Service, it is the service that determines the location where they are to be held based on availability and treatment needs, without in any way addressing the request for family reunification. Likewise, on February 11, 1997, Mr. López's defense attorney submitted a request before the same Chamber repeating the request for family reunification.[258] In

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[253] *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela,* para. 77; and *Case of San Miguel Sosa et al. Venezuela,* para. 189.
[254] *Cf. Case of Yatama v. Nicaragua*, *supra*, para. 152; and *Case of San Miguel Sosa et al. Venezuela,* para. 189.
[255] *Cf. Case of Claude Reyes et al v. Chile*. *Merits, Reparations, and Costs.* Judgment of September 19, 2006. Series C No. 151, para. 122; and *Case of San Miguel Sosa et al. v. Venezuela*, para. 189.
[256] *Cf.*, *mutatis mutandi, Case of García Ibarra et al. v. Ecuador*, para. 133; and *Case of San Miguel Sosa et al. v. Venezuela,* para. 189.
[257] Hearing record of February 10, 1997 (evidence file, folios 155).
[258] Urgent request for transfer of February 11, 1997 (evidence file, folios 1265 and 1266).

response to this request, the Chamber responded only by indicating that this had been addressed in the previous ruling.[259] A cassation appeal was filed in response to this decision before the High Court of Justice of Neuquén, followed by a special federal appeal. In both cases, the remedies were rejected without the court in any way ruling with regard to the alleged impact that the transfer was having on Mr. López's right to stay in contact with his family.[260] In fact, in its ruling on the cassation appeal, the High Court of Justice explicitly decided to make the focus of the matter different from what the appellant had invoked.[261] These arguments were repeated, including the decision to shift the focus of the matter, almost word for word, in the ruling dated September 13, 2002, rejecting the second writ of *habeas corpus* filed by Mr. López;[262] in the resolution of October 20, 1997, rejecting the cassation appeal filed by Mr. González;[263] and in the ruling of November 5, 1997, rejecting the cassation appeal filed by Mr. Muñoz.[264]

219. Additionally, in only a few situations, the courts limited themselves to requesting regular reports from the Federal Penitentiary Service[265] and suggesting (never ordering) temporary visits. Regarding this, the Court confirms that the special visits were, by their nature, brief and infrequent (*supra* para. 165). Additionally, the case file does not contain information on whether the reports were drafted and submitted by the penitentiary service to the pertinent courts.

220. Additionally, at no time did administrators or the courts give content to the expression "re-adaptation" of the convicted persons, used to justify the transfers. In the Court's opinion, the expression was used without explaining how each transfer would have a positive impact on the re-adaptation of the convicted persons, especially when they were located far from their families, children, lawyers, and sentence execution court. The Court therefore finds that there was no attempt to strike a balance between the federal ministry authority to place convicted persons, the alleged explicit purpose of re-adaptation of the convicted persons, and the right of the convicted persons—and, incidentally, of their relatives as well—to maintain, as much as possible, contact with family and the outside world particularly with regard to children. Specifically, the courts were required to have exercise oversight to ensure that the measure imposed would not cause suffering and violations to the rights of family members—that is, to verify that the punishment did not extend beyond the convicted person or exceed the suffering inherent to deprivation of liberty. Additionally, the intervening judges were required to examine, when requested, any impact on the right to a legal defense and contact with public defenders.

221. One example of this is the judicial response to return Mr. González after he had been transferred for reasons of "penitentiary administration." In its decision, the court rejected the request to return him to Neuquén on finding that "there is therefore no serious reason why a sentence execution court would exercise jurisdictional authorities to interfere in a realm inherent to the administrative authority applying the punishment." Despite rejecting the request, this court merely suggested that Mr. González be transferred permanently to facilitate

[259] Ruling of Chamber 2 of Neuquén of February 13, 1997 (evidence file, folio 1267).
[260] Ruling of the High Court of Justice of November 27, 1997 (evidence file, folios 360 to 371) and ruling of the High Court of Justice of April 21, 1998 (evidence file, folios 372 to 381).
[261] Ruling of the High Court of Justice of November 27, 1997 (evidence file, folio 129).
[262] Ruling of the High Court of Justice of September 13, 2002 (evidence file, folio 59).
[263] Ruling of the High Court of Justice of October 20, 1997 (evidence file, folios 360 to 371).
[264] Ruling of the High Court of Justice of November 5, 1997 (evidence file, folio 1458).
[265] Ruling 55 of the of the High Court of Justice of Neuquén of October 20, 1997, in the case against Miguel Angel Gonzalez Mendoza (evidence file, folio 132); Ruling 58 of the High Court of Justice of Neuquén of November 5, 1997 in the case against Muñoz Zabala (evidence file, folio 1461); Ruling 67 of the of the High Court of Justice of Neuquén of November 27, 1997, in the case against Nestor Alanna Lopez (evidence file, folio 369); Interlocutory Record 329/04 of November 22, 2004, of Criminal Chamber 2 in the case against Hugo Alberto Blanco (evidence file, folios 142 and 143).

his relationships with his relatives.[266] That is, it concluded that contact with the family, contact with legal defense, and contact with the sentence execution judge—as well as the alleged extension of the punishment to the relatives of Mr. González due to the transfer—did not represent "serious reasons" for jurisdictional intervention.

222. Once the requests to return to Neuquén to serve their sentences were based precisely on proximity to their families (including because of serious health issues), children, and defense attorneys, and the consequent impact on the re-adaptation of the convicted person, it was essential for the intervening judges to address these pleadings and not limit their rationale to justifying the formal legality of the transfers.

223. The Court consequently concludes that the grounds or justification given by domestic courts was insufficient where it decided on the *habeas corpus* requesting transfer back to the province of Neuquén for Mr. López, Mr. González, and Mr. Muñoz to serve their sentences there. The State is therefore responsible for failing to comply with its obligation to guarantee the rights to access to justice and judicial protection, recognized in articles 8(1) and 25(1) of the American Convention, in conjunction with Article 1(1) of the Convention, to the detriment of Néstor López, Miguel González, and José Muñoz Zabala.

224. Regarding Mr. Blanco, in view of the particular characteristics of his case, the analysis of the rulings responding to his request to be sent back will differentiate between the rulings issued by Criminal Chamber 2 of Neuquén and the High Court of Justice of Neuquén.

225. First, according to the documents submitted to the case file, it is clear that the rulings of Criminal Chamber 2 of Neuquén responding to the requests to return Mr. Blanco omit—as in the other cases—addressing in any way the alleged impact on his right to be close to his family. In the brief wherein Mr. Blanco expanded the writ of *habeas corpus* filed on November 20, 2004, and sought protection of his relatives, his defense attorney explicitly alleged that the transfer deprived Mr. Blanco of contact with his children, his sister, and his mother (the latter two gravely ill) and therefore caused pain and suffering that could run contrary to the purposes of the sentence, thereby impacting the right to protection of the family and violating the principle that sentences shall not extend beyond the person convicted, pursuant to Article 5, parts 3 and 6, and Article 17 of the American Convention.[267] As documentary evidence, the pleading included medical certificates and the medical histories and reports on Mr. Blanco's mother and sister.[268] This request was rejected by a ruling from Criminal Chamber 2 of Neuquén dated November 23, 2004, which, referring to the ruling dated November 22, 2004, found that the transfer to Unit 6 in the city of Rawson had been ordered to protect Mr. Blanco's physical integrity in view of the attacks he had suffered and because it was impossible to transfer him to another prison facility located in Neuquén because he had a history of flight, escape attempts, and other incidents in prison facilities located in that province. As regards the inmate's family and social relationships, Criminal Chamber 2 only indicated that they were strictly related to the restrictions inherent to the sentence handed down.[269] Thus, the documents found in the case file indicate that the Chamber in no way referenced the action brought on behalf of his relatives, the violation of the principle that sentences shall not extend beyond the individual convicted, and did not explicitly consider the pleadings regarding the need for return due to the health of Mr. Blanco's relatives and the distance from his children.

[266] Resolution of Criminal Chamber 2 of May 14, 1997, in the case of Miguel Angel Gonzalez Mendoza (evidence file, folios 79 and 80).
[267] Expansion of habeas corpus, no date (evidence file, folio 149).
[268] Expansion of habeas corpus, no date (evidence file, folio 150).
[269] Ruling of November 23, 2004 (evidence file, folios 152 to 153).

226. For its part, in response to the appeal of the ruling referred to in the above paragraph, the High Court of Justice of Neuquén issued a ruling on April 25, 2005, on the issues raised as to the obstacles to resocialization that could arise from being separated far from his nuclear family and potential impacts on the rights of Mr. Blanco's relatives, indicating that in view of the specifics of the case, the "special visits" could—with certain reasonability—lessen the impacts on the nuclear family that the transfer may entail.[270] Likewise, a resolution of the High Court of Justice of November 22, 2005, rejecting the special federal appeal found that it was not demonstrated that simply transferring convicted persons a great distance from their homes would in and of itself cause intolerable harm to federal guarantees with respect to the serving of the sentence. In this regard, the High Court found common recursive weaknesses in the filing of the remedy, as "a sufficient pleading of harm would have included the assertion and evidence of circumstances such as the family conditions of the prisoners, regulatory provisions of the penitentiary regimen on the length and frequency of the visits, problems caused by the distance of the visits, problems caused by the distance between the establishment and the domicile of the persons authorized to make them."[271] Regarding the latter, it should be noted that there is no indication why the ruling on this specific special federal appeal did not consider the medical certifications and medical records and reports of the mother and daughter as evidence of the condition of Mr. Blanco's family. The court did not mention this evidence, and this pleading of Mr. Blanco's defense attorney went unanswered.

227. Therefore, this Court finds that because they did not respond to the specific pleadings of Mr. Blanco regarding the impact on, among other things, his right to remain in contact with his family, the remedies before Criminal Chamber 2 of Neuquén were ineffective for resolving the matter at hand. This Court finds that the failure to provide grounds in this instance is sufficient to declare a violation of Article 25 of the American Convention, in view of the fact that, as set forth in article 3 of Law 24,660, in this case, the sentence execution judge was the one with jurisdiction to guarantee compliance with constitutional norms, the international treaties ratified by the Argentine Republic, and the rights of convicted persons not restricted by the sentence or by law. Without prejudice to this, it is also found that although the rulings of the High Court of Neuquén on the appeals of the rulings of the execution court include specific arguments dismissing the relevance of the transfer regarding the right of the relatives, by omitting from its ruling the evidence submitted by the appellant regarding the medical certificates and medical history and reports of the mother and sister of Mr. Blanco, it failed to comply with its duty to take into account the argument submitted by the appellant in the grounds for its decision. This Court therefore concludes that the State is responsible for failing to comply with its obligation to guarantee the rights to access to justice and judicial protection, recognized in articles 8(1) and 25(1) of the American Convention, in conjunction with Article 1(1) of the Convention, to the detriment of Hugo Alberto Blanco.

228. Lastly, regarding the alleged violation of Article 8(2)(h) (right to appeal a ruling to a higher judge or court) of the Convention in view of the application of article 280 of the Civil and Commercial Procedural Code of the Nation to reject the special appeals, the Court finds that the pleading was already examined under the right to judicial protection (Article 25 of the Convention) and does not deem necessary an additional pronouncement.

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

[270] Ruling of April 25, 2005 (evidence file, folios 1153-1154).
[271] Ruling of November 22, 2005 (evidence file, folio 1170).

229. Based on Article 63(1) of the American Convention,[272] the Court has indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.

230. Reparation of the harm caused by the violation of an international obligation requires, insofar as possible, full restitution (*restitutio in integrum*), which consists in the restoration of the previous situation.[273] If this is not feasible, as in most cases of human rights violations, the Court will determine measures to ensure the rights that have been infringed, and to redress the consequences of the resulting harm.[274] Therefore, the Court has found it necessary to grant different measures of reparation in order to redress the harm integrally so that, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction and guarantees of non-repetition have special relevance for the harm caused.[275]

231. The Court has established that reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm proved, and also the measures requested to redress the respective damage. Therefore, the Court must observe this concurrence in order to rule appropriately and in accordance with the law.[276]

232. Based on the violations declared in the preceding chapter, this Court will proceed to examine the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in the case law of the Court as regards the nature and scope of the obligation to make reparation, in order to establish measures to redress the harm caused to the victims.[277]

233. International case law, in particular that of the Court, has repeatedly establish that the judgment constitutes, per se, a form of reparation.[278] However, in view of the circumstances of this case and the suffering caused to the victim by the violations committed, the Court deems it pertinent to establish other measures.

A. Injured party

234. The Court reiterates that, pursuant to Article 63(1) of the Convention, the injured parties are considered those who have been declared victims of the violation of any right recognized therein.[279] Therefore, the Court considers the following persons to be "injured parties": Néstor Rolando López, Hugo Alberto Blanco, Miguel Ángel González Mendoza, and José Heriberto Muñoz Zabala; as well as Lidia Mabel Tarifeño, Silvia Verónica Tejo de López, Sandra Elizabeth López, Nicolás Gonzalo Tejo López, Nicolás López, Josefina Huichacura,

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[272] *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*, para. 176.

[273] *Cf. Case of Velásquez Rodríguez v. Honduras.* Reparations and Costs, paras. 26, and *Case of Romero Feris v. Argentina*, para. 177.

[274] *Cf. Case of Velásquez Rodríguez v. Honduras.* Reparations and Costs, paras. 177, and *Case of Romero Feris v. Argentina*, para. 177.

[275] *Cf. Case of the "Las Dos Erres" Massacre v. Guatemala*, para. 226, and *Case of Romero Feris v. Argentina*, para. 177.

[276] *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*, para. 178.

[277] *Cf. Case of Andrade Salmón v. Bolivia*, para. 189, and *Case of Romero Feris v. Argentina*, para. 179.

[278] *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*, para. 180.

[279] *Cf. Case of the "La Rochela Massacre" v. Colombia. Merits, Reparations, and Costs.* Judgment of May 11, 2007, Series C No. 163, para. 233, and *Case of Romero Feris v. Argentina*, para. 181.

Carina Fernández,[280] Mirta Fernández, Enzo Blanco, and Carina Blanco, who, as victims of the violations declared in Chapter VIII of this Judgment, shall be considered beneficiaries of the reparations that the Court orders hereinafter.

B. Measures of satisfaction

235. The ***representatives*** asked that the judgment be published in the Official Gazette and in a widely-circulated national newspaper, and that a public act of recognition of responsibility be carried out in the framework of a National Congress on Sentence Execution.

236. The ***State*** indicated that a public act of recognition of responsibility is only acceptable in cases of great significance.

237. Regarding this, the Court deems it pertinent to order, as it has in other cases,[281] that the State publish, within six months of notification of this judgment: a) the official summary of this judgment prepared by the Court, once, in the Official Gazette, in an appropriate and legible font; b) the official summary of this judgment prepared by the Court, once, in a newspaper with widespread national circulation, in an appropriate and legible font, and c) this judgment in its entirety, available for one year, on an official website, in a format accessible to the public.

238. The State must inform this Court immediately when it has made each of the publications ordered.

239. Regarding the request for a public act of recognition of responsibility, the Court finds that the publications ordered in paragraph 237 are sufficient for redressing the harm done.

C. Measures of non-repetition

240. The ***Commission*** asked the State to change its infrastructure as necessary to ensure that the provinces have prisons where convicted persons can serve their sentences in the locations that meet the required standards, by not unduly restricting their contact with their families. It also requested the adoption of the changes to legislation at the federal and provincial level that were necessary to ensure that convicted persons can serve their sentences in a prison located close to their nuclear family and the next of kin and where their sentence execution courts are located.

241. The ***representatives*** asked the Court to order the State to amend its laws on the execution of prison sentences to ban transfers of any detainees—either those being prosecuted or those who have been convicted—to locations far from the place of residence of their nuclear families and next of kin, their defense attorneys, and their prison sentence execution judges. They also asked that article 280 of the Civil and Commercial Procedural Code of the Nation be repealed or amended.

242. As regards changes to the legal provisions on transferring persons deprived of liberty, the ***State*** said the measure was an abstract one on related to the facts in question, especially because the regulations are in line with international standards. It also indicated that article 280 of the Civil and Commercial Procedural Code of the Nation must be read in concordance with the rest of the law that gives authority to the Supreme Court of Justice of the Nation and in comparison with the legal systems of other States. Additionally, it noted that in Argentina,

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[280] The representatives established that Lucas Antonio Caporaso, Franco Alejandro Caporaso, and Lautaro Damián Sepúlveda are the heirs/representatives of Carina Fernández.
[281] *Cf.* Case of Cantoral Benavides *v. Peru*, para. 79, and *Case of Romero Feris v. Argentina*, para. 185.

regarding sentence execution, execution judges ensure that provinces have internal guarantee mechanisms in place to protect the human rights of detainees in practice. Additionally, of special relevance is the sentence execution public defender, who is in charge of the legal defense of persons deprived of liberty following a guilty verdict. Regarding the transfers of detained persons, the Provincial Office on Penitentiary Affairs and Policies ensures that the transfers are subjected to prior control by the sentence execution public defender and legal oversight by the sentence execution judge. In the executive branch of the province of Neuquén, the Provincial Office on Penitentiary Affairs and Policies was established under the Undersecretary for Security (Decree 100107) as an agency to comply with its sentence execution responsibilities.

243. As regards the province's penitentiary infrastructure, it reported that there are currently nine prisons in Neuquén, located throughout the province. It is therefore currently guaranteed that persons deprived of liberty in the provincial justice system serve their detention in facilities located in the province.

244. The ***Court*** notes that the subject under analysis in this case was the violation of the human rights of Néstor Rolando López, Miguel Ángel González Mendoza, José Heriberto Muñoz Zabala, and Hugo Alberto Blanco resulting from prison transfers—made arbitrarily and without the proper legal justification—to locations far from their families, lawyers, and sentence execution judges. The Court finds that it has been established that the violations established in the judgment were partially the result of deficient penitentiary infrastructure in Argentina that did not ensure that the detention centers in the province of Neuquén had sufficient space or, apparently, met the standards required without unduly restricting family contact.

245. Based on the violations proven and the details of the case, how much time is past, and its procedural consequences, the Court takes note of the measures taken by Argentina as regards sentence execution, the creation of the sentence execution public defender, and informed control prior to all transfers of persons deprived of liberty by the sentence execution public defender and execution judge, as well as the expansion of Neuquén province's prison infrastructure.

246. The Court concludes that the administrative or judicial decisions establishing the location where a sentence is to be served or the transfer of a person deprived of liberty must take the following considerations—among others—into account: i) a central objective of the punishment must be the readaptation or reintegration of the inmate; ii) contact with family and the outside world is crucial for the social rehabilitation of persons deprived of liberty. This includes the right to receive visits from relatives and legal representatives; iii) restricting visits may be harmful to the personal integrity of persons deprived of liberty and their families; iv) separating persons deprived of liberty from their families without justification is a violation of Article 17(1) of the Convention and, eventually, of Article 11(2) as well; v) if the transfer has not been requested by the person deprived of liberty, the person must, where possible, be consulted about each transfer to one prison or another, and provided with an opportunity for judicial review prior to the transfer should the prisoner oppose it.

247. Without prejudice to this, in view of the finding that current law in Argentina (article 72 of Law 24,660) does not meet the legality requirement established in the American Convention, the Court finds that the State must adopt all legislative, administrative, or judicial measures necessary to establish regulations for and implement transfers of convicted persons deprived of liberty in accordance with the American Convention on Human Rights and the standards established in this judgment: the right of the person deprived of liberty and subsequent State obligation to guarantee as much contact as possible with their family, the representatives, and the outside world, to the degree possible (*supra* para. 118).

248. The State must implement this measure within one year of notification of this judgment.

D. Measures of rehabilitation

249. The ***representatives*** asked that the State be ordered to provide effective and professional psychological and/or psychiatric treatment to the victims who request it, at their choice, either from private or public providers. This especially applies to those who were minors at the time of the violations alleged: that is, the two children of Hugo Alberto Blanco (Enzo Ricardo and Camilo Andrea) and the son of Néstor Rolando López (Nicolás Gonzalo Tejo López). The ***State*** did not comment on these measures.

250. The Court notes that the physical and psychological suffering and ailments of the victims as a result of the transfers and the abuse that took place while serving the sentence has been demonstrated. Also considering that in this case, there is no evidence demonstrating that the victims had effective access to health or psychological treatment, despite the suffering and feelings of anxiety they experienced—the effects of which persist to this day—the Court finds that the State must provide any adequate and effective psychological treatment that the victims may need, immediately and free of charge, with their informed consent and for a length of time considered necessary, including the provision of medications free of charge. Where possible, the respective treatments must be provided at a location closest to their place of residence in Argentina, for as long as necessary. For these purposes, the victims have six months from notification of this judgment to request this treatment from the State.

E. Compensation

251. The ***Commission*** requested reparations in the form of due compensation, including pecuniary and non-pecuniary damages.

252. The ***representatives*** argued that in view of the suffering the violations caused to the victims and the subsequent non-pecuniary impacts they experienced, the Court should order, for compensation and comprehensive reparation, the payment of fair and adequate compensation, understanding that amount, in equity, should be set at US$10,000 for each victim. Later, in their brief of final arguments, the representatives added that "a) the four persons deprived of liberty who were transferred should be assigned as compensation the sum of US$50,000 each; and b) the other victims (relatives of the persons deprived of liberty who were transferred) should be assigned, as compensation, the sum of US$30,000 to each of the mothers, fathers, and children who were minors at that time (identified in our brief) and US$20,000 to each of the others." Also in their final written arguments, they requested, for the first time, compensation for pecuniary damage for expenditures on transportation, communication, and shipments that the families had to make to maintain contact with the four convicted victims. They also asked for compensation for the lack of work opportunities in the framework of the prison regime due to the transfers and the expenditures on the medical treatment because of the harm caused by the transfers and the conditions in which they were made. They held that these amounts must be established in equity.

253. As regards compensation, the ***State*** said the representatives had requested compensation that was completely disproportionate with respect to the alleged harm caused.

254. The Court has developed the concept of pecuniary[282] damages and the situations in which compensation must be provided for them. Specifically, the Court has developed the concept of pecuniary damage in its case law and established that it involves "the loss of or detriment to the victims' income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts" of the case. The Court will therefore determine the applicability of granting pecuniary reparations and the corresponding amounts due in this case.

255. In this case, the Court notes that the representatives' request was only presented in its brief of final arguments. It is therefore time barred and cannot be taken into consideration by the Court.

256. Additionally, regarding non-pecuniary damages, the Court has established in its case law that non-pecuniary damages can include suffering and afflictions caused by the violation, such as tampering with individual core values and changes of a non-pecuniary nature in the living conditions of the victims or their families. Given that it is not possible to assign a precise monetary value to non-pecuniary damages, compensation is only provided for the purposes of providing the victim with comprehensive reparations through the payment of money or delivery of in-kind goods and services that the Court establishes through reasonable application of judicial discretion and in equity.[283]

257. Therefore, in view of the circumstances of this case, as well as the other non-pecuniary impacts found in this Judgment, the Court deems it pertinent to establish in equity, for non-pecuniary damages, compensation equivalent to US$10,000 (ten thousand dollars of the United States of America) for each of the victims identified in paragraph 234 of this judgment. Specifically as regards Carina Fernández, the deceased sister of Hugo Blanco, the compensation provided in this paragraph must be divided equally among her heirs, who are, according to the information provided by the representatives, Lucas Antonio Caporaso, Franco Alejandro Caporaso, and Lautaro Damián Sepúlveda.

F. Costs and Expenses

258. The ***representatives*** asked the Court to order the State to include the reimbursement of all legal expenses and costs incurred in the processing of the case both domestically and before the inter-American system and that the victims and their representatives have had pay in the framework of the domestic and international proceedings.

259. The Court reiterates that, based on its case law,[284] costs and expenses form part of the concept of reparation, because the efforts made by the victims to obtain justice, both at the national and international level, entail disbursements that must be compensated when the State's international responsibility has been declared in a condemnatory judgment. Regarding the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, which includes expenses incurred before the authorities of the domestic courts and 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 based on the principle of equity, taking

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[282] *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*, para. 189.

[283] *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*, 190, para.

[284] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Romero Feris v. Argentina*, para. 196.

into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[285]

260. This Court has found that "the claims of the victims or their representatives with regard to costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural opportunity granted to them; that is, in the pleadings and motions brief, without prejudice to these claims being updated subsequently, in keeping with the new costs and expenses incurred during the proceedings before this Court."[286] The Court also 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 that it is considered to represent and, in the case of alleged financial disbursements, ensure that the items and their justification are clearly described."[287]

261. In the instant case, the Court observes that there is no precise evidentiary support in the case file with regard to the costs and expenses incurred by Mr. López, Mr. Muñoz, Mr. Blanco and Mr. González or their representatives regarding the processing of the cases before domestic jurisdiction or before the Inter-American Commission. The Court also notes that the legal defense domestically was carried out by the Public Ministry of Defense. However, the Court finds that the procedures before the inter-American system necessarily entailed financial expenses, for which it determines that the State must pay the amount of US$10,000.00 (ten thousand United States dollars) for costs and expenses, an amount that must be divided among the representatives. This amount shall be delivered directly to the accredited representatives in this case. At the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victims or their representatives for any reasonable expenses incurred during that procedural stage.[288]

G. Reimbursement of expenses to the Victims' Legal Assistance Fund

262. In this case, the President's Order of February 14, 2019, provided the necessary financial assistance to cover the expenses of presenting the statements of the alleged victim, a witness (proposed by the representatives), and the appearance of two legal representatives[289] at the public hearing.

263. The ***State*** reported that it had no observations regarding the expenditures made in the instant case.

264. Therefore, based on the violations declared in this judgment and the fact that the requirements to accessing the fund were met, the Court orders the State to reimburse the fund the sum of US$4,805.40 (four thousand eight hundred and five dollars of the United States of America with forty cents). This sum must be reimbursed within six months of notification of this judgment.

H. Method of compliance with the payments ordered

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[285] *Cf. Case of Garrido and Baigorria v. Argentina*, para. 82, and *Case of Ruiz Fuentes et al. v. Guatemala*, para. 251.
[286] *Cf. Case of Garrido and Baigorria v. Argentina*, paras. 79 and 82, and *Case of Ruiz Fuentes et al. v. Guatemala*, para. 251.
[287] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 277, and *Case of Romero Feris v. Argentina*, para. 197.
[288] *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala.* Interpretation of the Judgment on the Merits, Reparations, and Costs. Judgment of August 19, 2013. Series C No. 262, para. 62, and *Case of Romero Feris v. Argentina*, para. 198.
[289] Gustavo L. Vítale and Fernando Luis Diez.

265. The State shall make payment of the compensation for non-pecuniary damage, as established in this judgment, directly to the person indicated herein, within one year of notification of this judgment.

266. If the beneficiary is deceased or dies before they receive the respective compensation, it shall be delivered directly to their heirs, in accordance with the applicable domestic law, and pursuant to paragraphs 257 and 261 of this judgment.

267. As regards the currency used to pay the compensation and reimbursement of costs and expenses, the State shall comply with the monetary obligations by payment in United States dollars or, if this is not possible, in the equivalent in Argentine currency, using the highest and most beneficial rate for the beneficiaries allowed by its domestic law at the time of the payment to make the respective calculation. During the stage of monitoring compliance with the judgment, the Court may make a prudent readjustment of the equivalent of the respective sums in Argentine currency in order to avoid exchange variations substantially affecting their purchasing power.

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

269. The amounts assigned in this judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses shall be delivered to the person indicated integrally, as established in this judgment, without any deductions resulting from possible taxes or charges.

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

X
OPERATIVE PARAGRAPHS

271. Therefore,

THE COURT

DECIDES,

By four votes in favor and one opposed,

1. To reject the preliminary objection filed by the State with regard to the Court's lack of jurisdiction due to failure to exhaust domestic remedies, in the terms of paragraphs 20 to 24 of this judgment.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

2. To reject the preliminary objection filed by the State with regard failure to comply with the mandate set forth in Article 48(1)(b) of the American Convention, in the terms of paragraphs 28 to 29 of this judgment.

Eduardo Vio Grossi dissents.

AND DECLARES,

By four votes in favor and one opposed,

3. The State is responsible for violating the rights to humane treatment, to the essential aim of reform and re-adaptation of the convicted person, to not be subject to arbitrary or abusive interference in one's private and family life, and the family, pursuant to articles 5(1), 5(6), 11(2), and 17(1) of the American Convention on Human Rights, in relation to articles 1(1), 2, and 30 of the Convention, to the detriment of Néstor López, Hugo Blanco, José Muñoz Zabala, and Miguel Ángel González, pursuant to the terms of paragraphs 89 to 162 of this judgement.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

4. The State is responsible for the violation of the rights to humane treatment, the prohibition that the punishment extend beyond the person being punished, the right to not suffer arbitrary interference in private and family life, and the right to family, set forth in articles 5(1), 5(3), 11(2), and 17(1) of the American Convention on Human Rights, in relation to Article 1(1) of the Convention, to the detriment of Lidia Mabel Tarifeno, Silvia Verónica Tejo de López, Sandra Elizabeth López, Nicolás Gonzalo Tejo López, Nicolás López (father) and Josefina Huichacura (relatives of Néstor López); Carina Fernández, Mirta del Carmen Fernández, Enzo Ricardo Blanco and Camila Andrea Blanco (relatives of Hugo Blanco). Likewise, regarding Nicolás Gonzalo Tejo López, Camila Andrea Blanco, and Enzo Ricardo Blanco, who were children at the time of the facts, the violations indicated *supra* are related to Article 19 of the American Convention, all pursuant to the terms of paragraphs 163 to 178 of this judgment.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

5. The State is responsible for the violation of the right to personal integrity, recognized in Article 5(2) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Néstor López, Miguel González, José Muñoz, and Hugo Blanco, pursuant to paragraphs 179 to 187 of this judgment.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

6. The State is responsible for violation of the right to assistance by a defense attorney of one's choice and the right to communicate freely and privately with them, established in Article 8(2)(d) of the American Convention on Human Rights, in relation to Article 1(1) of the Convention, to the detriment of Néstor López, Hugo Blanco, Miguel Ángel González, and José Muñoz Zabala, pursuant to the terms of paragraphs 195 to 208 of this judgment.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

7. The State is responsible for violating the rights to access to justice and judicial protection, recognized in articles 8(1) and 25(1) of the American Convention on Human Rights, in conjunction with Article 1(1) of the Convention, to the detriment of Néstor López, Miguel González, José Muñoz Zabala, and Hugo Blanco, pursuant to the terms of paragraphs 209 to 227 of this judgment.

Eduardo Vio Grossi dissents.

AND ORDERS:

By four votes in favor and one opposed,

8. This judgment constitutes, per se, a form of reparation.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

9. The State shall adopt all legislative, administrative, or judicial measures necessary to establish regulations for transfers of convicted persons deprived of liberty in accordance with the American Convention on Human Rights and the standards established in this judgment, pursuant to paragraph 247 of this judgment.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

10. Within six months, the State shall issue the publications indicated in paragraph 237 of this judgment.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

11. The State shall pay the amounts established in paragraphs 257 and 261 of this judgment for pecuniary and non-pecuniary damages and for reimbursement of costs and expenses.

Eduardo Vio Grossi dissents.

By four votes in favor and one opposed,

12. The State must provide any adequate and effective psychological treatment that the victims may need, immediately and free of charge, with their informed consent and for a length of time considered necessary, including the provision of medications free of charge, pursuant to the terms of paragraph 250 of this judgment.

Eduardo Vio Grossi dissents.

Unanimously,

13. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the sum disbursed during the processing of this case, pursuant to paragraph 264 of this judgment.

Unanimously,

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

Unanimously,

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

Judge Eduardo Vio Grossi informed the Court of his individual partially dissenting opinion, which accompanies this judgment.

DONE, at San José, Costa Rica, on November 25, 2019, in the Spanish language.

I/A Court HR. *Case of López Soto et al. v. Argentina.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019.

Eduardo Vio Grossi
Acting President

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

L. Patricio Pazmiño Freire

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered

Eduardo Vio Grossi
Acting President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF LÓPEZ ET AL. V. ARGENTINA
JUDGMENT OF NOVEMBER 25, 2019
(Preliminary Objections, Merits, Reparations and Costs)

I. INTRODUCTION

1. This dissenting opinion to the judgment named in the heading[1] is issued in response to the finding in Operative Paragraph 1[2] on the objection raised by the Argentine Republic[3] regarding the requirement of prior exhaustion of domestic remedies established in the American Convention on Human Rights.[4]

2. For a better understanding of this dissent, it is necessary to reiterate and even expand upon what has already been expressed in other individual opinions[5] regarding the

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[1] Hereinafter the Judgment.

[2] "To reject the preliminary objection filed by the State, on being submitted out of time, in the terms of paragraphs 20 to 24 of this judgment."

[3] Hereinafter, the State.

[4] Hereinafter, the Convention.

[5] *Concurring opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Gómez Virula et al. v. Guatemala, Judgment of November 21, 2019, (Preliminary Objection, Merits, Reparations and Costs); Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, Judgment of November 21, 2019, (Preliminary Objections, Merits, Reparations and Costs); Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Díaz Loreto et al. v. Venezuela, Judgment of November 19, 2019 (Preliminary Objections, Merits, Reparations and Costs); Concurring Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Terrones Silva et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2018, Series C No. 360; Individual Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of April 25, 2018, Series C No 364; *Individual Concurring Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights*. *Case of Yarce et al. v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 22, 2016. Series C No. 325; Concurring Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of Herrera Espinoza et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2016. Series C No. 316; Concurring Opinion of Judge Eduardo Vio Grossi. *Inter-American Human Rights, Case of Velásquez Paiz et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 19, 2015. Series C No. *307; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. Case of the Peasant Community of Santa Bárbara v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. *299; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. Case of Wong Ho Wing v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 30, 2015. Series C No. *297; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of*

fulfillment of the cited requirement, thus addressing, therefore, successively some prior and general considerations providing the rationale supporting this dissenting opinion, the norms of the Convention on this subject, the norms of the Rules of Procedure regarding the matter, and lastly, the consequences that would derive from adopting a standard different from the one set forth in these lines.

II. PRELIMINARY AND GENERAL CONSIDERATIONS.

1. The preliminary and general considerations pertaining to the matter in question are related to the function of the Inter-American Court of Human Rights[6] and the role of the individual opinion.

A. Regarding the role of the Court.

2. This dissenting opinion is based on the fact that what corresponds to the Court[7] is to impart justice in matters of human rights in accordance with the law and more specifically, in accordance with the Convention and, therefore, both international human rights law of which it is a part and public international law[8] that it, in turn, comprises.

3. Thus, the Court is not, strictly speaking, responsible for promoting and defending human rights, since the Convention expressly assigned that function to the Commission,[9] which could

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Human Rights. Case of Cruz Sánchez et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C No. *292; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. Case of Liakat Ali Alibux v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 30, 2014. Series C No. *276; and Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. Case of Díaz Peña v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 26, 2012. Series C No. 244.

[6] Hereinafter, the Court.

[7] Article 62(3) of the Convention: "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."

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

[9] Article 41 of the Convention: "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.

be classified as activist, understanding this term in the most positive sense possible.[10] In contrast, it is the Court's responsibility to resolve human rights disputes that arise between States Parties to the Convention, which can come before the Court on their own,[11] or, if a person, group of persons, or non-governmental entity has presented a petition against one or several States Parties,[12] giving rise to the case in question,[13] the other States Parties are represented by the Commission[14] and even must hear the cases in which the State Party accused has not complied with rulings issued in the proceedings brought against them.[15]

4. The function of the Court is, it is reiterated, to rule by applying and interpreting the Convention—that is, to determine the meaning and scope of the Convention's provisions that, due to being to some extent perceived as obscure or unclear, may be subject to application in a variety of ways, ensuring that the consequence of its rulings is the effective protection of human rights and their reestablishment as soon as possible, should they have been violated.[16]

5. Obviously, in order to do this, the Court does not have the authority to judge independently of the law or outside what it establishes (expressed, in this regard, in the Convention). In this vein, the principle of public law must be respect, in the sense that the

[10] Dictionary of the Spanish Language, Royal Spanish Academy, 2019: "Activism: 1. Tendency to behave in an extremely dynamic way. 2. Exercise of public proselytism and social action. Activist: 1. Belonging to or relating to activism. 2. Follower of activism."

[11] Article 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."

[12] Article 55: "1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.

2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an ad hoc judge.

3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge.

4. An ad hoc judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide."

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

[15] Article 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."

[16] Article 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."

Court can only do what the law expressly provides for. Therefore, in terms of what the law does not address, the internal, domestic or exclusive jurisdiction of the State applies.[17]

6. Furthermore, and for the same reason indicated, the Court must, on the one hand, proceed only in accordance with what the Convention actually establishes and not what it would like it to establish, and, on the other, avoid amending it, an authority expressly assigned to the States Parties to that Convention.[18] Consequently, should the Court disagree with what the norm of the Convention establishes, rather than exercising the international normative function that is the responsibility of the States, the Court should represent to them the need to modify the norm in question. In this way, the new provision that eventually arises from the exercise of the aforementioned function by the States will certainly enjoy a more solid and broad democratic legitimacy.

7. Along these same lines, it should likewise be noted that this document is in response to the circumstance that the Court, as a judicial body, enjoys the widest possible autonomy in its work, and there is no higher authority that can review its conduct,[19] a characteristic that means it must itself be extremely rigorous in the exercise of its jurisdiction in order not to distort it and, consequently, ultimately weaken the inter-American human rights protection system. Therefore, this brief argues for, among other objectives, the broadest recognition of the Court by all those who appear before it (that is, the alleged victims of human rights violations,[20] the Commission,[21] and the States Parties to the Convention) that have recognized

[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, Nationality Decrees Issued in Tunis and Morocco (French Zone), Series B No. 4, p. 24.
Protocole n° 15 portant amendement à la Convention (Européenne) de Sauvegarde des Droits de l'Homme et des Libertés fondamentales, art.1: "*A la fin du préambule de la Convention, un nouveau considérant est ajouté et se lit comme suit*: *Affirmant qu'il incombe au premier chef aux Hautes Parties contractantes, conformément au principe de subsidiarité, de garantir le respect des droits et libertés définis dans la présente Convention et ses protocoles, et que, ce faisant, elles jouissent d'une marge d'appréciation, sous le contrôle de la Cour européenne des Droits de l'Homme instituée par la présente Convention".*

[18] Article 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."
Article 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."
Article 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] Article 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."

[20] *Supra* footnote 13.
Article 25(1) of the Rules of Procedure of the Court: "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 14.

its jurisdiction[22] to strengthen it as a judicial body and, consequently, as the most complete fully-realized human rights protection entity of continental scope, which is why it is necessary to persist in consolidating and perfecting it without subjecting it to risks that could negatively affect that effort.

8. All of the above bearing in mind, in addition, that the Court, on the one hand, must exercise its functions in adherence to, among other things, the principles of impartiality, independence, objectivity, political independence, equanimity, full equality before the law and justice, non-discrimination and absence of prejudice, characteristics inherent to all jurisdictional bodies; and, on the other hand, the ultimate purpose of its work is to duly and in a timely manner protect the human rights of the alleged victims of violations thereof, that is, it must proceed by taking into account that its function is similar, for example, to that of the juvenile and labor courts—the former of which is based on the best interest of the child and the latter of which is based on the protection of the worker—and all in the framework of the administration of justice.

9. Considering all the foregoing and in view of the fact that the Convention is a treaty between States[23] that establishes their obligations, but with respect to human beings who are under their respective jurisdictions,[24] it can be concluded that the function of the Court is to get to the bottom of what they wanted when they signed the aforementioned treaty and, eventually, how what was expressed in the Convention should be understood in new situations.

10. Is for this reason that when interpreting the Convention, the Court uses not only that tax but also other sources of international public law—that is, international custom, the general principles of law and the unilateral legal acts under them, and if agreed upon by the States appearing before it, equity, as well as—but as auxiliary sources—the case law, doctrine, and acts of international legal bodies.[25]

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[22] Supra footnote 7.

[23] Article 2(1)(a) of the Vienna Convention on the Law of Treaties: "Terms used. 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 of the Convention: "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] Article 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: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; 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.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
This is the only international conventional provision that refers to the sources of public international law. It does not include unilateral legal acts or resolutions of international law bodies.

11. Now, the main rule of interpretation of treaties contained in the Vienna Convention on the Law of Treaties[26] 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."[27]

12. This standard therefore includes four methods of interpretation. One is the method based on good faith, which implies that what has been agreed upon by the States Parties to the treaty in question must be viewed in the understanding that they actually had the will to agree to it, such that it can actually be applied or have a useful effect. The second is the textual or literal method, which involves the analysis of the text of the treaty, the vocabulary it uses, and the ordinary meaning of its terms. A third is the subjective method, which seeks to establish the intention of the States Parties to the treaty, analyzing, in addition, the preparatory work for it and their subsequent conduct surrounding it. And the fourth is the functional or teleological method, which aims to determine the object and purpose for which the treaty was signed. These four methods must be applied simultaneously and harmoniously in the interpretation of a treaty, without privileging one over the other.[28]

13. Ultimately, the underlying point of these lines is that, on the one hand, the inter-American jurisdiction provided for in the Convention is the peaceful means of resolving disputes that arise between its States Parties regarding respect for the human rights of human beings under their respective jurisdictions and, on the other hand, that the Court, by proceeding in accordance with the provisions of the Convention, provides the necessary and corresponding legal certainty for its rulings. All this is because we consider the law to be a means to achieving justice and peace.

B. Regarding the role of the individual opinion.

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[26] Hereinafter, the Vienna Convention.

[27] Article 31 of the Vienna Convention. The article continues as follows:
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.
Article 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 distinguishes it from the interpretation of the law, for 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 tenor shall not be disregarded on the pretext of consulting its spirit.
But to interpret an obscure expression of the law, it is permissible to resort to its intention or spirit, clearly manifested in itself, or in the trustworthy history of its establishment."

14. This partially dissenting opinion is formulated with full and absolute respect for what was resolved in the record by the Court and that, therefore, must be respected. This document cannot, therefore, be interpreted, in any way or under any circumstances, as diminishing the legitimacy of the decision adopted in the present case.

15. Therefore, it is also appropriate to expressly state that the grounds given for this opinion are not, under any circumstances meant to weaken or restrict the validity of human rights, but precisely the opposite. Indeed, this opinion is based on the intimate certainty that effective respect for human rights is achieved when what is required of the States Parties to the Convention is what they themselves really freely and sovereignly committed to comply with.[29] In this regard, legal certainty plays a fundamental role, and it therefore cannot be understood as a limitation to or restriction on the development of human rights, but rather as the instrument that can best guarantee effective respect for them or, if they have been violated, their reestablishment by the corresponding State as soon as possible.[30] Thus, this involves not only issuing well-founded judgments that develop human rights, but also and principally, in the event that these rights have been violated, that their validity is restored as soon as possible by the State concerned.

16. The issuance of individual opinions—which sometimes can lead to misunderstandings and even disparagement or discrimination—not only constitutes the exercise of a right, but fundamentally the fulfillment of a duty, which is to contribute to a better understanding of the function assigned to the Court.[31] Additionally, individual opinions could even be related to the exercise of the right to freedom of thought and expression, enshrined in the Convention.[32]

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[29] *Supra* footnote 25.
Article 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* footnote 16.

[31] Article 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."
Article 24(3) of the Statute of the Inter-American 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."
Article 32(1) of the Rules of Procedure of the Inter-American Court: "The Court shall make public: a. 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."
Article 65(2) of the Rules of Procedure of the Inter-American Court: "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 Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

[32] Article 13 of the Convention: "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) For the protection of national security or of public order (ordre public), or of public health or morals.

17. This is why, moreover, the institution of individual opinions is also provided for in the international norms establishing 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]

18. The opinion is formulated, then, in the hope that in the future it will be accepted, either by the jurisprudence itself or by a new norm of International Law, as indicated therein. Regarding the former, given that the Court's ruling is binding only for the State Party of the case in which it is issued,[38] it may, as an auxiliary source of international law that therefore corresponds to "the determination of rules of law "established by an autonomous source of international law—that is, treaty, custom, general principle of law, or unilateral legal act[39]—change in the future when a judgment is issued in another case. Regarding the latter, this is by virtue of the fact that the international normative function falls to States and, in the case of the Convention, to its States Parties through amendments to the latter.[40]

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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.

[33] Article 74(2) of its 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] Art. 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] Article 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 have his dissenting or separate opinion attached to the judgment."

[36] Article 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] Article 30(3) 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 have his dissenting or separate opinion attached to the judgment."

[38] Infra footnote 41, Article 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."
Article 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."
Articles 46(1) and 46(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."

Article 59 of the Statute of the International Court of Justice: "The decision of the Court is not binding except for the parties in dispute and with respect to the case that has been decided."

[39] *Supra* footnote 25.

[40] *Supra* footnote 18.

III. NORMS OF THE CONVENTION.

A. Exhaustion of domestic remedies

19. The rule of prior exhaustion of domestic remedies is set forth in Article 46(1)(a) of the Convention, which states that:

> "1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
> a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

20. For its part, Article 47(a) of the Convention adds that:

> "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: any of the requirements indicated in Article 46 has not been met;"

B. Basis.

21. The basis of the rule of prior exhaustion of domestic remedies in the inter-American human rights system is set forth in the third paragraph of the Preamble of the Convention, which states as follows:

> "Recognizing that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States."

C. Contributing or complementary nature of inter-American protection.

22. Having explained the grounds and applicable norms, I will now move forward to argue that the aforementioned rule of prior exhaustion of domestic remedies—and, therefore, the "international protection" of the inter-American human rights system—is described in the Convention as "in the form of a convention reinforcing or complementing the protection provided by domestic law," which, logically, implies that it does not replace it and that, among other reasons, on the merit of the fact that, with regard to compliance with what is decreed in that system, at least in disputes between the Commission and the petitioners on the one hand and the State concerned on the other, must always be complied with or executed by the latter.[41]

23. That is, the inter-American jurisdiction does not substitute for or replace the domestic jurisdiction. It only reinforces or complements it by contributing or helping it to restore, as soon as possible, the validity of the human rights that are allegedly violated. In this regard, it

[41] Article 68 of the Convention: 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

should not be forgotten that the party bound by the Convention is the State[42] and, therefore, not only does it have the international obligation to respect and ensure respect for the rights enshrined therein,[43] but also can on many occasions only do this through its own courts of law.

24. It is for this reason that, as the Court has indicated,

> "The rule of the prior exhaustion of domestic remedies was conceived in the interest of the State, because it seeks to exempt it from responding before an international organ for acts of which it is accused before having had the opportunity to remedy them by its own means."[44]

25. Ultimately, then, the aforementioned rule is a mechanism to allow the State to comply with its human rights obligations without waiting for the Inter-American System to eventually order it, following a process, to do so. Consequently, the aforementioned rule seeks to provide the State with the opportunity to order, as soon as possible, the effective enforcement of and respect for the human rights violated, which is the object and purpose of the Convention and, therefore, what is ultimately of interest is that it occur as soon as possible, making the subsequent intervention of the inter-American jurisdiction unnecessary.

26. For the rule of prior exhaustion of domestic remedies, what matters, therefore, is that in those situations in which it has already been alleged before the respective domestic jurisdiction that the State has not complied with the commitments it made to respect and to guarantee the free and full exercise of human rights, it is possible to petition for the intervention of the inter-American jurisdiction so that, if admissible, it may order compliance with the international obligations the State violated, provide a guarantee that it will not violate them again, and provide reparations for all the consequences of such violations.[45]

27. From this perspective, it can be argued that although the useful effect of the aforementioned rule is for the State to restore as soon as possible respect for the human rights violated—the object and purpose of the Convention—it is also true that said rule is established—perhaps mainly—for the benefit of the alleged victim of the human rights violation.

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[42] Article 1(1) of the Convention: "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."

Article 33 of the Convention: "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."

[43] *Supra* footnote 24.

[44] Inter-American Court of Human Rights. *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 61.

[45] *Supra* footnote 16.

D. Bearer of the obligation.

28. Additionally, it is also necessary to emphasize that the Convention conceives of the aforementioned rule as an obligation that must be fulfilled prior to "a petition or communication lodged in accordance with Articles 44[46] or 45,"[47] which amounts to affirming that the responsibility to demonstrate such compliance falls to those presenting the petition before the Commission, that is, "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization" that could subsequently intervene in the corresponding trial.[48]

29. Indeed, it can be argued, under the provisions of the aforementioned article 46, that, for the petition or pertinent communication to be admitted, domestic remedies must have been previously exhausted and, evidently, those responsible for doing so are the alleged victims, their representatives, or those presenting the petition. Obviously, it would not be logical or understandable to make the admissibility of a petition or communication for a human rights violation depend on the State against which it is directed having exhausted domestic remedies against its own consistent action precisely for having violated human rights, because in such an absurd hypothesis, it would never be possible to resort to international courts.

30. The foregoing seems obvious and is only noted to emphasize, with no room for doubt, that the reference that the case law of the Court has made to the circumstance that the rule in question "is conceived in the interest of the State" does not mean, consequently, that the State is the bearer of the obligation to prove compliance. The obligated party can therefore be no other than the alleged victim, their representative, or the petitioner, and compliance with this obligation will allow the State to respond to the petition submitted before the Commission and eventually raise the objection of failure to exhaust domestic remedies.

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[46] Supra footnote 13.

[47] "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.
2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.
3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.
4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

[48] The Rules of Procedure of the Court of 1996 established that "at the reparations stage, the representatives of the victims or other next of kin may submit their own arguments and evidence" (Article 21). The Rules of Procedure of 2000, 2003 and 2009 established that "when the application has been admitted, the alleged victims or their duly accredited representatives may submit their pleadings, motions, and evidence autonomously throughout the proceedings." (Article 23(1)). The current Rules of Procedure, approved by the Court during its LXXXV regular sessions held on November 16-28, 2009, establish that "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" (Article 25(1)).

E. Timing of the petition.

31. It should also be reiterated that the rule of prior exhaustion of domestic remedies logically constitutes a requirement that must be met prior to the presentation of the petition before the Commission, and the petition must describe compliance with this requirement or the impossibility of doing so.

32. Effectively, it should be borne in mind that the text of articles 46(1)(a)[49] and 47(b)[50] of the Convention refers to the "petition or communication submitted"—that is, to an instantaneous act, which occurs at a specific moment and does not persist over time. The same can be argued with respect to Article 48(1)(a) of the Convention, when it establishes that:

> "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case."

33. In other words, what the Convention indicates is that it is the "pertinent portions of the petition or communication," that is, of the "submitted" petition or communication, that are forwarded to the State in question, meaning that it is the petition that must indicate compliance with the requirements of prior exhaustion of domestic remedies or the impossibility of such exhaustion due to one of the circumstances provided for in Article 46(2) so that the State can respond and potentially raise the corresponding objection, meaning that at the moment of filing the petition, this must have already taken place.

34. This interpretation is supported by the provisions of Article 46(1)(b) of the Convention, to the effect that the petition must have been

> "lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment."

35. Certainly, this final judgment must be understood as the one regarding the last remedy filed, with no others available to be handed down. In other words, the deadline indicated for submitting the request is counted from the moment of notification of the final ruling of the domestic authorities or courts on the remedies that have been filed before them and which are, therefore, the ones that could have generated the international responsibility of the State, which obviously implies that, at the time the petition or communication was "submitted," they must have been exhausted.

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[49] *Supra*, para. 21.

[50] *Supra*, para.22.

36. The content of the aforementioned Article 6(1)(a) reinforces this, in that it refers to the fact that "the remedies under domestic law have been pursued and exhausted," that is, insofar as it refers to something that has already occurred before the filing of the corresponding request.

F. Mandatory rule.

37. In accordance with this, it may also be recalled that Article 47(a) provides that

> "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: any of the requirements indicated in Article 46 has not been met."

38. That is, the provision is compulsory. The Commission must declare inadmissible "any petition or communication submitted" with respect to which domestic remedies have not been exhausted or that is not in any of the situations provided for in the above-cited Article 46(2).

39. Obviously, the Commission cannot do otherwise, such as, for example, by declaring a petition or communication admissible despite the fact that, at the time it was "submitted," the requirement of prior exhaustion of domestic remedies had not been met but had been as of the time it was "admitted," since by doing so, the Commission renders it without effect or real or practical meaning, rather than initiating a procedure instead of the *litis*.

40. Effectively, if exhaustion of domestic remedies is not required prior to the submission of the petition or if it takes place within the time period of six months from final notification, then it also cannot be required that "the subject of the petition or communication is not pending in another international proceeding for settlement" or that it "contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition," requirements also set forth in Article 46 of the Convention, given that all of it could have been resolved later and, in any case, prior to the declaration of admissibility, which obviously is not in accordance with the provisions of the aforementioned rule.

G. Submission and admissibility of the petition.

41. Finally, it should also be noted that the aforementioned articles of the Convention do not indicate that the requirements indicated must be met at the time the Commission decides on the admissibility of the petition or communication. Rather, it can be argued that the aforementioned articles of the Convention distinguish between two moments, namely, one, in which it is "submitted" and another in which it is "admitted." This is also supported by the provisions of the above-cited Article 48(1)(a) and, likewise, by the provisions of paragraphs b) and c) thereof.[51]

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[51] "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:
a) If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case;

42. These provisions establish, therefore, that once the petition or communication has been "submitted" to the Commission, the admissibility procedure begins, in which the "litis" in question must be resolved, that is, if, at the time at which it was "submitted," as it was, did it or did it not meet the requirements stipulated in the aforementioned Article 46. If yes, the petition must be declared "admissible," and if not, it must be declared "inadmissible." It should be emphasized that the aforementioned provision of the Convention does not indicate that it is enough for these requirements to be met as of the time the Commission decides on the admissibility of the petition. It only states that, in order for the "petition submitted" to be admitted, domestic remedies must have been filed and exhausted. Consequently, regarding the "submitted" petition or communication, the Commission must rule on whether, at that moment and not later, it complied with the requirement of prior exhaustion of domestic remedies or not.

H. Supplementary means of interpretation.

43. Regarding supplementary means of interpretation, it should be noted that the beginnings of the Convention give no indication of the doctrinal inspiration of the provisions of Article 46(1)(a), in particular of its phrase "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

44. It should therefore be presumed that it meant what it said, that is, without need to justify reference to the principles in question, because they were already robustly incorporated or recognized by international public law, which the International Court of Justice found when it resolved the third preliminary objection filed by the United States of American in the *Case of Interhandel*, 1959. In this regard, the Court found that:

> "The rule that local remedies must be exhausted before international procedures can be established is a well-established rule of customary international law."[52]

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b) After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed;
c) The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.
d) If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities;
e) The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.
f) 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.
2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed."

[52] Affaire de l´Interhandel (Arrêt du 21 III 59), p.27: *"La règle selon laquelle les recours internes doivent être épuisés avant qu'une procédure internationale puisse être engagée est une règle bien établie du droit international coutumier; elle a été généralement observée dans les cas où un Etat prend fait et cause pour son ressortissant dont les droits auraient été lésés dans un autre Etat en violation du droit international. Avant de recourir à la juridicfion internationale, il a été considéré en pareil cas nécessaire que le'Etat où la lésion a été commise puisse y remédier par*

45. Being, therefore, a principle of international law, based on international and public custom and well established, it was probably not considered necessary to justify its incorporation into the Convention. Thus, the Convention not only consolidated it even more by establishing it in its text, but also did not limit it to the nationals ("*ressortissant*") of the requested State. Indeed, it made it applicable "to any person who is subject to (the) jurisdiction"[53] of its States Parties, whether or not they are nationals of any of them.

46. Now, as regards the position expressed in this opinion, according to the aforementioned resolution of the International Court of Justice, which should be understood as the background of the aforementioned Article 46(1)(c) of the Convention, the exhaustion of domestic remedies must have been carried out prior to the claim being made, which confirms the interpretation expressed in this document.

I. Exceptions to the rule of prior exhaustion of domestic remedies

47. Subparagraph 2 of article 46 establishes the following:

> "The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:
> a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
> b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
> c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

48. Therefore, compliance with the rule of prior exhaustion of domestic remedies admits the three exceptions established in the above-cited rule, all questions of fact under international law, which must be considered by the Commission or the Court, as and when appropriate.

49. However, regarding the proper moment to invoke them, it is also evident that it is in the petition, such that the processing of the aforementioned exceptions to the rule of prior exhaustion of domestic remedies follows the course of the petition.

IV. PROVISIONS OF THE RULES OF PROCEDURE

50. The foregoing is also addressed in the Rules of Procedure of the Commission itself, where they regulate the admissibility procedure of the petition lodged before the Commission, and

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ses propres moyens, dans le cadre de son ordre juridique interne. Cette règle s'impose à plus forte raison quand les procédures internes sont en cours, comme c'est le cas pour l'Interhandel et quand les deux actions, celle de la société suisse devant les tribunaux des Etats-Unis et celle du Gouvernement suisse devant la Cour dans sa conclusion principale, visent à obtenir le même résultat: la restitution des avoirs de l'Interhandel séquestrés aux Etats-Unis".

[53] Article 1 of the Convention: "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."

therefore reflect the interpretation of Article 46 of the Convention.[54] In said procedure, a distinction is drawn between the submission of the petition and its initial review, the transmission of the petition to the State, its response, the observations of the parties and, finally, the decision on its admissibility.

A. Initial review by the Commission.

51. Effectively, for the moment, we note that article 26 of said Rule of Proceedure establishes that:

> "Initial Review 1. The Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure.
> 2. If a petition or communication does not meet the requirements set for in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them.
> 3. If the Executive Secretariat has any doubt as to whether the requirements referred to have been met, it shall consult the Commission."[55]

52. For its part, article 27 of the Rules of Procedure establishes that:

> "Condition for Considering the Petition The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member States of the OAS, only when the petitions fulfill the requirements set forth in those instruments, in the Statute, and in these Rules of Procedure."[56]

53. For its part, Article 28(h) of the aforementioned Rules of Procedure provides that:

> "…. Requirements for the Consideration of Petitions Petitions addressed to the Commission shall contain the following information: ... any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure."[57]

54. It should be noted that Article 29(1) and (3) of the Rules of Procedure reiterates what is stated in Article 26(1) and (3):

> "Initial processing: 1. The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented. Each petition shall be registered, the date of receipt shall be recorded on the petition itself and an acknowledgement of receipt shall be sent to the petitioner.

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[54] The Rules of Procedure currently in force were approved on March 18, 2013 and entered into force on August 1 of the same year. Given that, at the time the petition was submitted, the 1980 Rules of Procedure were in force, that regulation's equivalent corresponding articles of the Rules of Procedure currently in force will be noted in a footnote.

[55] Article 27.

[56] Idem.

[57] Article 29(d)

...

3. If the petition does not meet the requirements of these Rules of Procedure, the Commission may request that the petitioner or his or her representative complete them in accordance with Article 26.2 of these Rules."[58]

55. From this it follows, then, that the information required for the pertinent petition to be "processed" or "considered" must refer either to the steps taken to exhaust domestic remedies or to the impossibility of exhausting them. That is, the petition must give an account of what was done so that the remedies in question were exhausted or indicate that it was impossible to exhaust them, and if it expresses nothing in this regard, the Commission must require the petitioner to do so with the warning that otherwise, pursuant to the Rules of Procedure, it will not be considered.

56. In this regard, the Commission, acting through its Executive Secretariat, must carry out an initial review of the petition pursuant to the Convention—that is, hold it up to the provisions of the Convention and the aforementioned Rules of Procedure. In other words, it must determine whether it complies with the corresponding requirements at the time of being "submitted" and if it finds that it does not comply, the Commission must require such compliance. Otherwise, the logic and necessity of the "study and initial processing" of the petition is not clear, nor why the petitioner should be required to indicate in the petition the steps taken to exhaust internal remedies or the impossibility of doing so.

57. It is, therefore, the Commission's own Rules of Procedure that require that petitions addressed to the Commission must include the information concerning the steps taken—obviously before they are submitted—to exhaust domestic remedies or indicate the impossibility thereof, which must be duly documented. This requirement in the Rules of Procedure, which provides the Commission's own interpretation of the corresponding provisions of the Convention, is of the utmost relevance, and it is compliance therewith that subsequently enables the litigation on the matter to be established.

B. Transfer of the petition to the State involved.

58. Also, with regard to the transfer of the petition to the State concerned, the Commission's Rules of Procedure confirm the interpretation alluded to, that is, that exhaustion of domestic remedies is a requirement that must be met prior to submitting the petition before the Commission, and that due account must be taken of this in the petition filed with the Commission.

59. Indeed, Article 30(1) and (2) of the aforementioned Regulation establishes:

> "Admissibility Procedure 1. The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure.

[58] Arts. 30 and 31(1)(a) and (b).

> 2. For this purpose, it shall forward the relevant parts of the petition to the State in question. (...) The request for information made to the State shall not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition."[59]

63. It should be borne in mind, in this regard, that the transfer to the State concerned ordered by the Commission must be of the petition itself, and only insofar as it complies with—among other things—the requirement related to information about the steps taken to exhaust domestic jurisdiction remedies or the impossibility of doing so. In other words, said transfer of the petition must proceed if it complies with the aforementioned requirement.

64. The aforementioned norm does not establish, therefore, that said requirement must or can be fulfilled at a time after the submission of the petition. Likewise, attention must be paid to the fact that the aforementioned transfer must be of the petition as it was "submitted" and that, therefore, it must include reference to the aforementioned requirement. Otherwise, the State would have no way of eventually raising the respective objection.

C. Response of the State and observations of the parties.

65. Now, in accordance with the provisions of the first sentence of Article 30(3) and Article 5 of the Rules of Procedure,

> "3. The State shall submit its response within two months from the date the request is transmitted.
> […]
> 5. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of these Rules of Procedure."[60]

66. Obviously, the State's response to the transfer granted and the additional observations of the parties in response to the invitation issued must refer to the petition in question, which, it is repeated, must comply with all the established requirements, among them, to report on the steps taken to exhaust, before its submission, the remedies of the domestic jurisdiction. For these purposes, it should be emphasized that the rule in question expressly refers to the fact that "prior to deciding upon the admissibility of the petition," it will invite "the parties to submit additional observations," which logically cannot refer to anything other than what was included in the petition "submitted."

67. It is for this reason that Article 31(3) of the Commission's Regulations stipulates that

> "When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to

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[59] Article 31(1)(c).

[60] Articles 31(5) and 6.

the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record."[61]

68. However, it should be borne in mind that, logically also, in the event not explicitly considered in the Commission's Rules of Procedure that the petitioner indicate, in the petition, that domestic remedies have been exhausted, that is, that the petitioner has complied with the requirements of Article 46(1)(a) of the Convention, the State may raise an exception or objection arguing that this has not happened.

69. Consequently, there is no question that the aforementioned response by the State must logically and necessarily be with regard to the petition "submitted" before the Commission, and that it is with respect to the procedure as of that moment and not later, when what was in question was the litigation or the challenge as regards prior exhaustion of domestic remedies.

70. Thus, it is clear that compliance with the rule of prior exhaustion of domestic remedies, or the impossibility of complying with it, must be indicated in the petition, as otherwise, the State could not respond with regard to this point. In other words, only if the petition indicates that the rule in question has been complied with or that it is impossible to do so can the State be in a position to allege its non-compliance and to demonstrate the availability, adequacy, suitability and effectiveness of the domestic remedies not exhausted, all of which means—it is reiterated once again—that such a requirement must have been previously met or the impossibility of compliance must be alleged before formulating the petition whose pertinent parts are transferred to the State precisely so it can provide its response.

71. On the other hand, if the petition does not make any reference to the requirement in question, the State is solely responsible for indicating such circumstance, that is, that the petition does not comply with it. Imposing on the State, in such a situation, the obligation to demonstrate anyway the existence of adequate, suitable, and effective remedies that have not been exhausted means replacing the petitioner with the State as the bearer of the obligation of prior exhaustion of domestic remedies as set forth in the Convention and in the Commission's Rules of Procedure and the obligation to provide information on "any steps taken to exhaust domestic remedies, or the impossibility of doing so," thereby imposing upon it a burden based on an obligation that binds others.

72. It should also be repeated that, for the same reason, it is the moment at which the petition is submitted that the domestic remedies must have been exhausted or the impossibility of doing so asserted, given that if these remedies could be exhausted after the petition is "submitted" and, consequently, after it was notified to the State, this would throw the procedure out of balance and leave the State defenseless, since it could not file the pertinent preliminary objection properly and in time.

73. It is in this framework that the Court's finding to the effect that "an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be filed

[61] Article 34(3).

at the proper procedural moment; that is, during the admissibility procedure before the Commission"[62] should be understood, since, as has been indicated, this covers from the moment the petition is received and initially processed by the Commission through its Executive Secretariat to the moment in which it decides on its admissibility. However, this does not mean that this latter moment is when the requirement must have been met, without regard to whether it was or not before.

D. Decision on admissibility.

74. Effectively, Article 31.1 of the Rules of Procedure, entitled "Exhaustion of domestic remedies," establishes that:

> "In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."[63]

75. Note that this provision indicates that in order to decide on the admissibility of a matter, the Commission must "verify"—that is, confirm or examine[64]—that domestic jurisdiction remedies have been submitted and exhausted, which must certainly have taken place at the very least before adopting the corresponding decision. The aforementioned provision of the Rules of Procedure does not provide that such verification must be carried out with respect to remedies filed and exhausted after the submission of the petition.

76. Additionally, Article 32(1) of said Rules of Procedure, entitled "Statute of Limitations for Petitions," coincides with the interpretation set forth where it indicates that

> "The Commission shall consider those petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies."[65]

77. In other words, the provision establishes the petitions that will be subject to consideration by the Commission with regard to their admissibility and for these purposes, reiterates the provisions of Article 46(1)(b) of the Convention: that the deadline indicated for submitting the request is counted from the moment of notification of the final ruling of the domestic authorities or courts on the remedies that have been filed before them and which are, therefore, the ones that could have generated the international responsibility of the State, which obviously implies that, at the time the petition or communication was "submitted," they must have been exhausted.

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[62] Para. 16.

[63] Article 32(a).

[64] Dictionary of the Spanish Language, Royal Spanish Academy, 2018.

[65] Articles 32(1) and 35.

78. Pursuant to Article 37 of the Rules of Procedure cited, entitled "Decision on Admissibility,"

> "1. Once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter. The reports on admissibility and inadmissibility shall be public and the Commission shall include them in its Annual Report to the General Assembly of the OAS.
> 2. When an admissibility report is adopted, the petition shall be registered as a case and the proceedings on the merits shall be initiated. The adoption of an admissibility report does not constitute a prejudgment as to the merits of the matter.
> 3. In exceptional circumstances, and after having requested information from the parties in accordance with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of admissibility until the debate and decision on the merits. The opening of the case will be carried out by means of a written communication to both parties."[66]

79. In this regard, it should be noted that this provision does not require that domestic remedies must necessarily have been exhausted in order to adopt the decision on admissibility, since the decision may ultimately be to not admit the petition precisely because such remedies have not been exhausted.

V. CONCLUSION.

80. In view of the foregoing, it can be concluded that in order to submit a petition before the Commission denouncing a State Party to the Convention for violating one of the human rights recognized therein, the petitioner must first exhaust the domestic remedies and then report, in the petition, on the steps taken for these purposes or the impossibility of exhausting such remedies. It can also be held that it is with regard to that petition or the pertinent parties thereto that the State in question must be notified; that its response can refute the petitioner's claim of having exhausted domestic remedies or the impossibility of doing so, raising the corresponding objection; and, obviously, if the petition does not address compliance with the requirements of prior exhaustion of domestic remedies, the State is not required to respond in this regard.

80. It can likewise be held that, should the petition fail to indicate compliance with exhaustion of domestic remedies or the impossibility of doing so, it is with the submission of the petition and the response to it formulated by the State that the litigation hinges on and that, consequently, it is with regard to this, at this moment, not later, that such remedies must be exhausted or demonstrated as not necessary, where the Commission must rule on admissibility.

81. Additionally, the record shows that the facts pertaining to the requirement of prior exhaustion of domestic remedies are:

a) In the petition presented to the Commission on April 8, 1998, the exception provided for in Article 46(1) of the Convention was invoked, that is, the

[66] Articles 37(1), (2), and (3), 38.

exhaustion of domestic remedies filed against the transfer of victims from detention centers to others far from their homes;

b) on November 14, 2003, the State was notified of said petition, and it responded on June 14, 2004, alleging that it violated the general principle of law regarding the reasonable period of time, since it took place five years from the presentation of the complaint, which affected its right to be informed of the accusations against it on a timely basis, and to legal certainty and security, depriving it of the opportunity to mount an adequate defense, in good and due form, especially because the time between the date of the petition and the transfer hindered the possibility of adopting, on its part, early measures aimed at resolving the conflict domestically; and

c) the Commission ruled, on January 5, 2011, in its admissibility report, to reject the objection filed by the State, based on the circumstances existing at that time.

Pursuant, therefore, to the aforementioned, the undersigned voted to reject operative paragraph 1 of the judgment dismissing the preliminary objection filed by the State on the lack of exhaustion of domestic remedies.[67]

Additionally, the undersigned considers that, for coherence and consequence, he must also vote against the rest of the operative paragraphs, since, on the one hand, he considers that if said objection had been admitted, it would not proceed to rule on the other points, and additionally, despite this opinion, he had to respect the provisions of Article 16(1) of the Rules of Procedure, that is, that he could not abstain in this regard.[68] It should be understood, therefore, that the votes against operative paragraphs 1 to 12 do not actually imply a position on their content and that the votes in favor of operative paragraphs 13 to 15 are in view of the fact that they exclusively concern the procedural aspects of the subsequent processing of the judgment, which, certainly and as stated above, must be complied with.[69]

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

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[67] Infra, footnote 2.

[68] "The Presidency shall present, point by point, the matters to be voted upon. Each Judge shall vote either in the affirmative or the negative; there shall be no abstentions."

[69] Infra II.B, first para.