INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF BAYARRI *V.* ARGENTINA

JUDGMENT OF OCTOBER 30, 2008

(PRELIMINARY OBJECTION, MERITS, REPARATIONS AND COSTS)

In the *case of Bayarri,*

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

Cecilia Medina Quiroga, President
Diego García-Sayán, Vice President
Sergio García Ramírez, Judge
Manuel E. Ventura Robles, Judge
Margarette May Macaulay, Judge, and
Rhadys Abreu Blondet, Judge*;*

also present,

Pablo Saavedra Alessandri, Secretary,[**]

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 37(6), 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers the following judgment.

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On July 16, 2007, in accordance with the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted to the Court an application against the Argentine Republic (hereinafter "the State" or "Argentina"), originating from the petition presented by Juan Carlos Bayarri on April 5, 1994. On January 19, 2001, the Commission approved Report No. 02/01, in which it declared Mr. Bayarri's petition

[*] On September 11, 2007, Judge Leonardo A. Franco, a national of Argentina, advised the Court that there was an impediment to his hearing the instant case. The same day, this recusal was accepted by the President, in consultation with the Judges of the Court. Consequently, on September 17, 2007, the State was advised that, within 30 days, it could appoint a judge *ad hoc* to sit as a member of the Court for this case. At the expiry of this period, the State had not made the appointment.

[**] The Deputy Secretary, Emilia Segares Rodríguez, advised the Court that, for reasons beyond her control, she would be unable to attend the deliberation of this judgment.

admissible. On March 8, 2007, the Commission approved Report on merits No. 15/07, pursuant to Article 50 of the Convention, making various recommendations to the State. This report was notified to the State on April 16, 2007. After considering the information provided by the parties following the approval of the report on merits, and "since it considered that the State had not adopted its recommendations satisfactorily," the Commission decided to submit this case to the jurisdiction of the Inter-American Court. The Commission appointed Luz Patricia Mejía, Commissioner, and Santiago A. Canton, Executive Secretary, as its delegates, and the lawyers Elizabeth Abi-Mershed, Deputy Executive Secretary, Manuela Cuvi Rodríguez and Paulina Corominas as legal advisers.

2. The Inter-American Commission's application relates to the alleged unlawful and arbitrary detention of Juan Carlos Bayarri on November 18, 1991, in the province of Buenos Aires, Argentina, his presumed torture, excessive preventive detention and subsequent denial of justice, in the context of the criminal proceedings against him for the alleged repeated perpetration of kidnapping for ransom. The Commission indicated that "Mr. Bayarri was deprived of his liberty for almost 13 years based on a confession obtained under torture. Despite the fact that the Federal National Criminal and Correctional Appeals Chamber of Argentina found it proved that he had been subjected to torture, the Argentine State has not provided an adequate judicial response to Mr. Bayarri in relation to the criminal responsibility of the authors and has not provided any reparation for the violations he suffered, even though 16 years have elapsed since the facts occurred."

3. The Commission asked the Court to determine that the State had failed to comply with its international obligations by violating Articles 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in relation to the general obligation to respect human rights established in Article 1(1) of the Convention, to the detriment of Juan Carlos Bayarri. It also asked the Court to order the State to adopt specific measures of reparation in favor of the alleged victim and his next of kin.

4. On October 17, 2007, Carlos A.B. Pérez Galindo and Cristian Pablo Caputo, representatives of the alleged victim (hereinafter "the representatives"), presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Article 23 of the Rules of Procedure. In addition to reiterating the Inter-American Commission's allegations, the representatives stated, *inter alia*, that "the harm caused by maintaining [the alleged victim] unjustly deprived of his liberty for almost 13 years, even though he was totally innocent, produced, in addition to the damage caused or set in motion against him […], substantial grave additional consequences for the members of his family": Juan José Bayarri (father), Zulema Catalina Burgos (mother), Claudia Patricia De Marco de Bayarri (wife), Analía Paola Bayarri (daughter), José Eduardo Bayarri (brother) and Osvaldo Oscar Bayarri (brother). Accordingly, they requested that the State be declared responsible for violating the rights established in Articles 5(1), 5(2), 7(2), 7(3), 7(5), 8 and 25 of the American Convention, all in relation to Article 1(1) thereof, to the detriment of Juan Carlos Bayarri and, consequently, that it make reparation to the alleged victim and his next of kin for the damage caused.

5. On December 28, 2007, the State presented its brief with preliminary objection, answer to the application and observations on the pleadings and motions brief (hereinafter "answer to the application"). In this brief, Argentina filed a preliminary objection concerning the alleged failure to exhaust domestic remedies. Should this preliminary objection be declared inadmissible, the State indicated that "it did not question the truth of the reported facts," since they had received "adequate reparation in the domestic jurisdiction." The State asked the Court to reject "the claim for reparations made by [the representatives] and,

based on the circumstances of the case, determine the possible reparations owed to Juan Carlos Bayarri and the persons to whom [the Court] finds they correspond, in keeping with the applicable international standards." The State appointed Jorge Nelson Cardozo as Agent and Alberto Javier Salgado as Deputy Agent in this case. The Commission and the representatives asked the Court to reject the preliminary objection filed by the State (*infra* paras. 10 and 11).

II
PROCEEDINGS BEFORE THE COURT

6. The Commission's application was notified to the State and to the representatives on August 28, 2007. During the proceedings before the Court, in addition to the presentation of the principal briefs forwarded by the parties (*supra* paras. 1, 4 and 5), the President of the Court ordered that the testimony of witnesses offered by the representatives and expert witnesses offered by the State,[1] be received by means of statements made before notary public (affidavit); the parties were given an opportunity to present their observations on these testimonies. Also, pursuant to Article 45(2) of the Rules of Procedure, the President of the Court ordered the State to present complete and legible copies of the administrative and judicial files relating to this case, as helpful evidence.[2] In addition, bearing in mind the specific circumstances of the case, the President convened the Commission, the representatives and the State to a public hearing to receive the testimony of the alleged

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[1] *Cf. case of Bayarri*. Call to a public hearing. Order of the President of the Court of March 14, 2008, first operative paragraph.

[2] *Cf. case of Bayarri*. Call to a public hearing, *supra* note 1, eleventh operative paragraph. The President of the Court asked the State to present the following documents: copy of the case records of proceeding No. 55,346/2005 "Bayarri, Juan Carlos: Perjury" before National Criminal Court of First Instance No. 39, Secretariat No. 135; copy of the case records of proceeding No. 4,227 "Macri, Mauricio: Unlawful Deprivation of Liberty" before National Federal Criminal and Correctional Court of First Instance No. 6 of the Federal Capital, Secretariat No. 11; copy of the case records of proceeding No. 66,138/96 "Storni, Gustavo Adolfo et al.: Unlawful Coercion, Torture, Unlawful Deprivation of Liberty..." before National Criminal Court of First Instance No. 49 of the Federal Capital, Secretariat No. 207; copy of the case records of proceeding No. 13,754/04 "Zelaya, Luis Alberto: Failure to Comply with the Obligation to Prosecute Criminals" before National Criminal Court of First Instance No. 41 of the Federal Capital, Secretariat No. 112; copy of the testimony provided in proceeding No. 66,138/96 "Storni, Gustavo Adolfo: Unlawful Coercion and Unlawful Deprivation of Liberty" before National Criminal Court of First Instance No. 39 of the Federal Capital, Secretariat No. 135; copy of the records of case file "S" No. 130/07 "Sablich, Carlos Alberto: Self-disqualification" before the Supreme Court of Justice; copy of the case records of proceeding No. 57,403 "Bayarri, Juan Carlos: Complaint based on being threatened…" before National Criminal Court of First Instance No. 8, Secretariat No. 125, delegated to Office of the Prosecutor for Preliminary Investigations No. 18; copy of the case records of proceeding No. 001225 "Marco de Bayarri, Claudia Patricia: Complaint based on Death Threats and Unlawful Deprivation of Liberty" before Correctional Court No. 4 of the Quilmes Judicial District of the Province of Buenos Aires; copy of the case records of proceeding No. 7/989 "Public Intimidation by placing an explosive device" before National Federal Criminal and Correctional Court No. 3 of La Plata, Secretariat No. 7; copy of file No. 330/3 "Orio, Eduardo and Szmukler, Beinusz *v.* Head of Court of First Instance No. 13 of the Federal Capital, Dr. Luis Alberto Zelaya" before the National Judicial Council; copy of file No. 393/2006 "Bayarri, Juan Carlos: Complaint against the Judges of the National Criminal Cassation Chamber, Gustavo Marcelo Hornos, Ana María Capolupo de Durañona and Vedia, and Amelia Lydia Berraz de Vidal for misconduct and the commission of offenses" before the National Judicial Council; copy of file No. 114/07 "Bayarri, Juan Carlos: Complaint against the Judges of the National Criminal Cassation Chamber, Juan Carlos Rodríguez Besavilbaso, Liliana Elena Catucci and Raúl Madueño" before the National Judicial Council; copy of administrative file opened under Chapter Nine (art. 613) of the Organic Law of the Argentine Federal Police No. 21.965, Decree No. 1866 in proceeding No. 66.138/96 before National Criminal Court of First Instance No. 49 of the Federal Capital, Judgment Secretariat No. 207; copy of the Report of the Commission to Investigate Contrived Police Procedures of the Prosecutor General's Office (*Procuración General*); National Civil and Commercial Procedural Code in force at the time of the facts and currently; copy of the laws or case law of the Argentine State indicating criteria for domestic compensation for damage/injuries inflicted on private individuals by State officials; copy of the laws and regulations in force in the Argentine State at the time of the facts and today with regard to the prevention, investigation and punishment of torture and cruel, inhuman or degrading treatment, and copy of the Penal Code and the Code of Criminal Procedure in force at the time of the facts and currently.

victim and two expert witnesses, together with the final oral arguments of the parties on the preliminary objection and the possible merits, reparations and costs.[3]

7. The public hearing was held on April 29, 2008, during the thirty-third special session of the Court held in Tegucigalpa, Honduras.[4] At the conclusion of the hearing, the judges asked the State and the representatives to submit further information on diverse juridical positions noted during the hearing, with their final written arguments. This request was reiterated to the State and to the representatives on May 7, 2008.[5]

8. After several extensions had been granted, the State submitted a digital copy of the documentation requested as helpful evidence on April 18 and June 17, 2008 (*supra* para. 6).

9. On July 11, 14 and 15, 2008, the representatives, the Inter-American Commission and the State, respectively, submitted their final written arguments.

III
PRELIMINARY OBJECTION

"Substantial change in the purpose of the application" and failure to exhaust domestic remedies

10. When answering the application filed by the Commission in this case, the State invoked "the objection of failure to exhaust domestic remedies" (*supra* para. 5). It alleged that this objection "is based on the evident fact that, in the instant case, there was a substantial change in the procedural purpose of the application filed by the Inter-American Commission," […] "because the principal violations [alleged therein] had been duly resolved in the State's domestic jurisdiction" (*infra* para. 15). In this regard, the State indicated that it considered that the purpose of the proceedings was "limited solely and exclusively to requiring the Court to determine any reparations to which it may find that Mr. Bayarri has a right, even though he has failed to exhaust the judicial remedies available in the domestic sphere" for that purpose.

11. The State alleged that when the Inter-American Commission decided to file the application in this case, "appropriate and effective remedies were available to the petitioner in the domestic jurisdiction and, if they had been filed in due form and time, they would have allowed him to obtain the pecuniary reparation that he is now claiming before the international instance."[6] It added that "it is not necessary to appeal to the jurisdiction of the

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[3] *Cf. Bayarri v. Argentina*. Call to a public hearing, *supra* note 1, fifth operative paragraph.

[4] At this hearing, there appeared: (a) for the Inter-American Commission: Luz Patricia Mejía, Delegate, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Manuela Cuvi Rodríguez, adviser; (b) for the alleged victim's representatives: Carlos A.B. Pérez Galindo and (c) for the State: Jorge Nelson Cardozo, Agent; Alberto Javier Salgado, Deputy Agent; Gonzalo Luis Bueno, Ana Badillos and Pilar Mayoral, legal advisers and Alejandro Aruma, Minister Chargé d'Affaires of the Argentine Embassy in Honduras.

[5] The information and documentation requested related to: (a) domestic recourses available for reparation; (b) domestic resources that allow reparations to Mr. Bayarri's next of kin, as well as reparations of a non-pecuniary nature; (c) an explanation about the procedural delays to which the State subjected the alleged victim; (d) an explanation about the alleged delays in complying with the time limits during the proceedings before the Commission; (e) the specific data used to calculate the pecuniary and non-pecuniary damage, and (f) the medical and pecuniary benefits that Mr. Bayarri has a right to, as a pensioner of the Argentine Federal Police.

[6] The State stated that the domestic remedy that Mr. Bayarri should have filed is the action for damages in the administrative jurisdiction, established in articles 330 to 485 of the national Code of Civil and Commercial Procedure, whose substantive basis arises from Articles 901 to 906, 1109, 1112 and 1113 of the Civil Code. *Cf.* the

Court to determine the existence of the State's responsibility for the facts denounced," and it questioned the Inter-American Commission's decision to submit the case to the Court.

12. The Inter-American Commission indicated that "the purpose of this case continues to be to obtain a decision on the State's international responsibility as a result of all the violations committed against Mr. Bayarri. It is not because any of the violations have ended that the States ceases to be responsible for them, or the victim ceases to have a right to adequate reparation." The Commission stated that, in any case, the State had not alleged before the Commission during the admissibility stage of the petition the failure to exhaust domestic remedies because an action seeking compensation for damage had not been filed; consequently, it had not had the opportunity to give an opinion in this regard. The Commission advised that the "State had alleged the failure to exhaust such remedies after the Reports on admissibility and merits [had been issued]" and, as stated in the application, this argument was taken into consideration when deciding to lodge the case before the Court (*supra* para. 1). In addition, it stated that, despite the above, the administrative jurisdiction is not the appropriate channel for remedying the violations committed against Mr. Bayarri, "so that, in a case such as this, it is not necessary to exhaust it as a condition for admissibility."

13. The representatives indicated various procedural and factual obstacles that would prevent the alleged victim and his family group from claiming reparations under the administrative jurisdiction or under any other Argentine jurisdiction, with "any possibility of success."

14. The State acknowledges that, before the Inter-American Commission, it had alleged "the change of the procedural purpose and the consequent failure to exhaust domestic remedies" available to claim compensation for damages, when responding to the Report provided for by Article 50 of the Convention and not during the admissibility stage of the petition.

15. Indeed, a review of the processing of the petition in this case before the Inter-American Commission shows that, after the Report on admissibility had been issued, the State informed the Commission that "[t]here had been a substantial change in the circumstances of the instant case, both with regard to the procedural situation [of Mr. Bayarri] and to the investigation that was underway in the domestic jurisdiction into the alleged torture of which he had been a victim" and, in this regard, the State indicated that "[t]he presumed violations alleged by the petitioner in the instant case had found a satisfactory response using the remedies of the domestic jurisdiction."[7] Furthermore, in its note of July 12, 2007, following the issue of the Report on merits (*supra* para. 1), the State advised the Commission that Juan Carlos Bayarri had not filed a complaint against the State seeking compensation for the damage he alleges he has suffered.[8]

16. According to the Court's case law,[9] the State's allegation of failure to exhaust domestic remedies "in order to obtain a pecuniary compensation" is time-barred, because it

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State's brief with final arguments (merits file, tome VI, folio 1479). The State submitted a copy of judicial decisions handed down by Argentine high courts as evidence of the effectiveness of such remedies.

7 *Cf.* the State's brief of September 1, 2005 (merits file, attachments to the application, appendix 3, tome VII, folios 2616 and 2617).

8 *Cf.* the State's brief of July 12, 2007 (merits file, attachments to the application, appendix 3, tome VIII, folio 3018).

9 *Cf. Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88; *Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 18; and *Apitz Barbera et al. ("First Administrative*

was only filed after the Report on admissibility. Consequently, the Court concludes that the State waived tacitly the presentation of this defense at the opportune procedural moment.

17. Nevertheless, Argentina considered that, based on two circumstances that occurred after the Report on admissibility in this case had been issued (*supra* para. 1), a change in the purpose of the proceedings underway before the Inter-American Commission had arisen, which would allow it to invoke, for the first time, at a stage other than that of admissibility, the failure to exhaust domestic remedies to claim compensation for damage. The State referred to the decision adopted on June 1, 2004, by the Federal National Criminal and Correctional Appeals Chamber, deciding that the alleged victim had been "subjected to practices of unlawful coercion owing to which he confessed his supposed authorship of kidnapping for ransom [and ordering] the annulment of the criminal action against him and his immediate release"; and the decision adopted on May 30, 2006, by the prosecutor's office involved in the proceedings to investigate the torture alleged by Mr. Bayarri that "declared the preliminary investigation stage closed and forwarded the case for trial."

18. The Court notes that both the petition filed by the alleged victim before the Inter-American Commission on April 5, 1994, and its admissibility on January 19, 2001, preceded the decisions adopted in the domestic jurisdiction that, according to the State, would have resulted in the said change in the procedural purpose (*supra* paras. 10 and 17). In other words, the mechanisms of the inter-American system for the protection of human rights had already been set in motion when the State adopted measures to repair the alleged violations. This has occurred in other cases heard by the Court.[10]

19. The Court must reiterate that the State's international responsibility arises immediately with the international unlawful act attributed to it, although this can only be required before the organs that compose the inter-American system for the protection of human rights after domestic remedies have been exhausted, under the rule established in Article 46 of the American Convention. Based on this principle, when the hearing of the case has already started under the American Convention[11] (that is, when its admissibility has been determined), a possible reparation made under domestic law does not prevent either the Commission or the Court from continuing to hear the case, and does not grant the State another procedural opportunity to question the admissibility of the petition, which has already been established. In these circumstances, the effects of possible reparation made in the domestic jurisdiction are a matter that is assessed in both the Inter-American Commission's and this Court's analysis of the case and do not constitute a preliminary objection. In general, a procedural action of this nature (preliminary objection) questions the admissibility of a case or the competence *ratione personae, materiae, temporis* or *loci* of the Court to hear a specific case or some element of it.[12]

Court") v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of August 5, 2008. Series C No. 182, para. 24.

[10] *Cf. "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs.* Judgment of February 5, 2001. Series C No.73, paras. 82 and 89; *Gómez Paquiyauri Brothers v. Peru.* Merits, reparations and costs. Judgment of July 8, 2004. Series C No. 110, para. 75; and *Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 58.

[11] *Cf. case of the Gómez Paquiyauri Brothers, supra* note 10, para. 75; *Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No 111, para. 71; and *case of Heliodoro Portugal*, *supra* note 10, para. 58.

[12] *Cf. Gabriela Perozo et al. v. Venezuela*. Order of the President of the Inter-American Court of March 18, 2008, considering paragraph 7.

20. The fact that the Inter-American Commission continued evaluating the merits of the case and decided to submit the case to the Court, based on "criteria that did not take into consideration any of the measures taken in the domestic jurisdiction," as the State alleges, cannot be a valid argument to prevent the Court from hearing this case. In this regard, it must be repeated that since the American Convention gives the Court full jurisdiction over all matters relating to a case submitted to its consideration, including those of a procedural nature on which the possibility of its exercising its jurisdiction are based, the Court has interpreted this to mean that the grounds for lodging a case before the Court cannot be the subject of a preliminary objection. The Commission is authorized to decide whether to submit a case to the jurisdiction of the Inter-American Court, based on what this organ considers to be the most favorable alternative for the protection of the rights established in the Convention.[13]

21. Based on the above, the Court rejects the State's argument concerning the "substantial change in the purpose of the application" and the failure to exhaust domestic remedies and will assess the facts on which these assumptions is based when it examines the merits of this case and reparations.

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22. Finally, the State alleged that the Commission had failed to comply with the time frame established in Article 23(2) of its Statute for the adoption of a decision on the merits of the matter. In the State's opinion, this constituted an "evident procedural flaw" and, "as a result, the Commission [failed to consider] the substantial changes that had occurred in the case." However, it indicated that this allegation "is not made by the State as an autonomous preliminary objection" and "is linked inseparably to the preliminary objection already filed." Since this allegation is linked to "the preliminary objection," now that the latter has been rejected (*supra* para. 21), the Court does not find it necessary to rule on it.

IV
JURISDICTION

23. The Inter-American Court is competent to hear the instant case, pursuant to Article 62(3) of the Convention, because Argentina has been a State Party to the American Convention since September 5, 1984, and accepted the Court's compulsory jurisdiction on the same date. On March 31, 1989, Argentina ratified the Inter-American Convention to Prevent and Punish Torture (hereinafter "ICPPT").

V
PRIOR CONSIDERATIONS

Dispute regarding the facts that are the subject of the instant case

24. Before analyzing the merits of the case, the Court will examine the implications of the State's declarations to determine whether the dispute on the facts subsists, in accordance with its case law and the norms that regulate the proceedings.

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[13] *Cf. Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 54; *19 Tradesmen v. Colombia. Preliminary objection.* Judgment of June 12, 2002. Series C No. 93, para. 30; and *Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 39.

25. In its answer to the application, the State affirmed that it considered it "unnecessary to formulate observations on the reality of the facts alleged by the Commission and the petitioners, because these facts […] have been repaired adequately in the domestic jurisdiction." It indicated that "since the allegations have been clarified and decided in the local jurisdiction, […] it did not question [their] truth." The State referred to the judgment of June 1, 2004, handed down by the Federal National Criminal and Correctional Appeals Chamber, which decided to absolve Juan Carlos Bayarri of guilt and of the charges and ordered his immediate release, considering that he had been the victim of "coercion and torture," and also to the decision ordering the closure of the preliminary investigation stage that was examining the reported acts of torture and unlawful detention. In addition, in its brief in answer to the application, the State gave a detailed description of the processing of the two criminal actions relating to this case, which matches and clarifies the corresponding description provided by the Inter-American Commission in its application and the representatives in their pleadings and motions brief.

26. The Inter-American Commission considered that "the factual grounds of the instant case […], which relate to the unlawful and arbitrary detention of Juan Carlos Bayarri, his torture and the corresponding criminal actions are not in dispute," as indicated by the State in its answer to the application. The representatives affirmed that, according to Article 38(2) of the Court's Rules of Procedure, "directly, indirectly and/or tacitly" [the State] "has acquiesced to the existence of the facts and the grave human rights violations perpetrated against the [alleged victim] and the members of his family." Consequently, they considered that "all the denounced facts, circumstances and accessory issues have been proved and admitted as definitely and unquestionably true."

27. Article 38(2) of the Rules of Procedure, cited by the representatives, establishes that:

> In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

28. According to Article 38(2) of the Rules of Procedure, the Court has the power, but not the obligation, to consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested. Therefore, in exercise of its power to determine the scope of its own competence (*compétence de la compétence*), in each case, the Court will determine the need to establish the facts, as they were presented by the parties or taking into account other elements from the body of evidence.[14]

29. The Court understands that, by not denying the facts that the Commission described in its application (*supra* para. 25), the State has accepted these facts, which constitute the factual basis of these proceedings. The Court observes that the representatives made factual affirmations relating to the merits of this matter[15] that are not in the Inter-American

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[14] *Cf. Ivcher Bronstein v. Peru. Competence.* Judgment of September 24, 1999. Series C No. 54, para. 32; *Constitutional Court v. Peru. Competence.* Judgment of September 24, 1999. Series C No. 55, para. 31; *Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 45; and *Yvon Neptune v. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 19.

[15] The different facts described by the representatives are related to: (1) the supposed "systematic concealment" by the police and judicial authorities of the officials who allegedly intervened in the detention and alleged torture of Juan Carlos Bayarri *Cf.* case file No. 13,745/04 before Court of First Instance No. 41 of the Federal Capital "Zelaya, Luis Alberto: Failure to Comply with the Obligation to Prosecute Criminals" (pleadings and motions brief, merits file, tome I, folio 196); (2) the placing of an explosive device in front of the residence of the alleged victim's next of kin *Cf.* file No. 7/989, entitled "Pubic Intimidation by placing an explosive device" before National Federal Criminal Court No. 3 of La Plata (pleadings and motions brief, merits file, tome I, folio 188); (3) the criminal action filed against the alleged victim for supposed perjury committed when denouncing the police

Commission's application. Nevertheless, the State indicated that it would not dispute the facts alleged "by the Inter-American Commission and the petitioners," without making a distinction between them (*supra* para. 25), so that it did not exercise its right to defense in this regard.

30. Consequently, in light of the State's acknowledgement, the Court will assess the facts established in the application and the facts presented by the representatives only to the extent that they help clarify or contextualize the facts described by the Commission,[16] together with the evidence submitted by the parties and, on this basis, it will make the corresponding decisions in light of the applicable international standards. The facts described by the representative that exceed the factual framework outlined in the application will not be assessed.

VI
EVIDENCE

31. Based on the provisions of Articles 44 and 45 of the Rules of Procedure, and also on the Court's case law regarding evidence and its assessment, the Court will examine and assess the documentary probative elements forwarded by the Commission, the representatives and the State at different procedural opportunities or as helpful evidence requested by the President, as well as the testimony rendered by affidavit and received at the public hearing. To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding normative framework.[17]

A) *Documentary, testimonial and expert evidence*

32. By order of the President of the Court, statements made before notary public (affidavits) were received from the following persons:

> (a) *José Enrique Villasante*, witness proposed by the representatives, who testified about the sufferings of the alleged victim and his family as a result of the threats and attacks they allegedly experienced, and about apparent libel regarding the alleged victim that appeared in the social communication media;[18]

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agents who had perpetrated acts of torture against him *Cf.* case No. 55,346/2005 before Criminal Court of First Instance No. 13 headed by Judge Luis Alberto Zelaya (pleadings and motions brief, merits file, tome I, folio 198), and (4) the suspension of Mr. Bayarri's pension as a retired police officer. *Cf.* administrative proceeding filed before the Argentine Federal Police ((pleadings and motions brief, merits file, tome I, folio 198). See also the report of the Ministry of Justice, Security and Human Rights of June 18, 2008, submitted by the State (file of attachments to the brief with final arguments of the State, sole tome, folios 6849 to 6850).

[16] In its case law, the Court has reiterated that the application constitutes the factual framework of the proceedings and that, consequently, the representatives are not allowed to present different facts from those set forth in the application, "although they may present those that allow the facts mentioned in the application to be explained, clarified or refuted." *Cf. "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153; *case of Yvon Neptune*, *supra* note 14, para. 157; and *case of Heliodoro Portugal*, *supra* note 10, para. 228. In this regard, the Court has established that the alleged victim may invoke different rights from those included in the Commission's application, based on the facts submitted by the Commission. *Cf. Case of the "Five Pensioners" v. Peru*, *supra*, para. 153; *Case of the Saramaka People*, *supra* note 13, para. 27; and *case of Heliodoro Portugal*, *supra* note 10, para. 228.

[17] *Cf. Paniagua Morales et al. v. Guatemala*. *Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 50 and 76; *case of Apitz Barbera et al. ("First Administrative Court"), supra* nota 9, para. 11; and *case of Heliodoro Portugal, supra* nota 10, para. 64.

[18] *Cf.* testimony rendered before notary public (affidavit) by José Enrique Villasante on April 3, 2008 (merits file, tome V, folios 927 to 929).

(b) *Clotilde Elena Rodríguez*, witness proposed by the representatives, who testified about the business activities of the alleged victim and his family, and about their alleged drastic impoverishment and isolation from their neighbors and society as a result of articles in the social communications media regarding the supposed offenses committed by the alleged victim;[19]

(c) *Matías Alejandro Colaci*, witness proposed by the representatives, who testified about the fears and the state of anguish and despair of the alleged victim's family while he was deprived of his liberty, and about the alleged serious depression and fears that the alleged victim suffered and continues to suffer as a result of the medical problems arising from detention,[20] and

(d) *Noemí Virginia Julia Martínez*, witness proposed by the representatives, who testified about the suffering and "anguish" suffered by the alleged victim and his family, as well as about their impoverishment and social isolation as a result of the facts.[21]

33. Also, expert appraisals were received from:

(a) *Juan Carlos Ziella*, expert witness, doctor in general medicine, proposed by the State, who gave his expert opinion on the degree of harm caused to the alleged victim and the consequences that could be attributed to the reported facts,[22] and

(b) *Aviel Tolcachier*, expert witness, psychiatrist, proposed by the State, who gave his expert opinion on the impact and consequences that the reported facts may have had on the alleged victim.[23]

34. In addition, during a public hearing, the Court received the testimony of the following persons:

a) *Juan Carlos Bayarri*, alleged victim**,** deponent proposed by the Inter-American Commission and the representatives, who referred to the circumstances in which he alleged that he had been deprived of his liberty, tortured and subjected to preventive detention; the supposed lack of an appropriate judicial response in relation to the criminal responsibility of the authors of the offenses perpetrated against him, and the harm caused to him;

b) *Luis Eduardo Garré*, expert witness proposed by the Inter-American Commission and the representatives, who gave his expert opinion on the physical consequences for the alleged victim of the alleged unlawful and arbitrary deprivation

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19 *Cf.* testimony rendered before notary public (affidavit) by Clotilde Elena Rodríguez on April 3, 2008 (merits file, tome V, folios 913 to 917).

20 *Cf.* testimony rendered before notary public (affidavit) by Matías Alejandro Colaci on April 3, 2008 (merits file, tome V, folios 930 to 933).

21 *Cf.* testimony rendered before notary public (affidavit) by Noemí Virginia Julia Martínez on April 4, 2008 (merits file, tome V, folios 918 to 925). By an order of March 14, 2008, *supra* note 1, fifth operative paragraph, the President of the Court convened Noemí Virginia Julia Martínez to provide her testimony at the public hearing. However, the representatives advised that "owing to her advanced age" and recent health problems, the witness called would be unable to attend the said hearing; they therefore forwarded her testimony rendered before notary public (affidavit). *Cf.* brief of the representatives of April 8, 2008 (merits file, tome V, folios 910 to 911). Neither the Inter-American Commission nor the State raised any objection in this regard.

22 *Cf.* written expert appraisal by Dr. Juan Carlos Ziella (merits file, tome V, folios 1046 to 1050).

23 *Cf.* written expert appraisal by Dr. Aviel Tolcachier (merits file, tome V, folios 1051 to 1057).

of liberty and torture, as well as of the lack of an appropriate judicial response to the alleged violations, and

c) *Susana Estela Quiroga*, expert witness proposed by the representatives, who gave her expert opinion about the psychological consequences for the alleged victim of the alleged unlawful and arbitrary deprivation of liberty and torture, as well as of the lack of an appropriate judicial response.

B) Assessment of the evidence

35. In this case, as in others,[24] the Court admits the probative value of those documents presented by the parties at the appropriate procedural opportunity,[25] which were not contested and the authenticity of which was not questioned.

36. The State contested part of the documentary evidence offered by the representatives in their pleadings and motions brief, because it "had never been forwarded to the Court." The State alleged that "these are probative elements that were not forwarded to the State with the application, so that the State has been unable to submit any arguments concerning their existence, truth and admissibility." The representatives indicated that this relates to evidence they forwarded to the Inter-American Commission to be incorporated into the case file before the Court.

37. Most of the contested evidence was submitted by the Inter-American Commission together with the application, in particular, in appendix 3, tome 8, thereof, and was duly forwarded to the State.[26] The President requested the Inter-American Commission to provide those documents that the Commission had not forwarded with its application (*supra* para. 6), pursuant to Article 44(2) of the Rules of Procedure. [27]

38. In relation to the newspaper articles forwarded by the parties at the appropriate procedural opportunity, the Court considers that they can be assessed when they refer to well-known public facts or statements made by State officials that have not been rectified, or when they corroborate aspects related to the case.[28]

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[24] *Cf. Velásquez Rodríguez v. Honduras. Merits,* Judgment of July 29, 1988. Series C No. 4, para. 140; *case of Yvon Neptune, supra* note 14, para. 29; and *case of Heliodoro Portugal*, *supra* note 10, para. 67.

[25] According to Article 44 of the Court's Rules of Procedure:

> 1. Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto […].
>
> 2. Evidence tendered to the Commission shall form part of the file, provided that it has been received in a procedure with the presence of both parties, unless the Court considers it essential that such evidence should be repeated.
>
> 3. Should any of the parties allege *force majeure*, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.
>
> 4. In the case of the alleged victim, his next of kin or his duly accredited representatives, the admission of evidence shall also be governed by the provisions of Articles 23, 36 and 37(5) of the Rules of Procedure.

[26] *Cf.* note of the Secretariat of the Inter-American Court REF.:CDH-11.280/001 of August 28, 2008 (merits file, tome I, folios 130 and 131).

[27] *Cf. case of Bayarri*. Summons to a public hearing, *supra* note 1, twelfth operative paragraph.

[28] *Cf. case of Velásquez Rodríguez*, supra note 24, para. 146; *Case of Yvon Neptune,* supra note 14, para. 30; and *case of Heliodoro Portugal, supra* note 10, para. 79.

39. In relation to the documents provided by the State as helpful evidence (*supra* para. 6), in a note of July 2, 2008, the representatives of the alleged victim indicated that they "are incomplete and/or, worse still, have possibly been manipulated to prevent [the Court] from being able to examine the significance of what was really processed and happened in these documents"; accordingly, they asked the Court "to invalidate the transmission of the files requested as evidence by this medium, [Adobe] 'acrobat reader', that is so insecure and unreliable and, instead [require the State] to send regular copies of each and every one of the case files requested as evidence, which should be authenticated and certified […] by the actuaries responsible for the corresponding judicial secretariats." Previously, during the public hearing held in this case, the representatives had questioned the digital presentation of the evidence requested. The representatives also forwarded a decision of Chamber VII of the National Criminal and Correctional Appeals Chamber of the Argentine Federal Capital[29] that they considered that the State had not provided, even though it appeared in one of the judicial case files, copy of which had been requested.

40. The Commission did not make any observations on this request. While the State asked that it be rejected because it was time-barred and contrary to the provisions of Article 29(3) of the Court's Rules of Procedure.

41. In relation to the reception and assessment of evidence, the Court has indicated repeatedly that the proceedings followed before it are not subject to the same formalities as domestic judicial proceedings.[30] The Court has recognized, in its practice, the essential role played by technology in dispensing inter-American justice appropriately.[31] Bearing in mind the limits set by respect for legal certainty and the procedural balance of the parties, the technological advances incorporated into the proceedings before the Court are designed to facilitate the efficient and economic performance of its functions by the eventual replacement of "paper back-up" by "digital back-up." The mechanisms for receiving evidence should reflect these advances.

42. The documentation presented by the State appears to be complete and there are no signs that it has been manipulated. Based on the above, the Court finds no reason to reject the evidence forwarded electronically, and therefore incorporates it into the body of evidence.

43. In addition to the documentation forwarded as attachments to their pleadings and motions brief, the representatives submitted additional evidence on the preliminary objection filed by the State with their written arguments on April 7, 2008, and with their final written arguments (*supra* paras. 5 and 9). The State also forwarded additional evidence with its final written arguments (*supra* para. 9).

44. In accordance with Articles 44(3) and 45 of its Rules of Procedure, the Court admits the evidence on the preliminary objection filed by the State forwarded by the representatives with their written arguments (*supra* para. 5),[32] which was produced after

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[29] *Cf.* decision of Chamber VII of the National Criminal and Correctional Appeals Chamber of the Federal Capital of Argentina, National Judiciary, of June 9, 2006, in case 22,405. "Sablich, Carlos Alberto". Preliminary hearing 39/135. Chamber VII.e (merits file, tome V, folios 1124 and 1125).

[30] *Cf. Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 71; *Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, para. 184.

[31] Under Article 26(1) of the Rules of Procedure of the Court, briefs may be forwarded by electronic means.

[32] *Cf.* as attachment B: true copy of Report No. 428/2007 of the Discipline and Indictment Commission of the Judicial Council of November 15, 2007 (file of attachments to the arguments of the representatives on the

the pleadings and motions brief had been forwarded; in other words, considered to be supervening evidence. This documentation was not contested and its authenticity and truth were not questioned. The evidence forwarded by the representatives at the same procedural opportunity that does not refer to supervening facts[33] is incorporated into the body of evidence to the extent that it has not been contested by the State and may be useful for the Court to determine the facts in this case; it will therefore be assessed in conjunction with the other elements of the body of evidence, within the factual framework being examined.

45. Regarding the documents transmitted by the representatives and by the State with their final written arguments, the Court will incorporate into the body of evidence, as helpful evidence, those that respond to the requests made by the Court during the public hearing held in this case (*supra* para. 7).[34] The Court will assess all this information applying the rules of sound judicial discretion, within the factual framework being examined.

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preliminary objection filed by the State, Single tome, folios 5364 to 5411 and 5412 to 5416). As attachment C: true copy of the Internal Agenda No. 3 of the Argentine Federal Police of January 4, 2008 (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5412 to 5416). As attachment F: copy of the magazine "*Noticias de la Semana"*, Year XXXI No. 1622, January 26, 2008 (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5427 to 5560).

[33] *Cf.* as attachment A: judgment of the Supreme Court of Justice of July 11, 2007, deciding the appeal for review of facts as well as law (*recurso de hecho*) in the case "Law, René Jesús: Motion for statute of limitations in relation to the criminal action–case No. 24,079," to which the Prosecutor General's opinion of September 1, 2006, is attached (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5344 to 5363). As attachment D: Certified copy of the identity document and driver's license of Juan José Bayarri (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5419 to 5424). As attachment E: note of March 17, 1995, signed by Dr. Jorge Luis Maiorano, Ombudsman, advising Juan José Bayarri of the list of the actions he had taken before this instance (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5424 to 5426). As attachment G: true copy of deed number fifty-one: donation of bare legal title: Juan José Bayarri and another to Juan Carlos Bayarri, signed on May 16, 1988, and true copy of deed number sixteen: waiver of the beneficial interest Juan José Bayarri and another of January 24, 1989 (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5561 to 5572, and 5586 to 5594). As attachment H.1): 25 copies of invoices authorized by the Federal Penitentiary Service, Unit 16, accrediting funds to the account of the alleged victim during the years he was imprisoned (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5596 to 5619). As attachment H.2): Paper and envelope with the letterhead "Bernal Motor Cars" and original commercial stamps of "Bernal Motor Cars." (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5620 to 5624).). As attachment H.3): original of newspaper articles and photographs related to the hairdressing business "Coiffeur" of the alleged victim's brother (file of attachments to the arguments of the representatives on the preliminary objection filed by the State, Single tome, folios 5625 to 5637).

[34] *Cf.* as attachment A: text of the Organic Law, Regulations of the Organic law, Personnel law, Regulations of the Personnel Law, and Civil Personnel Statute of the Internal Security Secretariat of the Presidency of the Nation, Argentine Federal Police, Police Editorial (file of attachments to the brief with final arguments of the representatives, tome 1, folios 5662 to 5761); As attachment E: Civil Code of the Argentine Republic. Edition updated under the supervision of professors of the University Institute of the Argentine Federal Police (file of attachments to the brief with final arguments of the representatives, tome 1, folios 5813 to 6109). As attachment J: text of Law No. 21,839: "Professional Fees." Text updated with the modifications established in Law No. 24,432. Decree No. 794/94. Text of Law 11,672: "Fees of Experts and Professionals employed by the Nation." Text of Decree No. 2284/91: "Financial deregulation: Fees" and text of Decree Law No. 8,904/77: "Professional Fees. Province of Bs. As" (file of attachments to the brief with final arguments of the representatives, tome 1, folios 6665 to 6680). As attachment I: updated Juridical Guidelines for the National Courts of the Province of Buenos Aires, autonomous city of Bs. As., and for Federal Courts in the Country's Interior. 2007 (file of attachments to the brief with final arguments of the representatives, tome 1, folios 6565 to 6664). As attachment C: police attestations dated April 21 and 22, 2008. Identity document with the right eye "punctured" and certificate of criminal record issued on July 21, 2006 (file of attachments to the brief with final arguments of the representatives, tome 1, folios 5786 to 5797). As attachment D: receipt for salaries paid to Mr. Bayarri and identification card to withdraw these salaries from the bank; communication addressed to the President of the Retirement and Pension Fund of the Argentine Federal Police, in which Mr. Bayarri requested information about the pension payments owed to him (file of attachments to the brief with final arguments of the representatives, tome 1, folios 5798 to 5805).

46. With regard to the documents, newspaper articles and books offered by the alleged victim's representatives that do not relate to the requests made by the Court (*supra* para. 7), the representatives alleged that this is "additional evidence that, in some cases relates to new facts or proposals introduced by the representatives of the […] Argentine State during the public hearing […], while in others it is evidence relating to certain matters that have occurred recently, so that we would never have needed to prove anything in that respect previously." In any case, the representatives indicated that this was "*iure et de iure* evidence, the authenticity of which could never be questioned." The Commission did not raise any objections to the incorporation of this evidence. The State asked that it be "summarily rejected as it was clearly time-barred." In this regard, the Court admits those probative elements that refer to supervening facts, which will be assessed together with the rest of the body of evidence within the factual framework being examined (*supra* para. 30). The remainder of the evidence offered on this occasion must be rejected as time-barred.

47. On July 2, 2008, the representatives forwarded documentation relating to the alleged victim's state of health when the medical and psychological expert appraisals offered by the State were prepared. This information could be useful for determining the facts of the case; it will therefore be assessed in conjunction with the other elements of the body of evidence, within the factual framework being examined (*supra* para. 30).

48. The Court decides to incorporate into the body of evidence the documentation presented by the representatives with their observations on the evidence provided by the State with its final written arguments, insofar as it seeks to clarify the information provided by the latter, and also the documentation forwarded on August 29, 2008, that refers to a supervening fact. The State did not present objections to the incorporation of this evidence, so that it will be assessed together with the other elements of the body of evidence, only to the extent that it corresponds to the factual framework being examined (*supra* para. 30).

49. Regarding the testimony and expert opinions, the Court considers them pertinent to the extent that they are in keeping with the purpose defined by the President in the Order requiring them (*supra* para. 6), taking into account the observations presented by the parties. The Court considers that, since Mr. Bayarri has a direct interest in this case, his testimony cannot be considered alone, so that it will be assessed together with the body of evidence in the proceedings.[35]

50. The Court admits the documents provided by the expert witnesses during the public hearing, because it considers them useful for this case; moreover, they were not contested and their authenticity and truth were not questioned.

51. Having examining the probative elements in the case file, the Court will now analyze the alleged violations, bearing in mind the claims made by the parties and the acknowledgement of facts made by the State (*supra* paras. 29 and 30) .

VII
ARTICLE 7 (RIGHT TO PERSONAL LIBERTY)[36] OF THE AMERICAN CONVENTION

[35] *Cf. Loayza Tamayo v. Peru. Merits.* Judgment September 17, 1997. Series C No. 33, para. 43; *Case of Apitz Barbera et al. ("First Administrative Court"), supra* note 9, para. 20; and *Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 72.

[36] In this regard, Article 7 of the Convention establishes that:

1. Every person has the right to personal liberty and security.

IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS)[37] THEREOF

52. In its application, the Inter-American Commission alleged the violation of the right to personal liberty established in Article 7(2), 7(3) and 7(5) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Bayarri. It maintained that Mr. Bayarri "was deprived of his liberty unlawfully, without respecting the reasons and conditions established in Argentine law or the international standards." In particular, it alleged that the detention of the alleged victim was not preceded by an arrest warrant or *flagrante delicto*. Furthermore, it indicated that "the methods used by the federal police to deprive him of his liberty were incompatible with respect for fundamental human rights." Lastly, it affirmed that "the State did not comply with its obligation to advance the criminal action diligently because it related to individuals who were deprived of their liberty, and it unduly retained Juan Carlos Bayarri in preventive detention for almost 13 years." The representatives endorsed the allegations submitted by the Commission and added that Mr. Bayarri was detained by "officials of the Argentine Federal Police who, […] even though they did not have a legal order from a competent judge and lacked the judicial authority to do so as they were not in their own territorial jurisdiction, proceeded to deprive him unlawfully of his liberty." They also alleged that, with the excuse of the gravity of the facts of which he was accused, Juan Carlos Bayarri did not receive the benefit of release from prison, provided for by Law 24,390 "which establishes that no one can be maintained in preventive detention for more than two years, except in exceptionally complex or grave cases, for which they can be detained one year more."

53. As mentioned above, the State did not contest the facts denounced and indicated that the alleged violations had already been settled in the domestic jurisdiction in favor of the alleged victim (s*upra* paras. 29 and 30). Taking this into account, in this chapter, the Court will examine the allegations of the Inter-American Commission and the representatives concerning: (a) the lawfulness of Mr. Bayarri's detention that took place in the context of the criminal action against him, and (b) the temporal limits of the preventive detention to which the alleged victim was subject, all in light of the principles and norms of the American Convention.

A) Lawfulness of the detention of Juan Carlos Bayarri

54. Article 7(2) of the American Convention establishes that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto." The

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> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto.
>
> 3. No one shall be subject to arbitrary arrest or imprisonment.
>
> 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
>
> 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

[37] Article 1(1) of the Convention stipulates that:

> 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.

Court has indicated that, owing to this reference to the Constitution and the laws established "pursuant thereto," the examination of the observance of Article 7(2) of the Convention entails an analysis of compliance with the requirements established in this body of law. If the domestic normative is not respected when depriving an individual of his liberty, this deprivation will be unlawful and contrary to the American Convention,[38] in light of Article 7(2). Consequently, the Court's task is to verify whether the detention of Juan Carlos Bayarri was carried out in accordance with Argentine law.

55. Article 18 of the 1853 Argentine Constitution, in force at the time of the facts, established that no one can be "arrested unless it is by virtue of a written order of a competent authority […]."[39] While article 2 of the Code of Criminal Procedure in force at the time of the detention of Juan Carlos Bayarri provided that "no one can be subjected to preventive detention without a written order of a competent judge issued against a specific person and based on the existence, against that person, of half proof of an offense or strong evidence of guilt."

56. Based on the law in force at the time of the facts,[40] it is clear that all detentions, except those carried out *in flagrante delicto,* must be preceded by a written order of a competent judge. Under this assumption, the person detained must be made available promptly to a competent judge, who must take the necessary steps to order his preventive detention or release. This Court must examine whether Mr. Bayarri's detention complied with these conditions.

Judicial order issued by a competent authority

57. The Inter-American Commission indicated in its application that Juan Carlos Bayarri was detained without a prior judicial order at around 10 a.m. on November 18, 1991, by several members of the Fraud Division of the Argentine Federal Police, who, armed and dressed in civilian clothing, intercepted him in Villa Domínico, in the Avellaneda district, Province of Buenos Aires, and placed him, blindfolded and with his hands tied, in one of the vehicles they were driving, to transfer him to a clandestine detention center.[41] The

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[38] *Cf. case of Chaparro Álvarez and Lapo Íñiguez supra* note 9, para. 57; and *case of Yvon Neptune, supra* note 14, para. 96.

[39] Argentine Constitution adopted by the General Constituent Congress on May 1, 1853, reformed and approved by the National Convention *"ad hoc*" on September 25, 1860, as reformed by the Conventions of 1866, 1898 and 1957. http://pdba.georgetown.edu/Constitutions/Argentina/arg1853.html

[40] Code of Criminal Procedure *Cf.* helpful evidence submitted by the State (file of attachments to the brief with the State's final arguments, folios 6681 to 6797). The relevant part of the Code of Criminal Procedure establishes that:

> Art. 4. The Chief of Police of the Capital and his agents have the duty to detain anyone caught in *flagrante delicto*, and anyone against whom there is strong evidence or half proof of guilt, and such persons must be made available promptly to a competent judge.
>
> Art. 6. When the person presumed guilty has been detained and brought before the competent judge, the latter shall proceed, as soon as his normal working hours commence, to question that person and to take the necessary steps to order his preventive detention or his release.
>
> […]
>
> Art. 374. When a person must be arrested in another jurisdiction, the arrest shall be made by issuing an official or rogatory letter to the judicial authority of the place where that person resides, with a transcript of the judicial decision ordering the arrest or imprisonment.

[41] In this regard, there is the official letter in which the Federal Secretary, Laura Amalia Benavides de Selvático, informed the Federal Judge, Manuel Humberto Blanco, in the context of application for habeas corpus 6,306, that the arrest warrant issued on November 19, 1991, could not be executed because Juan Carlos Bayarri had already been detained (*Cf.* file of attachments to the application, attachment 2.4, folio 70). There is also the official letter in which Nerio Bonifati, National Judge of First Instance informed the Judge responsible for Criminal

detention of the alleged victim took place in the context of preliminary proceedings in a criminal case filed for the repeated perpetration of kidnapping for ransom under case No. 4227, entitled "Macri, Mauricio. Unlawful Deprivation of Liberty," being processed by National Criminal Court of First Instance No. 25 of the Capital of the Argentine Republic.[42] In his testimony before the Court, Juan Carlos Bayarri confirmed the circumstances, place and time of his detention and added that he was with his father when he was detained.[43]

58. Based on the information provided by the State in the proceedings before the Court (*supra* paras. 29 and 30), the Court finds that these facts, which are also clear from the body of evidence, have been established.

59. In particular, the Court observes that on May 11, 2005, National Court of First Instance No. 13, which heard case No. 66,138 concerning unlawful coercion and unlawful deprivation of liberty to the detriment of the alleged victim, issued a committal order against nine officials of the Argentine Federal Police, considering, with the degree of conviction required at that stage of the criminal proceeding, that it had been proved that Mr. Bayarri's detention took place on November 18, 1991, in the Avellaneda district, without a prior written order issued by a competent judge.[44]

60. On July 25, 2005, Chamber VII of the National Criminal and Correctional Appeals Chamber confirmed the decision of the aforementioned Court of First Instance and determined that "Juan Carlos Bayarri and his father were unlawfully deprived of freedom of movement, which was confirmed by the circumstance that their arrest was hidden, the local judge did not intervene in the case, and only the former was placed at the disposal of the judge who intervened in the respective preliminary proceedings at a later date."[45]

61. Indeed, the case file of the preliminary proceedings against the alleged victim (*supra* para. 57) does not include an arrest warrant issued by a competent authority in that district[46] before the detention.[47] Consequently, the Court finds that the State is responsible for violating Article 7(2) of the Convention to the detriment of Juan Carlos Bayarri.

Court No. 4 of Lomas de Zamora that Juan Carlos Bayarri had been detained and made available to him since November 18, 1991 (*Cf.* file of attachments to the application, attachment 2.3, folio 67). See also, testimonies on the detention: testimony of Cándido Martínez Pérez, rendered on November 20, 1991 (*Cf.* file of attachments to the application, attachment 2.5, folio 72 to 74); testimony of Guillermo Daniel Balmaceda, rendered on November 20, 1991 (*Cf.* file of attachments to the application, attachment 2.1, folios 57 and 58); and testimony of Noemí Beatriz Lata de Caamaño of September 30, 1992 (*Cf.* file of attachments to the application, attachment 2.6, folios 76 and 787).

[42] *Cf.* case No. 4,227, entitled "Macri, Mauricio. Unlawful Deprivation of Liberty" (helpful evidence submitted by the State, file 7176-1992, from volume (*cuerpo*) 1 to 19).

[43] *Cf.* testimony of Juan Carlos Bayarri rendered during the public hearing, *supra* para. 7.

[44] *Cf.* decision of May 11, 2005, issued by National Criminal Court of First Instance No. 13 (file of attachments to the application, attachment 4.3, folios 544 to 582).

[45] *Cf.* decision of August 25, 2005, handed down by Chamber VII of the National Criminal and Correctional Appeals Chamber (file of attachments to the application, attachment 4.7, folio 632).

[46] Article 374 of the Code of Criminal Procedure stipulates that: "When a person must be arrested in another jurisdiction, the arrest shall be made by issuing an official or rogatory letter to the judicial authority of the place where that person resides, with a transcript of the judicial decision ordering the arrest or imprisonment." *Cf.* Code of Criminal Procedure (helpful evidence provided by the State, Codigo Penal.pdf). From examining the evidence provided, the Court merely observes the existence of the judicial order issued by the Federal Court of La Plata on November 19, 1991, a court that was competent to process the arrest warrant in the jurisdiction of the alleged victim's domicile. However, this warrant was issued on the day after Mr. Bayarri's detention; therefore, that court advised that the warrant could not be executed. *Cf.* search and arrest warrant issued by Federal Judge No. 1 of La Plata (Criminal Secretariat No. 3) of November 19, 1991 (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 243); request of November 18, 1991, by the Head of the Fraud Division of the Argentine Federal Police, Vicente Luis Palo, addressed to the Judge of First Instance No. 25, requiring "the issue of

Procedure used for the detention

62. The Inter-American Commission asked the Court to declare the violation of Article 7(3) of the American Convention, because Mr. Bayarri was detained using methods incompatible with human rights (*supra* para. 52). In this regard, the Court reiterates, in keeping with its most recent case law, that the arbitrariness mentioned in Article 7(3) of the Convention has its own legal content,[48] which only needs to be analyzed in the case of detentions that are considered lawful. In this case, the Court has already established that Mr. Bayarri was detained unlawfully (*supra* para. 61), so that it is not necessary to analyze the violation of Article 7(3) of the American Convention.

Prompt presentation before a competent judge and effectiveness of the judicial control

63. The first part of Article 7(5) of the Convention stipulates that any person detained must be brought promptly before a judge. The Court has determined that this is a measure designed to avoid arbitrary or unlawful detentions, taking into account that, under the rule of law, the judge is responsible for guaranteeing the rights of the detained person, authorizing the adoption of precautionary or coercive measures when strictly necessary, and generally endeavoring to ensure that the accused is treated in a way that is consequent with the presumption of innocence.[49]

64. According to Articles 2 and 6 of the Code of Criminal Procedure, after their arrest, detainees must be brought before a competent judge, who will proceed, as soon as his normal working hours commence, to question them and to take the necessary measures to order their preventive detention or their release (*supra* paras. 55 and 56).

65. According to the case file in the instant case, on November 19, 1991, the Head of the Fraud Division of the Argentine Federal Police made Mr. Bayarri available to Court of First Instance No. 25, and the Secretary of this court ordered that he remain detained.[50] For this procedure, Mr. Bayarri was not taken personally to the court; consequently, it does not

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the letters rogatory corresponding to the different judicial districts, in order to proceed for the 'immediate detention' of those named above" (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 182); note of November 18, 1991, in which the Head of the Fraud Division, Police Chief Vicente Luis Palo, asked the Judge of First Instance No. 25 to issue "the letters rogatory corresponding to each of the accused" (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 180); official communication of November 18, 1991, issued by National Court of First Instance No. 25, signed by its Secretary, Eduardo Larea, recommending the arrest of Juan Carlos Bayarri and Carlos Alberto Benito to the Head of the Argentine Federal Police" (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 188); letter rogatory issued by National Court of First Instance No. 25 addressed to the Federal Judge of La Plata on November 18, 1991 (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 46); official communication of November 20, 1991, in which the Head of the Fraud Division of the Argentine Federal Police, Vicente Luis Palo, informed Federal Court No. 1 of La Plata that the search order issued could not be executed because Mr. Bayarri had been detained in the jurisdiction of Court No. 25 (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 248), and official letter of November 20, 1991, in which the Head of the Fraud Division of the Argentine Federal Police, Vicente Luis Palo, annulled the search ordered "because of the detention of the citizen, Juan Carlos Bayarri, in the Capital" (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 241).

[47] United Nations. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Adopted by the General Assembly in Resolution 43/173, of 9 December 1988, Principle 4.

[48] *Cf. case of Chaparro Álvarez and Lapo Íñiguez, supra* note 9, paras. 93 and 96.

[49] *Cf. Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 129; *case of Chaparro Álvarez and Lapo Iñiguez, supra* note 9, para. 81; and *case of Yvon Neptune, supra* note 14, para. 107.

[50] *Cf.* procedure for granting a measure and consultation of Court of First Instance No. 25 of November 19, 1991 (helpful evidence submitted by the State, exp7176cuerpo2_92.pdf, page 227).

comply with the obligation established in Article 7(5) of the Convention to be brought before a "judge or other official authorized by law to exercise judicial power."[51] The Court has reiterated that the judge must hear the detainee personally and assess all the explanations that the latter provides, so as to decide whether it is in order to release him or to maintain the deprivation of liberty.[52] Otherwise, it would be tantamount to stripping the judicial review established in Article 7(5) of the Convention of its effectiveness.

66. Subsequently, on November 24, 1991, Juan Carlos Bayarri was transferred to the Palace of Justice of the Federal Capital to make a statement before Court of First Instance No. 25.[53] This measure, in addition to failing to comply with the provisions of Argentine law, thus violating Article 7(2) of the Convention (*supra* paras. 56 and 64), was taken almost one week after the detention and, consequently, did not satisfy the requirement of bringing any person detained "promptly" before the judicial authority established in Article 7(5) of the American Convention.

67. To constitute a real control mechanism in the face of unlawful and arbitrary detention, the judicial review must be carried out promptly and in such a way as to guarantee compliance with the law and the detainee's effective enjoyment of his rights, taking into account his special vulnerability.[54] As stated previously, the judge is the guarantor of the rights of any person in the State's custody and therefore has the task of preventing and ending unlawful and arbitrary detentions and guaranteeing a treatment that accords with the principle of presumption of innocence. In the case *sub judice*, the procedure during which the judge of the case received Juan Carlos Bayarri, personally, for the first time (*supra* para. 66), when the latter made his preliminary statement pleading guilty to committing several criminal acts, did not encompass appropriately those aspects that could support the lawfulness of his detention in order to exercise control of it. In addition, the judge did not order a medical appraisal to determine the causes of the alleged victim's state of health, even though he showed signs of severe traumatism (*infra* paras. 90). Moreover, the Court observes that, after having taken his preliminary statement, the judged ordered that Juan Carlos Bayarri be transferred to a penitentiary center without ordering pre-trial detention, as established in the Code of Criminal Procedure (*supra* para. 55, 56 and 64). It was only three months later, on February 20, 1992, that this was finally ordered. All the above shows that the judicial intervention was not an effective means of controlling the lawfulness of the actions taken by the police officials responsible for the detention and custody of Juan Carlos Bayarri and reestablishing his rights.

68. Based on the above, the Court finds that Mr. Bayarri was not brought promptly before a competent judge following his detention and that the judge did not exercise effective judicial control of the detention, thus violating Article 7(1), 7(2) and 7(5) of the Convention.

B) Right to be tried within a reasonable time or to be released

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[51] *Tibi v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 7, 2004. Series C No. 114, para. 119; *case of Chaparro Álvarez and Lapo Iñiguez*, *supra* note 9, para. 84. See also, United Nations. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 47, principle 37.

[52] *Case of Chaparro Álvarez and Lapo Iñiguez, supra* note 9, para. 85.

[53] *Cf.* statement made by Vicente Luis Palo, Head of the Fraud Division of the Argentine Federal Police, made on June 16, 1992, before the National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folios 3443 to 3445); and statement made by Juan Carlos Bayarri on January 8, 1992, before the National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folios 3334 to 3338).

[54] *Cf. Eur. Court HR, Iwanczuk v. Poland* (App. 25196/94) Judgment of 15 November 2001, para. 53.

69. The Court has observed that preventive detention "is the most severe measure that can be applied to a person charged with an offense; hence, its use should be exceptional, limited by the principle of lawfulness, the presumption of innocence, and the need and proportionality, in keeping with what is strictly necessary in a democratic society,"[55] because "it is a precautionary rather than a punitive measure."[56]

70. Article 7(5) of the American Convention guarantees the right of any person detained in pre-trial detention to be tried within a reasonable time or released, without detriment to the continuation of the proceedings. This right imposes temporal limits on the duration of pre-trial detention and, consequently, on the State's power to protect the purpose of the proceedings by using this type of precautionary measure. When the duration of pre-trial detention exceeds a reasonable time, the State can restrict the liberty of the accused by other measures that are less harmful than deprivation of liberty by imprisonment and that ensure his presence at the trial. This right also imposes the judicial obligation to process criminal proceedings in which the accused is deprived of his liberty with greater diligence and promptness. The Court must examine whether the preventive detention to which Juan Carlos Bayarri was subjected exceeded a reasonable time.

71. In the instant case, the judicial authorities imposed on Mr. Bayarri a precautionary measure of preventive detention, ordered in a decision of December 20, 1991,[57] and confirmed, following appeal, on February 20, 1992.[58] This measures was prolonged until June 1, 2004, when his liberty was ordered "absolving [him] of guilt and the charges."[59] Mr. Bayarri spent a total of approximately 13 years in preventive detention.[60]

72. The alleged victim requested his release on three occasions,[61] based on Law No. 24,390**,** which defines itself as the law regulating Article 7(5) of the American Convention. Article 1 of this law established that preventive detention could not exceed two years, as follows:[62]

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55 *Acosta Calderón v. Ecuador. Merits, reparations and costs.* Judgment of June 24, 2005. Series C No. 129, para. 74; *Servellón García et al. v. Honduras. Merits, reparations and costs*. Judgment of September 21, 2006. Series C No. 152, para. 88; and *case of Yvon Neptune,* supra note 14, para. 107.

56 *Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 77; *case of Chaparro Álvarez and Lapo Íñiguez,* supra note 9, para. 145; and *case of Yvon Neptune,* supra note 14, para. 107.

57 Decision handed down by National Judge of First Instance No. 25 on December 20, 1991, in which he decided "TO CONVERT INTO PREVENTIVE DETENTION the current detention of JUAN CARLOS BAYARRI, whose other personal information is included in the official record, in relation to the offense of UNLAWFUL ASSOCIATION IN CONJUNCTION WITH REITERATED KIDNAPPING FOR RANSOM" (helpful evidence submitted by the State, exp7176 cuerpo7_92 pages 127 to 170). This decision was appealed on December 23, 1991, by the alleged victim's legal representative (helpful evidence submitted by the State, exp7176cuerpo7_92.pdf, pages 178 to 175). In a court decision of December 30, 1991, the appeal was granted (helpful evidence submitted by the State, exp7176cuerpo7_92.pdf, page 207).

58 Decision of Chamber III of the Criminal and Correctional Chamber of February 20, 1992, deciding the appeal that had been filed, and confirming the preventive detention (helpful evidence submitted by the State, exp7176cuerpo10_92.pdf, pages 93 to 100).

59 Judgment of Chamber I of the National Federal Criminal and Correctional Appeals Chamber of June 1, 2004 (file of attachments to the application, attachment 1.7, folios 27 to 54).

60 United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 47, principles 38 and 39.

61 *Cf.* requests for release filed by Juan Carlos Bayarri and the different judicial decision rejecting them (file of attachments to the application, appendix 3, tome VI, folios 2513 to 2608).

62 *Cf.* Law No. 24,390, published in the official gazette of November 22, 1994, see: www1.hcdn.gov.ar. This norm was subsequently amended by Law No. 25,430 of May 9, 2001, article 1 of which establishes that it amends article 1 of Law No. 24,390, as follows: "Preventive detention may not exceed two years, without a judgment

> "Pre-trial detention shall not exceed two years. Nevertheless, when the number of offenses attributed to the accused or the evident complexity of the case shall prevent the conclusion of the proceedings within the indicated time, this may be extended by one more year by a founded decision which shall be communicated immediately to the corresponding court of appeal for due review."

73. The national authorities denied the request for release each time arguing that Law No. 24,390 "has not derogated the usual norms regulating release mechanisms" and that those norms did not guarantee a "system of automatic liberty."[63] The national authorities assessed the "characteristics of the offense of which Mr. Bayarri was accused, his personal situation as a sergeant of the Argentine Federal Police and the punishment requested in order to presume, with justification, that, if he was granted his liberty, […] he would evade the action of la justice."[64]

74. Preventive detention should not be prolonged when the reasons that gave rise to the adoption of the precautionary measure no longer exist. The Court has observed that the national authorities are responsible for assessing the pertinence of maintaining the precautionary measures they issue pursuant to their own body of laws. When exercising this task, the national authorities should provide sufficient grounds to permit the reasons for which they are maintaining the restriction of liberty to be known[65] and, to ensure that this is compatible with Article 7(3) of the American Convention, it should be based on the need to ensure that the person detained will not impede the development of the investigation or evade the action of justice. The personal characteristics of the supposed author and the gravity of the offense he is charged with are not, in themselves, sufficient justification for preventive detention. Despite this, even when there are reasons for keeping a person in preventive detention, Article 7(5) guarantees that he will be released if the detention period has exceeded a reasonable time. In this case, the Court understands that Law No. 24,390 established a maximum period of three years after which it was not possible to continue depriving the accused of his liberty (*supra* para. 72).[66] Consequently, it is clear that Mr. Bayarri's detention could not exceed this timeframe.

75. The Court considers that the duration of the preventive detention imposed on Mr. Bayarri not only exceeded the maximum legal limit established, but was clearly excessive. The Court does not find it reasonable that the alleged victim remained deprived of liberty for 13 years awaiting a final judicial ruling in his case, which ultimately acquitted him of the charges against him.

76. The Court also emphasizes that the judge does not have to wait until he hands down an acquittal for the detained person to recover his liberty, but should periodically assess whether the reasons and need for the measure and its proportionality are maintained,[67] and

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having been handed down […]" (underlining added). Law No. 25,430 substituted articles 1, 2, 3, 4, 9, 10 and 11, and derogated articles 7 and 8, all of Law No. 24,390.

63 Decision of March 30, 1995 issued by the Criminal and Correctional Chamber (file of attachments to the application, appendix 3. tome VI, folios 2575 and 2576).

64 Decision of March 30, 1995 issued by the Criminal and Correctional Chamber (file of attachments to the application, appendix 3. tome VI, folios 2577).

65 *Cf. case of Chaparro Álvarez and Lapo Íñiguez*, *supra* note 9, para. 107; and *case of Yvon Neptune*, *supra* note 14, para. 108.

66 In this regard, see the order of May 3, 2007, issued by Court of First Instance No. 39, deciding to extend for one more year the preventive detention ordered against the persons accused in the case file entitled "Storni, Gustavo Adolfo *et al*. Unlawful coercion of those detained" (helpful evidence submitted by the State, File.66.138-1996-Cuerpo18.pdf, pages 275 to 295).

67 *Cf. case of Chaparro*, *supra* note 9, para. 107; and *case of Yvon Neptune*, *supra* note 14, para. 108.

whether the duration of the detention has exceeded the limits established by law and reasonableness.[68] Whenever it appears that the preventive detention does not fulfill these conditions, the release of the person detained should be ordered, without detriment to the continuation of the respective proceedings.

77. Based on the above, the Court considers that the State violated Mr. Bayarri's right to a trial within a reasonable time or to be released in keeping with Article 7(5), 7(2) and 7(1) of the American Convention.

VIII
ARTICLE 5 (RIGHT TO HUMANE TREATMENT)[69] OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) THEREOF

78. In its application, the Inter-American Commission stated that Mr. Bayarri was subjected to unlawful detention in conditions of incommunicado, during which agents of the Argentine Federal Police deliberately beat him on the chest, face and right ear, and inflicted electric shocks to intimidate him and coerce him in order to obtain a confession concerning certain unlawful acts. It also alleged that the State had received information that Juan Carlos Bayarri had suffered injuries while he was in its custody and, although this called for an investigation by the State to verify and punish these facts, the State "has not produced any convincing explanation about the injury suffered by Juan Carlos Bayarri" to date, which constitutes a violation of its international obligations.

79. The representatives alleged that, for three consecutive days, and while he was detained at the clandestine center known as the "Olimpo," Juan Carlos Bayarri was "beaten savagely on different parts of his body, and then tortured by the application of the torture known as the 'cattle prod,' as well as the method known as 'dry submarine,' which consists in placing a plastic bag over the head to prevent the victim from breathing, while simultaneously beating [his] ears repeatedly." The representatives indicated that, after he had been transferred to the Central Police Department, he was threatened with possible harm to his next of kin so that he would confess to committing various criminal acts. They indicated that, even though the existence of injuries was clear from the first, State officials avoided making a complete and thorough examination of his person, pursuant to article 66bis of the Rules of Procedure of the Criminal and Correctional Jurisdiction of the Federal Capital.

80. The State did not dispute the facts relating to the alleged torture of Juan Carlos Bayarri and affirmed that the violations committed in this regard had been settled in the domestic jurisdiction in favor of the victim (s*upra* paras. 29 and 30). Despite the foregoing, in this chapter, the Court will now examine the alleged violation of Article 5 of the American Convention, based on the body of evidence and the facts that have been established.

A) Acts that constitute torture

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[68] *Cf.* United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 47, principio 39.

[69] In this regard, Article 5 of the Convention stipulates that:

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

81. Torture and cruel, inhuman and degrading treatment are strictly prohibited by international human rights law. Nowadays, the absolute prohibition of torture, both physical and psychological, belongs to the domain of international *jus cogens.*[70] The Court has understood that an act that constitutes torture exists when the ill-treatment is: (a) intentional; (b) causes severe physical or mental suffering, and (c) is committed with a purpose or objective,[71] including the investigation of crimes.

82. During the testimony he gave, on January 8, 1992, before Court of First Instance No. 13, which was in charge of investigating the reported acts of torture, Juan Carlos Bayarri stated that, following his arrest:

> He was transferred to an unknown place, which they called 'the pit'; there, they told him that his father had been brought to the same place and was in a similar situation: in other words, blindfolded and tied up. […] They stripped him, they laid him down on a rubber mattress […] and they questioned him about kidnappings for ransom. Since he was unaware […] of these acts that he was accused of, they applied what is known as the cattle prod to [his] genital area, penis, nipples, anus and the sole of his right foot […]. After that, since he continued to deny any involvement, they again applied the cattle prod and then proceeded to torture him with the so-called 'hood,' which consisted of placing a plastic bag over his head to prevent him from breathing, while beating him on the chest with their fists, boxing his ears with open hands, until a very strong blow to the right ear with the fist caused him to hemorrhage and then it was discovered that his eardrum had been perforated. […] Before the court, he declared what he had been instructed by Fraud, not considering it appropriate at that time to mention the torture that, anyway, was plain to see; and he feared greatly for the physical integrity of his family.[72]

83. The truth of the facts denounced by the victim on that occasion has been proved, as is clear from the different decisions adopted by the Argentine courts. On June 1, 2004, Chamber I of the Federal National Criminal and Correctional Appeals Chamber decided the appeal filed in favor of Juan Carlos Bayarri, the purpose of which was to obtain the annulment of all the legal actions following Mr. Bayarri's detention, because his defense counsel argued that "the police officials responsible for the case, coerced and tortured him

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[70] *Cf.* Martiza Urrutia v. Guatemala. Merits, reparations and costs. Judgment of November 27, 2003. Series C No. 103, para. 92; case of the Miguel Castro Castro Prison v. Peru, supra note 30, para. 271; and Buenos Alves v. Argentina. Merits, reparations and costs. Judgment of May 11, 2007. Series C No.164, para.76. See also, International Covenant on Civil and Political Rights, art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2; Convention on the Rights of the Child, art. 37; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 10; Inter-American Convention to Prevent and Punish Torture, art. 2; African Charter on Human and Peoples' Rights, art. 5; African Charter on the Rights and Welfare of the Child, art. 16; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6; Code of Conduct for Law Enforcement Officials, art. 5; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 87(a); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, art. 6; United Nations Standard Minimum Rules for the Administration of Juveniles Justice (The Beijing Rules), rule 17(3); Declaration on the Protection of Women and Children in Emergency and Armed Conflict, art. 4; Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, guideline IV; art. 3 common to the four Geneva Conventions; Geneva Convention (III) relative to the Treatment of Prisoners of War, arts. 49, 52, 87, 89 and 97; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, arts. 40, 51, 95, 96, 100 and 119; Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(2.ii), and Protocol Additional to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4.2.a.

[71] *Cf. case of Bueno Alves*, *supra* note 70, para. 79.

[72] *Cf.* testimony of Juan Carlos Bayarri of January 8, 1991 (helpful evidence, exp7176cuerpo16_92.pdf, pages 257 *ff.).*

[…] until they obtained a confession." Chamber I acquitted Mr. Bayarri, considering that his confession was obtained by "applying torture."[73]

84. When deciding the appeal, the said Chamber I found, based on the medical appraisals carried out on the victim during the first two weeks of his detention,[74] that Juan Carlos Bayarri was injured when he was in the custody of agents of the Fraud Division of the Argentine Federal Police.

85. "Leaving to one side the analysis of the responsibilities of each of those who intervened in the facts denounced by Bayarri […]," the said Chamber I concluded that the injuries observed were produced by "torture and coercion by the police agents who intervened in the case." When acquitting Juan Carlos Bayarri of all guilt and of the charges, Chamber I based its decision on the evidence gathered during the investigation into these facts:

> The facts proved by the court of first instance of the Capital cannot be branded as an excessive use of force by the police that was essential in order to comply with their lawful duty to detain a person for whom an arrest warrant had been issued. In this case, it has been proved that Bayarri was tortured in order to extract a self-incriminating confession. The content of what Bayarri said […] was included in the case file by means of the testimony of police personnel and, […] two handwritten attestations by him were added to the case file.
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> The fact that, as has been mentioned, the reports prepared by [Dr.] Barriocanal describe the injuries; the fact that [Mr. Bayarri] bears visible signs of ill-treatment, and the failure to prepare a complete forensic medicine report on the health of the detainee are signs of the hostile climate in which […] Bayarri made his statement.

86. Following this decision, on August 25, 2005, during the investigation initiated into the facts, Chamber VII of the National Criminal and Correctional Appeals Chamber of the

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[73] *Cf.* judgment of Chamber I of the National Federal Criminal and Correctional Appeals Chamber of June 1, 2004 (file of attachments to the application, attachment 1.7, folios 27 to 54). In his expansion of the said preliminary statement, Juan Carlos Bayarri affirmed his innocence and indicated that his confession had been obtained by torture. *Cf.* expansion of the preliminary statement of Juan Carlos Bayarri of March 17, 1992, before National Criminal Court of First Instance No. 25 of the Capital of the Argentine Republic (helpful evidence submitted by the State, exp7176cuerpo11_92.pdf, page 169).

[74] *Cf.* physical and psychological examination carried out on November 19, 1991, by the expert in medical jurisprudence of the Argentine Federal Police, Andrés Barriocanal (file of attachments to the application. attachment 1.5, folio 22); testimony of Andrés Barriocanal rendered on July 3, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folio 3469); testimony of Dr. José Cohen rendered on September 30, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the application, attachment 1.5, folios 24 and 25); testimony of Héctor Marcelino Troche, nurse with Unit 28 of the Federal Penitentiary Service – Courthouse Prison – rendered on August 31, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the application, attachment 1.2, folio 10); record of the examination carried out November 24, 1991, signed by Dr. José Cohen, doctor on duty of the Judicial Detention Center of the Courthouse Prison (helpful evidence submitted by the State, exp7176cuerpo3_92.pdf, pages 127 and 128); testimony of Wenceslao Emilio Gaebler Villafañe, doctor of Unit 16 of the Federal Penitentiary Service, rendered on July 7, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folio 3476); prescription for Juan Carlos Bayarri signed by Dr. Gaebler Villafañe of Unit 16 of the Federal Penitentiary Medical Service on November 26, 1991 (file of attachments to the pleadings and motions brief, folio 3411); testimony of Primitivo Burgo of the Forensic Medicine Unit rendered on July 14, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the application, attachment 1.3, folio 13); report of December 2, 1991, signed by Dr. Mario Sierra of the Otorhinolaryngology Service of the Forensic Medicine Unit (file of attachments to the application, attachment 1.3, folios 14 and 16); testimony of Juan Carlos Bayarri of January 8, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folios 3337 and 3338); decision issued by the National Criminal and Correctional Appeals Chamber on April 1, 1997, in the case of "Ramírez, Miguel A. and another – Unlawful Coercion – dismissal of proceedings (file of attachments to the pleadings and motions brief, folios 4841 to 4847).

Federal Capital considered that "all the elements taken together […] support Bayarri's version that he was tortured."[75]

87. The Inter-American Court considers it sufficient to accept the conclusion reached by the Argentine courts and, notwithstanding the criminal responsibility that may be decided in the domestic jurisdiction, considers that Juan Carlos Bayarri was subjected to torture. The ill-treatment applied to him by State agents was the result of a deliberate action implemented to extract an incriminating confession (*supra* para. 85). The severity of the injuries confirmed in this case allows the Court to conclude that Juan Carlos Bayarri was subjected to ill-treatment that produced intense suffering. The beatings applied to the victim resulted in the perforation of his eardrum.[76] In the domestic jurisdiction, it was established that torture was used repeatedly during three days, and that his captors threatened to harm his father, with whom he had a close relationship and whose whereabouts were unknown to him.[77] This caused the victim severe mental suffering.[78] The Court considers that all the foregoing constituted a violation of the right to humane treatment embodied in Article 5(1) and 5(2) of the American Convention, to the detriment of Juan Carlos Bayarri.

B) Obligation to initiate an investigation ex officio *and immediately*

88. The Court has stated that, pursuant to Article 1(1) of the American Convention, the obligation to guarantee the rights established in Article 5(1) and 5(2) of the American Convention entails the State's obligation to investigate possible acts of torture or other cruel, inhuman or degrading treatment.[79] This obligation to investigate is reinforced by the provisions of Articles 1, 6 and 8 of the ICPPT, to which Argentina is a State Party (*supra* para. 23), which oblige the State to "take effective measures to prevent and punish torture within their jurisdiction," as well as "to prevent and punish other cruel, inhuman or degrading treatment or punishment." Moreover, according to the provisions of Article 8 of this Convention:

> If there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal action.

89. Since April 30, 1989, the date on which the said Inter-American Convention against Torture entered into force in Argentina, in accordance with its Article 22, the State has been required to comply with the obligations contained in this treaty.

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75 Decision of August 25, 2005, delivered by Chamber VII of the National Criminal and Correctional Appeals Chamber of the Federal Capital (file of attachments to the application, attachment 4.7, folio 627).

76 *Cf.* expert appraisal of Dr. Eduardo Garré given during the public hearing, *supra* para. 7.

77 *Cf.* testimony of Juan Carlos Bayarri of January 8, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (attachments to the pleadings and motions brief, folios 3337 to 3338); expansion of the testimony rendered by Juan Carlos Bayarri on June 11, 1997, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folios 4886 to 4897) and testimony of Juan Carlos Bayarri rendered during the public hearing before the Inter-American Court of Human Rights, *supra* para. 7.

78 Expert appraisal of the psychologist Susana Estela Quiroga given during the public hearing, *supra* para. 7.

79 *Cf. Ximenes Lopes v. Brazil. Merits, reparations and costs*. Judgment of July 4, 2006. Series C No. 149, para. 147; *case of the Miguel Castro Castro Prison, supra* note 30, para. 344; and *case of Buenos Alves*, *supra* note 70, para. 88.

90. Despite the fact that, when making his preliminary statement, the victim had injuries to his face and ear[80] that were clearly visible,[81] Judge of First Instance No. 25 did not record this in the proceedings.[82] Moreover, there is no record in the case file that the judge of first instance had taken note of the medical appraisals carried out on Mr. Bayarri and, consequently, ordered immediately and *ex officio* that a thorough medical examination be carried out and an investigation initiated to determine the origin of the evident injuries, as provided for under Argentine law.[83] To the contrary, it has been proved that, by express order of this judge, the examination carried out by Dr. Primitivo Burgo, of the Forensic Medicine Corps, on November 28, 1991, was limited to evaluating the injuries to his ears.[84] Dr. Primitivo Burgo testified that the victim told him that he had been subjected to electric shocks and that he had undergone other abuse. When he consulted the Court of First Instance by telephone about the scope of the examination he was required to carry out, Dr. Burgo was informed that he should merely evaluate the injuries to the ears.[85]

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[80] As certified in the record of the examination of November 24, 1991, signed by Dr. José Cohen, doctor on duty at the Judicial Detention Center of the Courthouse Prison (helpful evidence submitted by the State, exp7176cuerpo3 1992.pdf, pages 127 and 128).

[81] *Cf.* medical certificate signed by Dr. Juan Carlos Basile on November 25, 1991 (file of attachments to the brief with pleadings and motions, folio 3939); sworn statement rendered before National Court of First Instance No. 13 on April 5, 1993, by Dr. Juan Carlos Basile of the Unit 1 prison hospital (file of attachments to the brief with pleadings and motions, folio 4069). See also, decision of August 25, 2005, issued by Chamber VII of the National Criminal and Correctional Appeals Chamber of the Federal Capital (file of attachments to the application, attachment 4.7, folio 627).

[82] *Cf.* preliminary statement of Juan Carlos Bayarri before National Criminal Court of First Instance No. 25 of the Federal Capital on November 24, 1991 (helpful evidence submitted by the State, exp7176cuerpo3_1992.pdf, pages 101 to 114).

[83] *Cf.* official record signed by the Secretary of the case, certifying that there is no request for a medical examination in the case file, as stipulated in article 66bis of the jurisdictional rules of procedure (file of attachments to the pleadings and motions brief, folio 3344). This article establishes that:

> "When the accused (whether or not he is on trial), a witness, a complainant or any person connected to a proceeding states or presents signs that he has been subjected to unlawful coercion, the judge of the case shall promptly require the Forensic Medicine Unit to make the respective examination. To avoid delays, the judge shall promptly obtain the authorization of the person who has allegedly been coerced to conduct the complementary tests, biopsies or analyses that require his express consent, and this must be forwarded to the experts forthwith. Within 24 hours, the doctors shall examine the person who has allegedly been coerced and prepare an exhaustive report on any injuries found, detailing their nature, gravity, data, probable mechanism that produced them, and any other conclusions that, in the opinion of the experts, could contribute to the respective investigation, notwithstanding any complementary examinations that are pending (Code of Criminal Procedure, art. 223). The experts' report shall be added to the complaint *ex officio* and lots shall be drawn to determine the court that will intervene. Once the documents have been received, two certified copies of the complaint and of the experts' report shall be made, duly certified by the court that was selected, noting the date they were received. The first copy shall be sent to the Chamber to be filed in a special archive kept, by the name of the accused and the assignment of the case, in the Pro-Secretariat of "*Patronatos.*" The second copy shall be forwarded to the original court, to be added to the respective case file. The representatives of the Attorney General's Office (*Ministerio Público*) shall monitor strict compliance with this provision."

[84] *Cf.* testimony of Primitivo Burgo of the Forensic Medicine Unit rendered on July 14, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the application, attachment 1.3, folio 13); testimony of Juan Carlos Bayarri rendered on January 8, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folios 3337 and 3338), and decision issued by the National Criminal and Correctional Appeals Chamber on April 1, 1997, in the case, "Ramírez, Miguel A. and another – Unlawful Coercion – dismissal of proceedings (file of attachments to the pleadings and motions brief, folios 4841 to 4847 and file of attachments to the application, attachment 1(1), folios 02 to 08).

[85] *Cf.* testimony of Primitivo Burgo of the Forensic Medicine Unit rendered on July 14, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the application. attachment 1.3, folio 13).

91. Meanwhile, the Head of the Fraud Division of the Federal Police, who had the victim in his custody for the first six days of the latter's detention, testified before the national judicial instances that, even though Juan Carlos Bayarri showed traces of having been beaten, he "had not been asked anything [in this regard], because, at that time, interest was focused on the investigation."[86] The investigation into the acts of torture was only initiated after the victims' defense counsel had informed the court of the coercion used against Juan Carlos Bayarri (*infra* para. 112).

92. In light of the above, the Court must reiterate that, even when the application of torture or cruel, inhuman or degrading treatment has not been denounced before the competent authorities, whenever there are indications that it has occurred, the State must initiate, *ex officio* and immediately, an impartial, independent and meticulous investigation that allows the nature and origin of the injuries observed to be determined, those responsible to be identified, and their prosecution to commence.[87] It is essential that the State act diligently to avoid the practice of torture, taking into account that the victim usually abstains from denouncing the facts because he is afraid. The judicial authorities have the duty to guarantee the rights of the person detained, which entails obtaining and ensuring the authenticity of any evidence that can prove acts of torture.[88] The State must guarantee the independence of the medical and health care personnel responsible for examining and providing assistance to those who are detained so that they can freely carry out the necessary medical evaluations, respecting the norms established for the practice of their profession.[89]

93. In *Bueno Alves v. Argentina,* the Court emphasized that when there are allegations of torture or abuse, the time that elapses before the corresponding medical examinations are carried out is an essential factor in duly determining the existence of the harm, especially when there are no witnesses other than the perpetrators and the victims themselves and, consequently, probative elements may be very limited.[90]

94. In the instant case, the Court observes that the State authorities did not observe these provisions. The judicial authorities responsible for hearing the case did not order *ex officio* a meticulous investigation to ensure that the evidence, which would have permitted establishing what happened to Juan Carlos Bayarri, was obtained promptly and preserved. To the contrary, they obstructed the obtaining of such evidence (*supra* paras. 90 and 91). Argentine law clearly establishes the obligations of the judge of the case in this regard (*supra* para. 90). Consequently, and taking into consideration the State's acknowledgement of the facts, the Inter-American Court concludes that the State did not investigate with due diligence the torture to which Juan Carlos Bayarri was subjected in violation of the right to humane treatment embodied in Article 5(1) and 5(2) of the American Convention, in

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86 *Cf.* testimony of Vicente Luis Palo, Head of the Fraud Division of the Argentine Federal Police, rendered on June 16, 1992, before National Criminal Court of First Instance No. 13 of the Capital of the Argentine Republic (file of attachments to the pleadings and motions brief, folios 3443 to 3445), and decision of August 25, 2005, issued by Chamber VII of the National Criminal and Correctional Appeals Chamber of the Federal Capital (file of attachments to the application, attachment 4.7, folio 632).

87 *Gutierrez Soler v. Colombia. Merits, reparations and costs*. Judgment of September 12, 2005. Series C No. 132, para. 54; *case of the Miguel Castro Castro Prison*, para. 344; and *case of Bueno Alves*, *supra* note 70, para. 209.

88 *Cf. Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), principles included in para 76.*

89 *Cf. idem,* principles included in paras. 56, 60, 65 and 66.

90 *Case of Bueno Alves*, *supra* note 70, para. 111.

relation to Article 1(1) thereof. Also, in application of the *iura novit curia* principle, the Court finds that the State is responsible for the violation of Articles 1, 6 and 8 of the ICPPT.

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* *

95. In their final written arguments, the representatives asked the Court to classify the acts of torture perpetrated against Mr. Bayarri as crimes against humanity.

96. Based on the elements available in the instant case, the Court is unable to find that the torture of which Juan Carlos Bayarri was a victim took place in a context of massive and systematic violations.

IX
ARTICLES 8 (RIGHT TO A FAIR TRIAL) [91] AND 25 (RIGHT TO JUDICIAL PROTECTION)[92] OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) THEREOF

97. The Inter-American Commission stated that there had been a delay in processing the two criminal actions relating to the instant case. Regarding the action in which Mr. Bayarri appeared as the accused, the Commission indicated that its processing lasted almost 13 years, the period during which the victim was deprived of liberty. Regarding the case in which Mr. Bayarri was the complainant, the Inter-American Commission indicated that the State took more than 14 years to conclude the investigation into the facts and that more than 16 years have elapsed and a judgment in first instance has not yet ruled on the criminal responsibility of the State agents who intervened in the facts. In this regard, it indicated that "even though a substantial number of measures were taken, […] the judicial proceedings as a whole have not been able to confirm or deny that a human rights violation was committed, and have not produced an alternative explanation for the injuries."

98. Furthermore, the Commission argued that "[t]he prolonged preventive detention to which Mr. Bayarri was subjected implie[d] that the Argentine State presumed that he was guilty and treated him as such," thus violating the principle of the presumption of innocence. In addition, the Inter-American Commission alleged that the State violated Article 8 of the American Convention "owing to the coercion to which he was subjected in order to extract a confession of guilt."

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91 In this regard, Article 8 of the Convention establishes that:

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
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> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
>
> […]
>
> (g) The right not to be compelled to be a witness against himself or to plead guilty […]

92 Article 25(1) of the Convention stipulates:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

99. The representatives reiterated the Commission's arguments on the violation of Article 8 of the Convention. They also stated that the individuals accused of the offenses of unlawful deprivation of liberty and unlawful coercion to the detriment of Juan Carlos Bayarri enjoy "[t]otal protection and strong institutional support […] from the Argentine Federal Police authorities" and that there has been "[a] systematic institutional cover-up [and] a total lack of willingness and interest by the Argentine State to punish and/or even investigate those responsible for the offenses committed by judges and judicial officials [who] resolutely and systematically protected the federal police agents who were the authors of the offense of torture and other human rights violations […]."

100. The State did not dispute the facts that form the purpose of the instant case. However, it indicated that the alleged violations had already been resolved in the domestic jurisdiction in favor of the alleged victim (*supra* paras. 29 and 30). Regarding the supposed delay in the hearing of the cases, the State indicated that it acknowledged the procedural delays that occurred prior to June 1, 2004, the date on which Mr. Bayarri was acquitted and released. Nevertheless, regarding the action in which Mr. Bayarri is the complainant, the State argued that the delay as of that date could be attributed to the procedural conduct of the victim. Even though an order was issued on May 30, 2006, to close the preliminary investigation stage and submit the case to an oral proceeding, Mr. Bayarri "[r]esolutely opposed the request of those accused to exercise the option that the judicial proceedings against them be processed under the national Code of Criminal Procedure that was in force […]" and requested that the previous procedural code be applied. The State alleged that these claims were rejected as unfounded, so that "[i]t was only on March 4, 2008, that the prosecutor had the procedural opportunity to submit the case to an oral proceeding."

101. Article 8(1) of the Convention establishes the guidelines for the so-called "due process of law," which implies, among other matters, the right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or tribunal, previously established by law, to determine his rights.[93]

102. Article 25(1) of the Convention establishes, in broad terms, the obligation of the States to offer to all persons subject to their jurisdiction an effective judicial remedy for protection against acts that violate their fundamental rights. It also stipulates that the guarantee embodied therein is applicable not only with regard to the rights contained in the Convention, but also to those rights that are recognized by the Constitution or law.[94]

103. Based on the protection granted by Articles 8 and 25 of the Convention, the States are obliged to provide effective judicial remedies to the victims of human rights violations, which must be substantiated in accordance with judicial guarantees, all within the general obligation of the States to guarantee the free and full exercise of the rights established by the Convention to all persons subject to their jurisdiction (Article 1(1)).[95]

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[93] *Cf. Genie Lacayo. Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, para. 74; *Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, para. 56; and *case of Yvon Neptune*, supra note 14, para. 79.

[94] *Cf. Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001. Series C No. 71, para. 90; *case of Salvador Chiriboga*, *supra* note 93, para. 57; and *case of Castañeda Gutman*, *supra* note 35, para. 78. See also, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 23;

[95] *Cf. case of Velásquez Rodríguez, supra* note 9, para. 91; *case of Salvador Chiriboga, supra* note 93, para. 58; and *case of Yvon Neptune*, *supra* note 14, para. 77.

104. In light of the above, the Court will examine the facts of the instant case, as well as the evidence provided in relation to the alleged violation of judicial guarantees and judicial protection.

Case 4,227 entitled "Macri, Mauricio. Unlawful Deprivation of Liberty"

A) Right to be heard and for the case to be decided within a reasonable time

105. The Court has established that "the reasonable time referred to in Article 8(1) of the Convention should be assessed in relation to the total duration of the criminal proceedings against an accused, until the final judgment is handed down" and that, in this regard, the time begins to count when the first judicial decision is taken charging a particular individual with being the person probably responsible for a specific offense.[96]

106. As the Court has determined (*supra* para. 59), Mr. Bayarri's detention took place on November 18, 1991. In addition, the file shows that, on December 20 that year, Court of First Instance No. 25 issued a committal order against him (*supra* para. 71) and the judgment of first instance sentencing Mr. Bayarri to life imprisonment was handed down on August 6, 2001,[97] that is, approximately 10 years later. The appeal filed by the alleged victim was decided in a judgment of the Federal National Criminal and Correctional Appeals Chamber of June 1, 2004, acquitting him and ordering his release.[98] The Court observes that this judicial proceeding lasted approximately 13 years, the period during which Mr. Bayarri was subjected to preventive detention (*supra* para. 71).

107. In previous cases, when analyzing the reasonableness of the duration of the proceedings, the Court has assessed the following elements: (a) the complexity of the matter; (b) the procedural activity of the interested party, and (c) the conduct of the judicial authorities.[99] Nevertheless, [in the instant case,] the Court finds that there was a notorious delay in the abovementioned proceedings, with no reasonable explanation. Consequently, it is not necessary to examine these criteria. Bearing in mind, also, the acknowledgement of the facts that was made (*supra* paras. 29 and 30), the Court finds that, with regard to the said criminal case, the State violated Article 8(1) of the American Convention to the detriment of Juan Carlos Bayarri.

B) Right not to be compelled to be a witness against oneself or to plead guilty

108. It has already been established in this judgment that, following torture, Mr. Bayarri confessed to committing several criminal acts (*supra* para. 87). Furthermore, the Court is aware that Chamber I of the Chamber of Appeals declared that his confession was invalid and annulled the procedural actions arising from it (*supra* para. 83), which constituted an effective measure to end the consequences of the said violation of judicial guarantees perpetrated to the detriment of Juan Carlos Bayarri. As a result, the Court considers it appropriate to emphasize the grounds indicated by Chamber I in this regard:

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96 *Cf. case of Suárez Rosero*, *supra* note 56, para. 70; *Baldeón García v. Peru*. *Merits, reparations and costs.* Judgment of April 6, 2006. Series C No. 147, para. 150; and c*ase of Ximenes Lopes*, *supra* note 79, para. 195.

97 Judgment of August 6, 2001, handed down by Federal Judge Rodolfo Canicoba Corral (helpful evidence submitted by the State, exp7176cuerpo30_92.pdf, pages 85 and *ff.)*

98 Judgment of Chamber 1 of the Federal National Criminal and Correctional Appeals Chamber of June 1, 2004 (file of attachments to the application, attachment 1.7, folios 27 to 54).

99 *Cf. case of Genie Lacayo, supra* note 93, para. 77; *case of Escué Zapata, supra* note 30, para. 102; *and case of Heliodoro Portugal, supra* nota 10, para. 149.

> The Supreme Court of Justice, in the well-known "Montenegro" case (Judgments 303:1938), had occasion to rule on the validity of confessions by the accused obtained by torture. In that case, the [Supreme] Court observed that there was a conflict of interests: on the one hand, the social interest of applying criminal law promptly and efficiently and, on the other hand, the interest of the community that the rights of the individual should not be violated by unconstitutional methods of executing criminal law. [The] highest court inclined towards the supremacy of the latter interest, stating: "[…] this conflict has been resolved in our country since the dawn of the constitutional process when the 1813 Assembly, defining torture as "a horrendous invention to discover offenders," ordered the burning of the instruments used to apply it […]; this decision was formalized in the prohibition to oblige anyone to testify against himself contained in article 18 of the Constitution; […] the judges' compliance with this constitutional mandate cannot be limited to ordering the prosecution and punishment of those eventually found responsible for the abuse because, according importance to the result of their offense and using it as grounds for a conviction, is not only contradictory to the necessary rebuke, but compromises the satisfactory administration of justice by seeking to make it the beneficiary of an unlawful act."
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> […]
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> The verification of the violation of this fundamental right requires, first, the obligation to separate all the evidence that relates to the statements that […] Bayarri […] made under the effects of abuse, threats and torture from the analysis of the case.
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> [O]nly a few hours after the acts of torture, when making his preliminary statement in the courtroom, [Mr. Bayarri] provided a version that agreed with the contents of the testimony of the police agents […]. Despite this, the testimony rendered by […] Bayarri cannot be considered as evidence of a confession, since the circumstances surrounding [his statement] make the accused's explanations hard to believe, insofar as he stated that he ratified the contents of the testimony of the police agents, because he was threatened by the same officials who tortured him and brought him to the court to make a statement.
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> In this context, it should be underscored that this proceeding took place without the presence of his defense counsel, which indicates the lack of guarantees that surrounded the […] preliminary statement. To this must be added the particular treatment that, as can be inferred from the statement, Bayarri received in the courtroom. Bayarri bore visible marks of having recently suffered injury, yet the Court of First Instance ordered the forensic doctors only to examine him with regard to the alleged pain in his right ear.
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> […]
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> As stated above, we find ourselves faced with the hypothesis of exclusion of evidence obtained unlawfully. Pursuant to the legal doctrine of the Supreme Court of Justice, the State cannot use as evidence for the prosecution those elements that have been incorporated into an investigation unlawfully; that is, affecting individual rights recognized in the Constitution […].
>
> In addition, it is necessary to establish whether the lawfulness of the said acts results in consequences over and above this exclusion. In this hypothesis, the legal doctrine of the *poisoned fruit* must be applied; this postulates that not only must the evidence obtained unlawfully be excluded, but any other evidence that was found or that was a result of the information obtained unlawfully must also be rejected.
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> In application of this rule, which is to be found in the provisions of articles 511 and 512 of the Code of Criminal Procedure, the procedural decisions that were issued as a result of the said preliminary statement must be declared null and void.[100]

109. Based on the above, the Court find that the State violated Article 8(2)(g) of the American Convention to the detriment of Mr. Bayarri.

C) Presumption of innocence

110. This Court has established that, since preventive detention is a precautionary rather

[100] Judgment of June 1, 2004, of Chamber 1 of the Federal National Criminal and Correctional Appeals Chamber (file of attachments to the application, attachment 1.7, folios 34 to 35).

than a punitive measure, there is a "State obligation not to restrict the liberty of the person detained over and above limits that are strictly necessary to ensure that he does not impede the development of the proceedings or evade the action of justice."[101] Acting in any other way would be tantamount to anticipating the punishment, which violates general principles of law that are widely recognized, including the principle of presumption of innocence.[102] Indeed, on previous occasions, the Court has found that, by depriving individuals whose criminal responsibility has not been established of liberty unnecessarily or disproportionately, the State has violated the right of all persons to be presumed innocent, recognized in Article 8(2) of the American Convention.[103] The same conclusion should be reached if the State keeps a person in preventive detention over and above the temporal limits established by the right embodied in Article 7(5) of the American Convention (*supra* para. 70).

111. It has already been established that the victim remained in preventive detention for approximately 13 years and that this period exceeded the maximum time established by domestic law (*supra* para. 77). The Court also considers that, during this time, Mr. Bayarri was subjected to a criminal proceeding in which several judicial guarantees were violated (*supra* paras. 107 and 108). Based on all the above, the Court finds that the prolonged duration of the preventive detention of Juan Carlos Bayarri during the criminal proceeding that violated the American Convention converted it into a punitive rather than a precautionary measure, which denatured the measure. The Court finds that the State violated Mr. Bayarri's right to be presumed innocent and, consequently, that it is responsible for the violation of Article 8(2) of the American Convention to the detriment of Juan Carlos Bayarri.

Case 66,138 entitled "Bayarri Juan Carlos. Unlawful Coercion"

A) Access to justice, right to be heard and for the case to be decide within a reasonable time, and effectiveness of the remedies

112. On November 19, 1991, Juan José Bayarri reported the unlawful detention of his son, Juan Carlos Bayarri (*supra* para. 59). On December 23, that year, the victim's defense counsel filed a complaint based on the torture perpetrated against him. Both cases were joindered in case No. 66,138/96. With regard to the latter, Court of First Instance No. 13 issued a temporary stay of proceedings in favor of those accused on two occasions.[104] The greater part of these decisions was revoked by Chamber VII of the National Criminal and Correctional Appeals Chamber of the Federal Capital, considering that the analysis of the facts reported by Juan Carlos Bayarri required other probative measures to be taken.[105]

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101 *Cf. case of Suarez Rosero, supra* note 56, para. 70; and *case of Chaparro Álvarez and Lapo Íñiguez,* supra note 9, para. 145.

102 *Cf. case of Suarez Rosero, supra* note 56, para. 77; and *case of Chaparro Álvarez and Lapo Íñiguez*, *supra* note 9, para. 146

103 *Cf. case of Suarez Rosero,* supra note 56, para. 77; and *case of Chaparro Álvarez and Lapo Íñiguez*, *supra* note 9, para. 146

104 *Cf.* brief of December 223, 1991, submitted by Juan Carlos Bayarri's defense counsel (helpful evidence submitted by the State, File-66.138-1996-Cuerpo1.pdf, page 7); judgment of September 1, 1996, delivered by National Court of First Instance No. 13 (file of attachments to the pleadings and motions brief, folios 4782 to 4790), and judgment of July 2, 1998, delivered by National Court of First Instance No. 13 (file of attachments to the application, attachment 4.1, folios 528 to 537).

105 *Cf.* decision issued by the National Criminal and Correctional Appeals Chamber on April 1, 1997, in the case, "Ramírez, Miguel A. and another–Unlawful Coercion–dismissal of proceedings 13/140-VII (file of attachments to the pleadings and motions brief, folios 4841 to 4847 and file of attachments to the application, attachment 1(1),

113. From the case file it can be seen that, on May 30, 2006, it was decided to close the preliminary investigation stage and that the case file be forwarded to the corresponding court for processing the full trial. Nevertheless, this order could not be executed because, on various dates in April 2006, those accused requested the application of the Code of Criminal Procedure in force,[106] and the processing of the case was therefore suspended until this point had been decided.[107] The request was admitted on March 13, 2007, by Chamber IV of the National Criminal Cassation Chamber. Consequently, an order was issued for the return of the case file to the original court, so that the case could be processed in accordance with the Code of Criminal Procedure in force.[108] On March 28, 2007, Mr. Bayarri filed a special federal recourse[109] that was rejected on November 12, 2007. [110] On February 25 and 29, 2008, respectively, Juan Carlos Bayarri[111] and the National Criminal Prosecutor for preliminary proceedings who had been assigned to the case[112] requested that the case should be sent to trial. On March 1, 2008, the accused contested this request and filed the objection that a statute of limitations applied to the criminal action.[113]

114. The Court finds that approximately 16 years have elapsed and the criminal case is still underway in the domestic jurisdiction. The State acknowledged the existence of a delay up until June 1, 2004, and argued that, as of that date, the delay was explained by the complexity of the case and by the opposition of Mr. Bayarri's representatives to the accused being processed under the code of Criminal Procedure in force. Although the Court acknowledges that, as of 2006, the State has guided, with relative promptness, several judicial proceedings, particularly those relating to the settlement of the dispute concerning the application of the law on criminal procedure, the period of approximately 15 years taken by the investigation is excessive. The same can be said of the 16 years that have elapsed without a final judgment being handed down. This violates the right of the alleged victims and their next of kin to know, within a reasonable time, the truth of what happened, which requires the State's actions to be diligent and effective. Consequently, the Court finds that it is not necessary to examine the criteria established for assessing the reasonableness of the duration of the proceedings (*supra* para. 107).

115. Furthermore, this delay has had consequences other than the violation of reasonable time, such as an evident denial of justice. First, the fact that the preliminary investigation

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folios 02 to 08). See also the decision of October 30, 1998, issued by Chamber VII of the National Criminal and Correctional Appeals Chamber of the Federal Capital (file of attachments to the application, attachment 4.2, folios 539 and 540).

106 *Cf.* briefs of Carlos Alberto Sablich, Carlos Jacinto Gutiérrez, Julio Roberto Ontivero, Delfor Panelli, Vicente Luis Palo and Alberto Alejandro Armentano, (helpful evidence submitted by the State, File 66.138-1996-Cuerpo16.pdf, pages 229 to 243, and 247 to 248).

107 *Cf.* decision of July 12, 2006, handed down by the Judge of First Instance Facundo Cubas (helpful evidence submitted by the State, File 66.138-1996-Cuerpo16.pdf, page 469).

108 *Cf.* helpful evidence submitted by the State (File 66.138-1996-Cuerpo17.pdf, pages 463 to 475).

109 *Cf.* helpful evidence submitted by the State (File 66.138-1996-Cuerpo18.pdf, pages 5 to 69).

110 *Cf.* decision of November 12, 2007, issued by Chamber IV of the National Criminal Cassation Chamber (helpful evidence submitted by the State, File 66.138-1996-Cuerpo19.pdf, pages 179 to 181).

111 *Cf.* undated brief of the proceedings (helpful evidence submitted by the State, file 66.138-1996-Cuerpo19.pdf, page 312).

112 *Cf.* undated brief of the Prosecutor's Office (helpful evidence submitted by the State, file 66.138-1996-Cuerpo19.pdf, page 354).

113 *Cf.* brief of Vicente Luis Palo's defense lawyer (helpful evidence submitted by the State, file 66.138-1996-Cuerpo19.pdf, page 395 to 409); and brief of Alberto Armentano's defense lawyer (helpful evidence submitted by the State, file 66.138-1996-Cuerpo19.pdf, pages 411 to 436).

lasted 15 years had an adverse effect on the criminal action filed against Juan Carlos Bayarri, who was unable to obtain opportune clarification of the torture inflicted on him. Second, the fact that 16 years had elapsed since the filing of the complaints and the start of the investigations could thwart the continuation of the criminal action that is underway.[114] It has been proved that, on August 10, 2007, Judge of First Instance No. 41 declared that the criminal action relating to the two individuals identified in this case as allegedly responsible for the human rights violations committed to the detriment of the victim had extinguished owing to the statute of limitations.[115] Furthermore, the case file shows that on March 1, 2008, those accused contested the case being brought to trial and filed the objection that the criminal action was subject to a statute of limitations.[116] The Court has no information on how this issue was settled at the date of this judgment.

116. The denial of access to justice relates to the effectiveness of the remedies, in the terms of Article 25 of the American Convention, because it cannot be asserted that a criminal action in which clarification of the facts and determination of the alleged criminal responsibility is made impossible, owing to an unjustified delay in the proceedings, can be considered an effective judicial remedy. The right to effective judicial protection requires the judges to direct the proceedings so as to avoid undue delays and obstructions that lead to impunity, and thus prevent due judicial protection of human rights.[117]

117. The Court considers that, based on the lack of a prompt and final ruling on the criminal complaints filed in this case for torture and unlawful deprivation of liberty, the victim's right to due judicial protection was violated. This right includes not only the victim's access to criminal actions as a complainant, but also the right to obtain a final judgment through effective mechanisms of justice. Moreover, bearing in mind the notorious delay in both the investigation and the said proceedings, without any reasonable explanation, together with the acknowledgement of the facts made by the State, the Court finds that Argentina has violated Articles 8(1) and 25(1) of the American Convention to the detriment of Juan Carlos Bayarri.

B) Right to be heard by an independent and impartial judge or tribunal

118. The representatives alleged a series of facts concerning the supposed shielding by judges and judicial officials of those accused of the unlawful deprivation of liberty and

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114 *Cf. García Prieto et al. v. El Salvador. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2007. Series C No. 168, para. 158.

115 *Cf.* decision of August 10, 2007 (attachments to the brief with pleadings and motions, folios 5336 and *ff.)* in which the judge of first instance found that the maximum period of 12 years required for the application of a statute of limitations to the criminal action against those accused at that time had elapsed.

116 *Cf.* brief of Vicente Luis Palo's defense lawyer (helpful evidence submitted by the State, file 66.138-1996-Cuerpo19.pdf, pages 405 and 406) requesting the dismissal of the case precisely because more than 16 years after it had started "it had not been possible to prove the existence of the alleged fact" and, consequently, at the opportune time, they had opposed the case being brought to trial. Alternatively, he requested that a statute of limitations be applied to the criminal action because, in his opinion, more than the 12 years required for this according to the provisions of the Argentine Penal Code had elapsed. See also the brief of Alberto Armentano's defense lawyers (helpful evidence submitted by the State, file 66.138-1996-Cuerpo19.pdf, pages 412 to 420) requesting the extinction of the criminal action owing to the application of the statute of limitations, because "over and above" the maximum length of the punishment established for the alleged crimes had elapsed since the time of their supposed perpetration and the moment the case was brought to trial: to wit, approximately 17 years. He also requested the dismissal of the proceedings, because he considered that it had not been proved that the accused was the author of the offense of which he was charged.

117 *Cf. case of Bulacio*, supra note 49, para. 115; *Myrna Mack Chang v. Guatemala. Merits, reparations and costs.* Judgment of November 25, 2003. Series C No. 101, para. 210; and c*ase of Servellón García et al.*, *supra* note 55, para. 151.

torture of Mr. Bayarri, who also enjoyed the protection of the Argentine Federal Police. In this regard, the Court has established that the alleged victim, his next of kin or his representatives may invoke different rights from those included in the Commission's application, based on the facts described therein.[118] The facts that presumably gave rise to the alleged partiality and lack of independence of the judicial authorities when processing this criminal case cannot be inferred from the application and, consequently, the Court is unable to examine them (*supra* paras. 29 and 30).

X
REPARATIONS
(APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

119. It is a principle of international law that any violation of an international obligation that has resulted in harm entails the obligation to repair it adequately.[119] The Court has based its decisions in this regard on Article 63(1) of the American Convention.[120]

120. Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (*restitution in integrum*), which consists in the re-establishment of the situation prior to the violation that was committed. If this is not possible, as indeed it is not in all cases, the international court must determine the measures that will guarantee the violated rights and repair the consequences of the violations produced, as well as establish payment of compensation for the damage caused,[121] and ensure the non-repetition of harmful acts such as those that occurred in this case.[122] International law regulates all aspects (scope, nature, methods and determination of the beneficiaries) of the obligation to make reparation, and the State may not invoke provisions of domestic law to modify or fail to comply with this.[123]

121. Reparations consist of measures tending to eliminate or reduce and compensate the effects of the violations that have been committed. Their nature and amount depend on the characteristics of the violation and the pecuniary and non-pecuniary damage caused.[124]

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118 *Cf. case of the "Five Pensioners", supra* note 16; *case of Salvador Chiriboga*, *supra* note 93, para. 128; and *case of Heliodoro Portugal*, *supra* note 10, para. 212.

119 *Cf. Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 25; *case of Castañeda Gutman, supra* note 35, para. 214; and *case of Heliodoro Portugal, supra* note 10, para. 217.

120 Article 63(1) of the Convention stipulates that:

> 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.

121 *Cf. case of Velásquez Rodríguez, supra* note 119, paras. 25 and 26; *case of the Miguel Castro Castro Prison, supra* note 30, para. 415; and *La Cantuta v. Peru. Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 201.

122 *Cf. Garrido and Baigorria v. Argentina*. *Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 41; *Vargas Areco v. Paraguay. Merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 155, para. 141; and *case of La Cantuta*, *supra* note 121, para. 201.

123 *Cf. case of Velásquez Rodríguez, supra* note 119, para. 30; *case of the Miguel Castro Castro Prison*, *supra* note 30, para. 414; and *case of La Cantuta*, *supra* note 121, para. 161.

124 *Cf. Loayza Tamayo v. Peru. Reparations and costs.* Judgment of November 27, 1998. Series C No. 42, paras. 86 and 87; *case of the Miguel Castro Castro Prison*, *supra* note 30, para. 416; and *case of La Cantuta*, *supra* note 121, para. 202.

122. Based on the abovementioned findings on merits and the violations of the Convention declared in the preceding chapters, as well as in light of the criteria established in the Court's case law, the Court will rule on the claims submitted by the Commission and by the representatives, and the position of the State as regards the reparations, so as to order measures designed to repair the damage.

A) Injured party

123. The Court considers that Juan Carlos Bayarri, in his capacity as victim of the violations that have been declared, is the "injured party," in accordance with Article 63(1) of the Convention; hence, he will be a beneficiary of the reparations established by the Court.

124. The representatives alleged that "the damage caused by keeping [the alleged victim] deprived of [his] liberty unjustly for almost 13 years […] produced […] grave and tremendous additional consequences for the members of [his] family," who are: Juan José Bayarri (father), Zulema Catalina Burgos (mother), Claudia Patricia De Marco de Bayarri (wife), Analía Paola Bayarri (daughter), José Eduardo Bayarri (brother) and Osvaldo Oscar Bayarri (brother); they therefore asked that the State ensure that they receive adequate reparation. Similarly, the Commission identified Juan Carlos Bayarri's next of kin as beneficiaries of the reparations requested.

125. Despite this, the Court observes that the Commission did not declare them to be victims of any violation of the Convention in its Report on merits (*supra* paras. 1 and 2), and did not expressly ask this Court to declare a violation of the Convention to their detriment.

126. The Court reiterates that, in the terms of Article 63(1) of the Convention, the injured party is considered to be the person who has been declared a victim of the violation of any of the rights embodied therein. In this regard, according to the most recent decisions of the Court, the alleged victims must be identified in the application and in the Report adopted by the Commission pursuant to Article 50 of the Convention.[125] Moreover, according to Article 33(1) of the Court's Rules of Procedure, it is for the Commission, not the Court, to identify the alleged victims precisely and at the appropriate procedural opportunity.[126] This has not occurred in the instant case; therefore, Juan Carlos Bayarri's next of kin cannot be considered beneficiaries of reparations in these proceedings.

B) Compensation

Pecuniary damage

127. In its case law, the Court has reiterated that pecuniary damage supposes the loss of, or harm to, the victims' income, and the expenses and any other consequences of a pecuniary nature arising from the facts of the case being examined.[127]

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[125] *Cf. Chaparro Álvarez and Lapo Iñiguez*, *supra* note 9, para. 224; *Kimel v. Argentina.* Merits, reparations and costs. Judgment of May 2, 2008 Series C No. 177, para. 102; and *case of Apitz Barbera et al. ("First Administrative Court"), supra* note 9, para. 229.

[126] *Cf. Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006. Series C No. 148, para. 98; *case of Kimel, supra* note 125, para. 102; and *case of Apitz Barbera et al. ("First Administrative Court"), supra* note 9, para. 229.

[127] *Cf. Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43; *case of the Miguel Castro Castro Prison*, *supra* note 30, para. 423; and c*ase of La Cantuta*, *supra* note 121, para. 213.

128. In the instant case, the Inter-American Commission asked the Court to order the State to pay compensation for indirect damage and loss of earnings. While the representatives asked that the State compensate the victim for: (a) "patrimonial damage"; (b) "loss of earnings"; (c) "lost opportunities" (*derecho de chance*); (d) "punitive damages"; (e) "medical expenses incurred"; and (f) "future medical expenses, for pending psychological and physical treatment.

129. In the following sections, the Court will establish the compensation corresponding to pecuniary damage based on the violations declared in this judgment, taking into account the particular circumstances of the case, the evidence provided by the parties and their arguments.

i) "Indirect damage"

130. The Commission indicated that "Mr. Bayarri and his family had to invest significant financial resources in order to claim justice and pay for the psychological treatment needed to overcome the consequences of the grave violations suffered." In addition, it stated that "[t]he impunity of those responsible and the absence of reparation, 16 years after the facts, have altered the life project of Mr. Bayarri and his family."

131. Under the heading of "medical expenses incurred," the representatives requested that the victim be compensated for the expenditure at "the pharmacy and for the acquisition of the prosthesis up until 1995, to which should be added what he has spent on psychological treatment since he recovered his liberty in June 2004 and until the beginning of 2007, when he had to interrupt his treatment owing to lack of resources." They requested the sum of US$15,000,00 (fifteen thousand United States dollars) up until 1996, plus US$3,000.00 (three thousand United States dollars) until 2007, plus an annual interest rate of 18% on each of these amounts, which adds up to a total of US$42,300.00 (forty-two thousand three hundred United States dollars). In addition, they alleged that "the receipts for the purchase of many of the medicines have not been kept in view of the very special situation experienced by the Bayarri [family], although many of the prescriptions for the purchase of medicines were attached to case No. 66,138/96, in which they were opportunely provided as evidence." In their final written arguments, the representatives also requested the sum of US$2,000,000.00 [two million United States dollars] "[f]or motor disability, owing to the definitive loss of the ability to walk normally, to engage in sports activities, to lift weights, to jump and/or to walk long distances and/or remain standing still for a long time."

132. In this regard, the State argued that "[the victim] did not attach a single receipt […] for the medical or psychological expenses that he said he had incurred over the years." The State also argued that "[the victim] was deprived of liberty during the period mentioned, so that his possible physical or psychological ailments were treated by the medical and psychiatric services of the establishment in which he was lodged."

133. The Inter-American Commission stated that, according to Dr. Eduardo Garré's expert appraisal, "[t]he lack of dental care and attention while he was in preventive detention meant that [the victim] lost several teeth, so that, of the 32 that he should have, he only has seven." The Commission also referred to the loss of several teeth that was recorded by Dr. Juan Carlos Ziella in his expert appraisal.

134. In relation to future medical expenses, the representatives stated that "[i]n the 13 years that he was imprisoned [the victim's] teeth deteriorated totally, because […] the only dental treatment provided in Argentine prisons is tooth extraction, so that [Mr.] Bayarri's

teeth must be repaired with a prosthesis with implants […].” They also indicated that “[i]n the Argentine Republic, this treatment costs US$18,000.00 [eighteen thousand United States dollars]. In addition, the representatives indicated that Mr. Bayarri “[m]ust continue with his psychological therapy to try to come to terms with almost 13 years deprived of his liberty.” In this regard, they requested the sum of US$15,000.00 [fifteen thousand United States dollars]. Regarding, the hearing disability that the victim suffers, the representatives indicated that it should be “considered that the situation of Juan Carlos Bayarri’s hearing is […] critical, with a hearing loss of 40% in his right ear and approximately 20% in his left ear; this means that he requires another operation and/or to use a hearing aid in future and for the rest of his life in order to overcome the serious problem he suffers as a result of the torture to which he was subjected […].” The representatives calculated a future expense for corrective ear surgery of US$35,000.00 [thirty-five thousand United States dollars] and of US$30,000.00 [thirty thousand United States dollars] should he have to acquire hearing aids, one for each ear, over the next 20 years of his possible life expectancy. In total, the representatives requested a sum of US$65,000.00 (sixty-five thousand United States dollars) for future medical expenses.

135. In this regard, the State argued that the victim had not attached “a series of certificates […] relating to the alleged hearing loss that Juan Carlos Bayarri suffered in about 1995, an operation in 1996, and successive hearing tests.” It added that “[t]hese claims do not contain any reference to the causes of the alleged loss of hearing from which [the victim] says he suffers.” Lastly, the State indicated that the victim did not attach “the budgets or projections of expenses verifying the amounts that he would be need in the future.” The State asked the Court to reject these items as unfounded.

136. In their pleadings and motions brief, as well as during the public hearing, the representatives asked for compensation for ear and teeth injuries, psychological harm and for the injuries to the victim’s feet. The Court observes that the purpose of the expert medical and psychological appraisals carried out in this case was to determine the physical and psychological consequences for the victim of the alleged unlawful and arbitrary deprivation of liberty and torture,[128] as well as the degree of damage and consequences that could be attributed to the reported facts, and the possible impact and consequences of these facts.[129] In this regard, the Court finds it pertinent to analyze, first, the existence of the damage alleged by the representatives and its relationship to the facts of this case, in order to then determine the compensation that it may consider pertinent.

137. Regarding the physical injuries, in his expert appraisal, Dr. Luis Eduardo Garré referred to an injury to Mr. Bayarri’s eardrum when he entered the Federal Penitentiary Service which, was only operated on four years later. The expert witness indicated that the time taken to resolve the problem gave rise to a “[p]ermanent aggravated lesion, […] produced or facilitated during his detention.” The expert witness stated that Mr. Bayarri’s current hearing disability corresponds to a 40% loss of hearing in the right ear. Dr. Juan Carlos Ziella, whose expertise was offered by the State, reached similar conclusions about the loss of hearing, indicating that the victim had “work-related perceptive hypooacusia, with a hearing loss of 7.7% in the left ear and 36.7% in the right ear.” Furthermore, the medical expert witnesses concluded that the victim suffered from a degenerative and inflammatory type of injury to both feet that caused him intense pain.[130] During the public

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[128] Order of the President of the Court of March 14, 2008, *supra* note 1, fifth operative paragraph.

[129] *Cf.* note of the Secretariat of the Inter-American Court REF.: CDH-11.280/078 of April 18, 2008 (merits file, tome V, folio 972).

[130] In his expert appraisal, Dr. Luis Eduardo Garré indicated that Mr. Bayarri suffers from “hallux rigidus”; this is a deformation and an inflammation of the metatarsal phalangeal articulation that is extremely painful and that

hearing, Dr. Garré mention that this injury was not a "consequence […] of prison itself [or] of the detention, but because preventive or curative measures were not applied at the appropriate time." Dr. Ziella established that the cause was the "[u]se of inadequate footwear over a prolonged period and the effect of excess humidity in the environment." Both expert witnesses agreed that Mr. Bayarri needs surgery on both feet.[131] It is also clear from Dr. Garré's expert appraisal that Mr. Bayarri "[l]acks molars and pre-molars in the upper and lower jaw [which] has led to a loss of his ability to masticate [and] he can only use his incisors to bite but not to masticate." The expert witness mentioned that there is evidence that the victim "[e]ntered the prison service with his teeth complete [and that,] if there had been an adequate dental service where each tooth had been treated, very probably he would not have [lost his teeth]." He indicated, that as a medical solution, Mr. Bayarri "[r]equires a replacement treatment, implants and several prosthesis in his mouth, because the few teeth that remain [7 or 8] are in very bad condition." Regarding whether a public or a private hospital should provide treatment, during the public hearing, the expert witness, Dr. Garré stated that even though "the medical system in Argentina is excellent […] in general, unless the illness is an emergency, the wait for an appointment […] is extremely long and, in the case of some hospitals, can be measured in years"; he indicated that if the treatment were provided by private services it would be immediate. He also mentioned that in Argentina "there is a considerable backlog for dental treatments."

138. Regarding the psychological and psychiatric harm, Dr. Aviel Tolcacher, expert witness offered by the State, concluded that the victim suffered from "post traumatic stress syndrome [and that] he had been exposed to a traumatic event during which there were […] threats to his physical integrity [and that] he responded with intense fear and horror."[132] Dr. Susana E. Quiroga reached similar conclusions, and added that this is a chronic problem produced by torture and by the 13 years that he was deprived of his liberty; she therefore recommended "[i]mmediate and very frequent psychotherapeutic treatment [more than twice a week] over a long period [which could be for as long as he lives], by highly-qualified professionals […]."[133] Furthermore, when questioned during the public hearing (*supra* 7) about the possibility that the psychological treatment be provided by State hospitals, the expert witness indicated that [Mr. Bayarri] would be "given an appointment in about two or three months' time to see him once a week" and that he "would be attended by a young professional who was doing his residency and still learning." She emphasized that Mr. Bayarri required "[p]rofessionals with considerable experience […]" and that this type of treatment is very expensive.

139. The expert medical appraisals carried out in the instant case show that there was a relationship of cause and effect between the victim's injuries and the facts denounced. Indeed, the blows inflicted on Mr. Bayarri and the injuries they caused to his ears (*supra* para. 87), particularly the right ear, were not treated properly while he was deprived of liberty in the State's custody and, consequently, they degenerated to their current

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makes it impossible for him "to jump." *Cf.* expert appraisal provided during the public hearing, *supra* para. 7. Dr. Juan Carlos Ziella concluded that the victim "[s]uffers from degenerative arthritis of both metatarsal phalangeal articulations, with their destruction [and that] these articulations have minimum functionality, but the residual mobility – when walking – causes intense pain." *Cf.* written expert appraisal (merits file, tome V, folio 1048).

131 Dr. Luis Eduardo Garré indicated that Mr. Bayarri requires an operation in order to have "[a] normal life for [his] age." *Cf.* expert appraisal provided during the public hearing, *supra* para. 7. While Dr. Juan Carlos Ziella considered that "[t]he therapeutic solution for the pain is arthrodesis (surgery to immobilize both articulations), at the expense of eliminating their functionality (rigidity)." *Cf.* written expert appraisal (merits file, tome V, folio 1048).

132 Expert appraisal provided by Dr. Aviel Tolcacher (merits file, tome V, folio 1054).

133 Written expert appraisal provided by Dr. Susana E. Quiroga, psychologist (merits file, tome V, folio 1000-20).

condition. Furthermore, although it has been established that the injuries to his feet and the loss of his teeth were not caused by the torture and ill-treatment that the victim received during his detention, it is reasonable to conclude, based on the opinion of the expert witness (*supra* para. 137), that adequate and timely care while he was deprived of liberty would have avoided or lessened the current lesions. Furthermore, based on the psychological appraisals of the expert witnesses, Susana E. Quiroga and Aviel Tolcacher, as well as the testimony given by the victim in this case, the Court finds that the existence of psychological damage deriving from the violations of the American Convention to which Mr. Bayarri was subjected has been proved.

140. The State alleged that Mr. Bayarri's "possible physical or psychological complaints" were treated by the medical and psychiatric services of the establishment where he was interned. However, the State did not provide any evidence in this regard. The State also denied that the corrective ear surgery alleged by the representatives had been performed. Nevertheless, Dr. Juan Carlos Ziella, the expert witness offered by the State indicated that "the surgical intervention on the right ear was evident […] although more than 12 years had passed since the corrective surgery."[134] Dr. Garré also referred to an operation carried out on Mr. Bayarri "[o]nly four years after" his entry into the Federal Penitentiary Service owing to a slight hearing problem.[135]

141. The Court observes that Mr. Bayarri received medical and psychological care, as a result of the injuries mentioned in this case. However, based on the evidence in the case file, the Court is unable to quantify precisely the amount that Mr. Bayarri and his next of kin have disbursed. Consequently, and taking into account the time that has elapsed, the Court establishes, in equity, the sum of US$18,000.00 (eighteen thousand United States dollars), which must be paid by the State to Mr. Bayarri for reimbursement of expenditure for medical and psychological treatment.

142. In addition, based on the above, it can be concluded that Mr. Bayarri's physical and psychological problems subsist to this day. As it has on other occasions,[136] the Court intends to establish compensation that includes future expenditure for psychological treatment, Considering the circumstances and specific needs of the victim, as described by the expert witnesses, the Court finds that it is reasonable to deliver to him the sum of US$22,000.00 (twenty-two thousand United States dollars) for future expenses for psychological care.

143. Furthermore, the State must provide free of charge and for the necessary time, the medical and odontological care required by Juan Carlos Bayarri in relation to the injuries that have been established in this judgment. The State must ensure that Mr. Bayarri is treated immediately and that he is granted all the necessary facilities.

ii) Loss of income

144. The representatives argued that, before his detention, the victim was "[a] prosperous businessman in the automobile sector with a monthly income of approximately US$7,500.00 [seven thousand five hundred United States dollars] and suddenly he was prevented from carrying on this activity definitively as a result of being deprived of his liberty, and [that], since he recovered his liberty, because he was morally and spiritually destroyed, intimidated, fearful and in bad repute with society and his neighbors because he

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134 *Cf.* written expert appraisal provided by Dr. Juan Carlos Ziella (merits file, tome V, folio 1047).

135 *Cf.* written expert appraisal provided by Dr. Luis Eduardo Garré during the public hearing, *supra* para. 7.

136 *Cf. case of Bulacio, supra* note 49, para. 100; *case of Tibi, supra* note 51, para. 249; and c*ase of Bueno Alves*, *supra* note 70, para. 189.

was an ex-prisoner, […] he finds it difficult to work both psychologically and because of his hearing problems." Based on the above, the representatives asked that the State be ordered to compensate the victim for this concept with the sum of US$3,750,000.00 [three million seven hundred and fifty thousand United States dollars]; this sum results from multiplying the said monthly amount by the 187 months during which the victim ceased receiving this amount, plus 18% annual interest.

145. The Commission stated that "Mr. Bayarri's testimony, and also the expert reports of Dr. Garré and Dr. Quiroga, produced during the public hearing of the instant case, together with the expert opinions of Dr. Ziella and Dr. Tolcachier offered by the State, reveal the magnitude of the physical and psychological consequences suffered by Mr. Bayarri as a result of the events he endured."

146. The State indicated that "[the victim] did not forward documentation that would confirm the income indicated […] such as receipts for the payment of national, provincial or municipal taxes, records of contributions to the National Social Security Administration, sales invoices or invoices for purchases issued by suppliers of the supposed business premises, balance sheets or bank records." It also argued that "[the victim] has not even provided elements that authenticate the very existence of the automobile agency, Bernal Motor Cars, at the time of the reported facts." The State asked the Court to reject the request for compensation for this item as unfounded.

147. The Court observes that, in his testimony, José Enrique Villasante stated that, "[s]ince I was a friend of Juan Carlos Bayarri's father-in-law, who is now deceased, […] I had dealings with the Bayarri family, and went once to the automobile agency that the Bayarri family had on a corner, near Bernal station, in front of the railway lines […] and it was very important, because they had many expensive cars on sale, some of them expensive imported vehicles, and even collectibles; however, owing to what happened to the Bayarri, the business 'declined entirely' and, therefore, Juan José Bayarri, […] did not sell vehicles from his domicile either because he said that he had to see his lawyers and look after Juan Carlos and obtain his release."[137] The witness, Clotilde Elena Rodríguez, testified that Juan José Bayarri and his son, Juan Carlos, "[t]ogether had a very important automobile agency in the Bernal zone, a few blocks from the station and from the Bayarri's house in calle Belgrano; [she had] visited this automobile agency [and] there were very valuable cars on show and for sale in the agency, some imported cars and even antique cars, although [she did] not recall the make because [she does] not know much about cars."[138] Lastly, the witness, Noemí Virginia Julia Martínez testified that she "worked in the automobile agency that the Bayarri family had in Avenida San Martín 742, on the corner of Cerrito 10, in Bernal, a few blocks from the train station." The witness stated that "[t]here was a lot of movement in this agency, because they had cheap cars, but also some very expensive ones; they were all used cars, some of them imported and also antique cars that `Don Juan' Bayarri had restored in the workshops of friends who were mechanics in order to sell them at a good price to collectors and/or individuals who look for this type of car; people even came from abroad to buy collectibles."[139]

148. As documentary evidence of the commercial activities of Mr. Bayarri, the representatives presented a certificate authorizing the use of the premises; a certified copy of the Minutes Book of the automobile agency, dated March 27, 1989, issued by the

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137 *Cf.* statement provided by affidavit (merits file, tome V, folios 927 to 929).

138 *Cf.* statement provided by affidavit (merits file, tome V, folio 915).

139 *Cf.* statement provided by affidavit (merits file, tome V, folio 920).

Commercial Department of the Municipality of Quilmes; a certified copy of the Car Exhibition and Sales Ledger, and a photograph of the facade of the business known as "Bernal Motor Cars." They also stated that, during the "[p]olice search of [their] domicile in calle Belgrano 716, in Bernal, Quilmes District, Province of Buenos Aires on November 21, 1991, [the police took away] a large amount of documentation, with the excuse that it had to be examined, and this was never officially recorded and the documentation was never returned to [them]."

149. The Court observes that the veracity of the documents and testimony provided by the representatives was not contested by the State (*supra* para. 49). On the other hand, from the file of case 4,227 "Macri, Mauricio: Unlawful Deprivation of Liberty," it is clear that, on November 21, 1991, a search was conducted of the victim's domicile during which money and documentation were seized. However, the official search record does not register the seizure of documents relating to the victim's commercial activities.[140] Nevertheless, it is worth noting that, in the same case file, it is recorded that, on November 7, 1991, National Court of First Instance No. 25 asked the Head of the Fraud Division to undertake intelligence work with regard to Juan Carlos Bayarri; to this end, the latter was identified as a "Federal Police sergeant […,] robust, 1.78 m tall, bald, with a beard, who has an automobile agency in San Martín and Cerrito [in Bernal]."[141]

150. The calculation of compensation for loss of earnings in the instant case must be made based on the length of time the victim was unable to work as a result of the violation. In this case, the Court has already found it proved that Juan Carlos Bayarri remained deprived of his liberty for 13 years and that this imprisonment constituted a violation of his right to personal liberty (*supra* para. 75). Having examined the body of evidence, the Court now finds that it has been proved that the victim carried out commercial activities in the automobile sector at the time of his detention. However, the representatives did not provide evidence to authenticate the income that Juan Carlos Bayarri received.

151. Based on all the above, the Court finds, in equity, that the State must deliver the sum of US$50,000.00 (fifty thousand United States dollars) to Mr. Bayarri, as compensation for loss of earnings during the 13 years that he was deprived of his liberty in violation of Article 7 of the American Convention.

iii) Other damage

152. The Commission and the representatives alleged that Mr. Bayarri suffered permanent physical and psychological damage.

153. The Court finds it evident that Mr. Bayarri's physical and psychological injuries affect his future working life, as would be the case of anyone in these circumstances. In this regard, the Court underscores that Juan Carlos Bayarri was deprived unlawfully of his liberty when he was 41 years of age, and remained detained during a significant part of his adult and working life, and this must be assessed.

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[140] *Cf.* Search application made by the Head of the Fraud Division, Chief of Police Vicente Luis Palo, to the National Criminal Judge of First Instance on November 21, 1991 (helpful evidence submitted by the State, exp7176cuerpo2_92, page 262); search warrant issued by Judge Oscar Alberto Hergott and addressed to the Head of the Quilmes Investigation Brigade dated November 21, 1991 (helpful evidence submitted by the State, exp7176cuerpo2_92, pages 361 and 362); official search record prepared by Principal Officer Fernando Canals and others on November 21, 1991 (helpful evidence submitted by the State, exp7176cuerpo2_92, pages 363 to 367).

[141] *Cf.* helpful evidence submitted by the State, (exp7176cuerpo2_92, page 31).

154. In this regard, the expert opinion presented by the psychologist Quiroga established that "Juan Carlos Bayarri was totally unable to work as a result of cognitive-intellectual, affective, decision-making and behavioral deterioration, resulting from the traumatic events he suffered [and is not] in any condition to return to the business activities that he carried out with his father (the sale of used cars) before the catastrophic events that affected him as of November 1991." She also indicated that, for reasons "of an individual nature, owing to his notable distrust of other people, and of a social nature, owing to his situation as an ex-prisoner and as a person who was libeled by the press for many years, Juan Carlos Bayarri is unable to enter into a solid commercial-social-labor relationship or the other relationships required in order to function in various essential areas."[142]

155. The Court finds it appropriate to establish the sum of US$50,000.00 (fifty thousand United States dollars) for the psychological problems that affect the victim's ability to work.

156. In addition, the representatives asked that, as a result of the confiscation of the money Mr. Bayarri had with him when he was deprived of liberty, and the money at his domicile when the search was carried out, the State be ordered to pay the victim the sum of US$2,113.00 (two thousand one hundred and thirteen United States dollars) which, with an annual interest rate of 18% adds up to US$57,051.00 (fifty-seven thousand and fifty-one United States dollars)."

157. The State argued that the victim had not attached to his pleadings and motions brief either the receipt for his personal effects that had been issued when he was detained by the Federal Police, or the official record of the search at his domicile. It added that "[the victim] has not forwarded any element authenticating that these amounts were not returned to him [and] he did not forward documentation certifying that he had made the corresponding complaints requesting the presumed restitution of the amounts that he is claiming […]." Lastly, the State indicated that the 18% annual interest rate was applied "without providing […] the least justification of the international legal and juridical criteria that would support this adjustment of the amounts claimed under the heading of compensation." The State asked the Court to reject the request for patrimonial damage as unfounded.

158. The Court observes, that based on the evidence submitted, in the context of the proceedings against Mr. Bayarri, his domicile was searched on November 21, 1991, and US$1,013.00 [one thousand and thirteen United States dollars] and 4,500,000 [four million five hundred thousand] australes were indeed seized.[143] In addition, the body of evidence shows that, when the victim was detained by the Federal Police, 6,303,800 australes were confiscated from him.[144] The Court reiterates that mere possession establishes a presumption of ownership in favor of the possessor and, in the case of movables, it is equal to ownership.[145] Taking into account that the victim was detained in its custody, the State has not proved that it actually returned the amounts indicated by the representatives, which it was obliged to, once the victim was acquitted of all responsibility in the said criminal action or, previously, when it was shown that the money seized bore no relationship to the offense investigated.

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142 *Cf.* written expert appraisal provided by Dr. Susana E. Quiroga, psychologist (merits file, tome V, folio 1000-9).

143 *Cf.* copy authenticated by notary public of the record of the search of Mr. Bayarri's domicile on November 21, 1991 (file of attachments to application, appendix 3. tome VIII (2) folio 3303); and accusation submitted by the National Federal Criminal and Correctional Prosecutor responsible for the No. 4 Prosecutor's Office, of December 20, 1994 (helpful evidence submitted by the State, exp.7176cuerpo20_92, page 162).

144 *Cf.* official record of deposit of personal effects of November 19, 1991 (helpful evidence submitted by the State, exp7176cuerpo_2, page 228).

145 *Cf. case of Tibi*, *supra* note 51, para. 218.

159. Based on the above, the Court orders the State to return the sum confiscated during the search and when Mr. Bayarri was detained. This amounts to US$2,113.00 (two thousand one hundred and thirteen United States dollars). The Court assesses the time that has elapsed since the confiscation of the money and the financial prejudice caused to Mr. Bayarri and therefore decides to grant, in equity, a total of US$5,000.00 (five thousand United States dollars) for this concept.

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160. The representatives also requested compensation for "lost opportunities" (*derecho de chance*); in other words, for "[t]he thwarted right of [Mr. Bayarri] to improve his commercial activities and increase his patrimony." In addition, during the public hearing and in their final written arguments, the representatives requested the application of the "mechanism […] of punitive damages"; in other words, that the total compensation be increased "based on the State's attitude of denying [Mr.] Bayarri's rights" and "in order to ensure the non-repetition of conduct such as that perpetrated against [Mr. Bayarri and his family]." The representatives requested a 30% increase.

161. In this regard, the Court reiterates the compensatory nature of the indemnity;[146] its nature and amount depends on the damage that has been caused, and it should not make the victims or their successors either richer or poorer.[147] Moreover, the Court has rejected claims for exemplary or dissuasive compensation.[148] Therefore, the Court considers these claims inadmissible.

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162. In their final written arguments, the representatives referred to "new physical, motor, functional and esthetic injuries" that Mr. Bayarri apparently suffers and, consequently, asked for compensation in this regard. The representatives alleged that the victim "is suffering esthetic damage owing to disfigurement of his face as a result of the torture inflicted on him; [he has] a significant scar on the frontal part of his nose, resulting from injuries that were not treated properly while he was detained […]." They also indicated that, on Mr. Bayarri's return "from Tegucigalpa [after the public hearing held in the instant case,] he developed a gastric ulcer and also a severe heart problem […]." In this regard, the Court observes that the request concerning the presumed disfiguring lesion of the face is time-barred. Regarding the gastric ulcer and the heart problem, even though these ailments were confirmed by the expert appraisal carried out by Dr. Juan Carlos Ziella,[149] the Court does not have any elements that allow it to verify the relationship of cause and effect of these ailments with the facts of the instant case. Consequently, the Court will not assess these claims.

163. The State must pay the compensation for pecuniary damage directly to Mr. Bayarri, within one year of notification of this judgment, in the terms of paragraphs 195 to 199 *infra.*

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146 *Cf. case of Velásquez Rodríguez, supra* note 119, para. 38; *case of Garrido and Baigorria, supra* note 122, para. 47.

147 *Cf. The "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 25, 2001. Series C No. 76, para. 79; *case of the Miguel Castro Castro Prison*, *supra* note 30, para. 416; and *case of La Cantuta*, *supra* note 121, para. 202.

148 *Cf. case of Garrido and Baigorria, supra* note 122, para. 44.

149 *Cf.* written expert appraisal provided by Dr. Juan Carlos Ziella (merits file, tome V, folio 1069).

Non-pecuniary damage

164. Non-pecuniary damage can include the suffering and hardship, the harm of objects of value that are very significant to the individual, and also changes, of a non-pecuniary nature, in the living conditions of the victim. Since it is not possible to allocate a precise monetary equivalent to make integral reparation to the victims, it can only be compensated in two ways: first, by the payment of a sum of money or the delivery of goods or services with a monetary value, which the Court determines by the reasonable exercise of judicial discretion and based on the principle of equity; and, second, by carrying out acts or projects with public recognition or repercussion, which the Court will refer to below, that have the effect, among others, of acknowledging the dignity of the victims, and avoiding the repetition of the violations,[150] bearing in mind, also, that international case law has established repeatedly that the judgment constitutes *per se* a form of reparation.[151]

165. The Commission stated that Mr. Bayarri "endured and continues to endure physical effects and profound psychological suffering as a result of the torture he underwent while he was in the State's custody." It indicated, also, that "[t]he suffering and anguish arose from the torture and are aggravated owing to the impunity that persists, [which] affects the lives of the victim and his family."

166. The representatives alleged that "[t]he different social communications media repeated […] libelous and harmful […] references to Juan Carlos Bayarri [as a dangerous kidnapper and murderer] as if this was the truth and, as a result, he was kept […] interned in maximum security prisons." Consequently, they requested that the State compensate Mr. Bayarri "for the libel of which he was a victim, and for the fact that he was kept in preventive detention for almost 13 years." In this regard, they asked for a reparation of US$5,000,000.00 (five million United States dollars) for the non-pecuniary damage owing to the libel and defamation of which Mr. Bayarri was the victim, together with the sum of US$1,500,000.00 (one million five hundred thousand United States dollars) for each year of prison. The total amount requested was US$19,500,000.00 (nineteen million five hundred thousand United States dollars).

167. The State indicated that the victim "did not identify who was responsible for the alleged libel and injuries or explain the reasons why the State and not the alleged authors thereof should be responsible for the alleged damage." It also indicated that "[i]f [the Court] decides to order payment of compensation for the non-pecuniary damage presumably suffered by Mr. Bayarri, its scope should be determined in accordance with the 'reasonable exercise' of judicial discretion and 'based on the principle of equity.'"

168. The Court takes into account, *inter alia*, that Mr. Bayarri: (i) was subjected to torture so that he would plead guilty to committing several offenses (*supra* para. 87); (ii) remained in preventive detention for almost thirteen years, in violation of his right to personal liberty (*supra* para. 75), and during this time he was separated from his family; and (iii) suffered as a result of the delay in clarifying the facts he was accused of and continues suffering

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150 *Cf. The "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84; *Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 10, 2007. Series C No. 167, para. 175; and *case of Apitz Barbera et al. ("First Administrative Court"), supra* note 9, para. 237.

151 *Cf. Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56; *case of Yvon Neptune*, *supra* note 14, para. 166; and *case of Castañeda Gutman*, *supra* note 35, para. 239.

owing to the persisting impunity as regards the identification of those responsible for his detention and torture. All of this has caused him non-pecuniary damage.

169. Following the criteria established in other cases,[152] the Court considers that the non-pecuniary damage inflicted on Mr. Bayarri is evident, because it is inherent in human nature that any persons subjected to torture experiences profound suffering, anguish, terror, feelings of powerlessness and insecurity, so that this harm does not need to be proved. In addition, the Court refers to the conclusions of the chapter on the right to personal liberty and humane treatment, as well as to the consequences of a physical and psychological nature that the torture and detention produced for the victim and that have been established in this judgment.

170. Consequently, the Court finds it pertinent to establish, in equity, the sum of US$100,000.00 (one hundred thousand United States dollars) as compensation for the non-pecuniary damage that the human rights violations declared in this judgment caused Mr. Bayarri.

171. The State must make the payment of the compensation for non-pecuniary damage directly to Mr. Bayarri within one year of notification of this judgment, in the terms of paragraphs 195 to 199 *infra.*

C) Obligation to investigate the facts that gave rise to the violations in this case and identify, prosecute and, if applicable, punish those responsible

172. The Commission alleged that "[t]he first and most important measure of reparation in this case is to end the denial of justice that has lasted almost 16 years." It indicated that those responsible for the facts of the instant case must be investigated and punished and, in particular, the appropriate criminal disciplinary and civil responsibilities must be established.

173. The representatives indicated that, since there is impunity as regards the violations that were committed, Mr. Bayarri has well-founded fears of being a "[v]ictim once again in a spurious criminal action." Consequently, they asked the Court to order the State to file administrative proceedings against all the police agents who intervened in the facts, as well as to guarantee prompt criminal trials, "in which these persons are prevented from doing whatever they want and being able to count on the support of the judges in order to use all kinds of procedural ploys." The representatives asked the Court to "monitor the rulings to guarantee the non-repetition of these facts."

174. The State indicated that on May 30, 2006, National Court of First Instance No. 49 decreed the closure of the preliminary investigative proceedings in case 66,138; consequently, it considered that it had complied with its obligation to investigate the facts of this case.

175. Bearing in mind the above, as well as this Court's case law,[153] the Court decides that the State must conclude the criminal action initiated based on the facts that gave rise to

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[152] *Cf. Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, para. 157; *Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 166, para. 143; and *case of Heliodoro Portugal*, *supra* note 10, para. 238.

[153] *Cf. case of Baldeón García, supra* note 96, para. 199; *the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, para. 295; and *case of Heliodoro Portugal*, *supra* note 10, para. 185.

the violations in the instant case (*supra* paras. 112 to 117) and decide it as provided for by law.

176. Lastly, the representatives informed the Court that, since 2005, the victim has been the subject of a criminal action for alleged perjury "committed when denouncing the police agents who [supposedly] tortured him" and that he has recently received threats to make him desist from the judicial actions that he has filed against those who he identifies as responsible for the human rights violations perpetrated against him.[154] In this regard, the Court reiterates to the State that it is obliged to ensure that the victim has full access and capacity to act at all stages and before all instances of the proceeding in which Juan Carlos Bayarri is the complainant (*supra* para. 112), in keeping with domestic law and the norms of the American Convention,[155] and this includes the obligation to guarantee the victim the necessary protection from threats and harassment aimed at obstructing the proceeding, avoiding the clarification of the facts, and concealing those responsible. When the victim denounces the use of judicial recourses as instruments of intimidation, the State must guarantee the victim his right to be heard by an independent and impartial court with the guarantees of due process in the processing of these recourses.

D) Measures of satisfaction and guarantees of non-repetition

177. In this section, the Court will determine measures of satisfaction and guarantees of non-repetition that seek to repair the non-pecuniary damage and that are not of a pecuniary nature.

i) Publication of the pertinent parts of this judgment

178. The Commission asked the Court to order the Argentine State to "publish the pertinent parts of the judgment." Neither the representatives nor the State submitted arguments in this regard.

179. As it has in other cases,[156] the Court considers it appropriate to order, as a measure of satisfaction, that the State publish once in the official gazette, and in two other national daily newspapers with widespread circulation, chapters I, VII, VIII and IX of this judgment, without the corresponding footnotes, as well as the operative paragraphs hereof. The publications must be made within six months of the notification of this judgment.

ii) Elimination of criminal record

180. In other cases in which the victims have been prosecuted by the State in violation of their human rights and subsequently acquitted by the national judicial authorities, the Court has ordered the elimination of their criminal record as reparation.[157] In the instant case, the

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[154] *Cf.* case No. 57.403/2005, entitled "threats against Bayarri" (helpful evidence submitted by the State, case 9523_05.pdf).

[155] *Cf. El Caracazo v. Venezuela. Reparations and costs.* Judgment of August 29, 2002. Series C No. 95, paras. 118 and 143; *case of Cantoral Huamaní and García Santa Cruz, supra* note 150, para. 191; and *case of Heliodoro Portugal, supra* note 10, para. 247.

[156] *Cf. Trujillo Oroza v. Bolivia. Reparations and costs*. Judgment of February 27, 2002. Series C No. 92; para. 119; *case of Castañeda Gutman, supra* note 35, para. 235; and c*ase of Heliodoro Portugal, supra* note 10, para. 247.

[157] *Cf. case of Suárez Rosero. Reparations and costs.* Judgment of January 20, 1999. Series C No. 44, para. 113; *case of Chaparro Álvarez and Lapo Íñiguez*, *supra* note 9, para. 260; and *case of Kimel, supra* note 125, para. 123.

Court has established that Mr. Bayarri was subjected to proceedings that involved the violation of his right to due process (*supra* paras. 107, 108 and 111). Therefore, the Court requires that the State ensure the immediate elimination of the name of Juan Carlos Bayarri from all public records, especially police records, in which it appears with a criminal record related to these proceedings.

iii) Other measures

181. The State indicated that "[i]n response to […] the recommendations that the [Inter-American Commission] made to the Argentine State in its Report on merits, […] a draft law is being examined concerning the implementation of a national mechanisms or system […] for the prevention of torture and cruel, inhuman or degrading treatment or punishment […] as established in the Optional Protocol to the [United Nations] Convention against Torture." It also mentioned that, in the context of this draft law, "[v]arious national and international meetings and seminars have been held, as well as visits, that have allowed an exchange of constructive ideas, models of work and experiences relating to this issue."[158]

182. The Court assesses positively the initiatives taken by the State. In this regard, the Court considers that the State should incorporate members of the security forces, the investigation units and the administration of justice into these dissemination and training activities, to the extent that it has not already done so, in order to avoid a repetition of facts such as those of this case.

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183. In their final written arguments, the representatives also requested other reparations related to the situation of Juan Carlos Bayarri as a retired federal police agent at the time of the alleged facts in the instant case: (a) that the time between November 18, 1991, and June 1, 2004, be recognized to the victim when calculating his length of service for his retirement and the corresponding pension; and (b) that he be granted a special promotion in an institutional public act and that this "[be published] simultaneously in the Internal Agenda of the Argentine Federal Police." In this regard, the Court observes that these requests were time-barred and, consequently, will not be assessed.

184. Moreover, in their final written arguments, the representatives also requested: (a) that the Argentine Federal Police should be ordered to make a ruling in administrative hearing No. 465-18-000.222/91, filed […] against […] Juan Carlos Bayarri, [and] dismiss the administrative proceedings against him immediately, by means of a final decision that expressly mentions that the filing of this action should, in no way, affect his good name, honor and reputation as a member of the Argentine Federal Police; (b) the adjustment "of the amount of the retirement pension that [Mr. Bayarri] should be receiving, and that, inexplicably, has not been paid to him since mid-2006"; and (c) the restitution to Mr. Bayarri of "[h]is immediate right to the use and enjoyment of each and every one of the benefits of the Argentine Federal Police Pension Fund that correspond to him, based on his police rank and status […]."

185. As requested by the Court during the public hearing (*supra* 7), in its final written arguments, the State informed the Court that:

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[158] The State mentioned different activities carried out from 2005 to 2007 *Cf.* brief answering the application, (merits file, tome II, folios 308 to 311).

> According to information received from the Argentine Federal Police […] former Sergeant 1 RP 162.134 […] Juan Carlos Bayarri entered the ranks of the police on July 5, 1971, and took voluntary retirement on October 1, 1988; this was changed to termination of employment on May 15, 2006, in the context of administrative hearing No. 465-18-000-222-91, filed as a result of the judicial proceedings entitled: "Kidnappings for Ransom," heard by National Criminal Court of First Instance No, 25, headed by Nerio Norberto Bonifati, Secretariat No. 145 of Eduardo Albano Larrea.
>
> As a result of his dismissal, Mr. Bayarri does not presently enjoy the benefits of the Pension Fund, since he was eliminated from the fund on May 17, 2006.
>
> The Argentine Federal Police Retirement and Pension Fund has advised that the person dismissed is registered in this welfare entity under Class 23 […] and, in principle, can take the necessary steps to obtain a minimum pension consisting in [82%] of the retirement pay that he enjoyed before being separated from the institution.[159]

186. Subsequently, the representatives informed the Court that the victim had not been notified of this administrative decision, by which the Federal Police had decided to dismiss him and asked that the Court "order whosoever it may concern to notify him officially as soon as possible […] so that he can marshal all legal means to contest the decision […]."

187. The Court considers that the administrative action filed against Juan Carlos Bayarri does not form part of the factual basis of the Inter-American Commission's application; hence it will not rule in that regard. Consequently, the Court will not examine the corresponding reparations requested by the representatives.

E) Costs and expenses

188. As the Court has indicated on previous occasions, costs and expenses are included within the concept of reparation embodied in Article 63(1) of the American Convention.[160]

189. The victim requested the sum of US$170,000.00 (one hundred and seventy thousand United States dollars) for "legal expenses, costs already paid, lawyers' fees and consultations with different legal experts." He also requested "the payment of litigation costs and professional fees […] in favor of [his] representatives, to be established taking into account the importance and scale of the proceedings." In this regard, he requested that the Argentine State pay 33% of the sum granted to him as compensation for the damage suffered to his representatives in this case, based on the provisions of Argentine law concerning professional fees.

190. The Inter-American Commission asked the Court "[t]o order payment of the costs and expenses that the victim incurred to litigate this case in the domestic jurisdiction and also before the Commission and the Court, as well as reasonable fees for his representatives."

191. The State alleged that "no vouchers have been provided for the supposed expenses that [Mr. Bayarri] is claiming […]." It also argued that the victim "merely establishes a sum that bears no relationship to the standard of reasonableness established by the [Court's] case law, according to which only those expenses that are strictly necessary to defend a

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[159] Note of June 18, 2008, addressed to the Head of the Cabinet of the Minister for Foreign Affairs, International Trade and Worship, Ambassador Alberto Pedro D´Alotto, by the Head of the Cabinet of Advisors to the Minister of Justice, Security and Human Rights, Silvina Zabala (file of attachments to the State's brief with final arguments, sole tome, folios 6849 to 6850).

[160] *Cf. case of the "White Van" (Paniagua Morales et al.), supra* note 147, para. 212; *case of Castañeda Gutman, supra* note 35, para. 240; *case of Heliodoro Portugal, supra* note 10, para. 264.

case in both the domestic and the international jurisdiction have been recognized," and therefore asked the Court to reject these claims.

192. Regarding the reimbursement of costs and expenses, the Court has indicated that it must prudently assess their scope, which includes the expenses generated before the authorities of the domestic jurisdiction as well as those arising during the proceedings before the inter-American system, bearing in mind the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be carried out based on equity and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[161]

193. In the instant case, the representatives have not provided the Court with sufficient evidence to support their claims for costs and expenses. Moreover, regarding the assessment of this amount, the Court is not subject to the provisions of the domestic laws of the States. Accordingly, the estimate submitted by the representatives is not appropriate and the amount is not reasonable.

194. Based on the above, and taking into account how long the processing of the proceedings against Mr. Bayarri has taken, as well as the delays in the ongoing case in which he is the complainant, the Court finds, in equity, that the State must pay the sum of US$50,000.00 (fifty thousand United States dollars) to Mr. Bayarri, who will deliver the amount he considers appropriate to his representatives to compensate for the costs and expenses incurred before the authorities of the domestic jurisdiction, as well as those arising during the proceedings before the inter-American system. This amount includes any future expenses that Mr. Bayarri may incur at the domestic level and during monitoring compliance with this judgment. The State must make the payment for costs and expenses within one year of notification of this judgment.

F) Means of complying with the payments ordered

195. The payment of compensation established in favor of Juan Carlos Bayarri shall be made directly to him. The same applies to the reimbursement of costs and expenses. If he should die before the respective compensation has been delivered to him, the compensation shall be delivered to his heirs, in accordance with the applicable domestic law.

196. The State shall comply with its obligation by payment in United States dollars or the equivalent amount in Argentine currency, using the exchange rate between the two currencies in force on the market of New York, United States of America, on the day preceding the payment.

197. If, for causes that can be attributed to the beneficiary of the compensation or to his heirs, they are unable to receive it within the specified time, the State shall deposit the said amounts in an account or a deposit certificate in their favor in an Argentine financial institution, in United States dollars, and in the most favorable financial conditions allowed by banking practice and law. If, after 10 years, the compensation has not been claimed, the amounts shall be returned to the State with the accrued interest.

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[161] *Cf. Juan Humberto Sánchez v. Honduras*. *Preliminary objection, merits, reparations and costs.* Judgment of June 7, 2005. Series C No. 99, para. 193; *case of García Pietro et al.*, *supra* note 114, para. 206; and *case of Apitz Barbera et al. ("First Administrative Court"), supra* note 9, para. 257.

198. The amounts assigned in this judgment as compensation and as reimbursement of costs and expenses must be delivered to the beneficiary integrally, as established in this judgment, without any reductions arising from possible taxes or charges.

199. If the State falls in arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in Argentina.

200. In keeping with its consistent practice, the Court reserves the authority, inherent in its attributes and derived also from Article 65 of the American Convention, to monitor compliance with all aspects of this judgment. The case will be closed when the State has fulfilled all aspects of the judgment. Within one year of notification of this judgment, the State must provide the Court with a report on the measures adopted to comply with it.

XI
OPERATIVE PARAGRAPHS

201. Therefore,

THE COURT

DECIDES:

Unanimously,

1. To reject the preliminary objection of "substantial change in the purpose of the application" in relation to the failure to exhaust domestic remedies filed by the State, in accordance with paragraphs 15 to 22 of this judgment.

DECLARES:

Unanimously that:

2. The State violated the right to personal liberty embodied in Article 7(1), 7(2) and 7(5) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Bayarri, in accordance with paragraphs 61, 68 and 77 of this judgment.

3. The State violated the right to humane treatment embodied in Article 5(1) and 5(2) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Bayarri, in accordance with paragraphs 87 and 94 of this judgment.

4. The State violated the rights embodied in Article 8(1), 8(2) and 8(2)(g) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Bayarri, in accordance with paragraphs 107, 109 and 111 of this judgment.

5. The State violated the rights embodied in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Bayarri, in accordance with paragraph 117 of this judgment.

6. The State failed to comply with its obligation to investigate with due diligence the torture to which Juan Carlos Bayarri was subjected, as stipulated in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, in accordance with paragraph 94 of this judgment.

AND ORDERS:

Unanimously that:

7. This judgment constitutes, *per se*, a form of reparation.

8. The State must pay Juan Carlos Bayarri the amounts established in paragraphs 141, 142, 151, 155, 159, 170 and 194 of this judgment, as compensation for pecuniary and non-pecuniary damage, and reimbursement of costs and expenses, within one year of notification of this judgment, in the terms of paragraphs 195 to 199 hereof.

9. The State must provide, free of charge, immediately and for the time necessary, the medical treatment required by Juan Carlos Bayarri, in the terms of paragraph 143 of this judgment.

10. The State must conclude the criminal action filed based on the facts that gave rise to the violations in the instant case and decide it as provided for by law, in accordance with paragraphs 175 and 176 of this judgment.

11. The State must publish once in the official gazette and in two daily newspapers with widespread circulation throughout the country, chapters I, VII, VIII and IX of this judgment, without the corresponding footnotes, and the operative paragraphs hereof, within six months of notification of this judgment, in the terms of paragraph 179 hereof.

12. The State must ensure the immediate elimination of the name of Juan Carlos Bayarri from all public records where it appears with a criminal record, in the terms of paragraph 180 hereof.

13. The State must incorporate members of the security forces and of the organs of investigation and administration of justice into dissemination and training activities on the prevention of torture and cruel, inhuman or degrading treatment or punishment, to the extent that it has not already done so, in the terms of paragraph 182 of this judgment.

14. It will monitor full compliance with this judgment and will consider the instant case close when the State has complied fully with all aspects of the judgment, in the terms of paragraph 200 hereof.

Done, at San José, Costa Rica, on October 30, 2008, in the Spanish and the English languages, the Spanish text being authentic.

Judge Sergio García Ramírez informed the Court of his concurring opinion, which accompanies this judgment.

Cecilia Medina Quiroga
President

Diego García-Sayán

Sergio García Ramírez

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ
TO THE JUDGMENT OF THE INTER-AMERICAN COURT
IN THE *CASE OF BAYARRI (ARGENTINA),*
OF OCTOBER 30, 2008

1. The examination of the Bayarri case and the Court's judgment give rise to several relevant issues in relation to the protection of human rights within the framework of criminal proceedings, which constitutes a complex and dangerous scenario for the encounter between the powers of the State and the rights of the individual. These issues include the preventive detention of the accused, a topic that has frequently been emphasized in the rulings of the Court – and also, evidently, the practice of criminal prosecution, plagued with defects – which has already produced a "body of legal doctrine" on this matter, whose influence could and should be extended to domestic law and decisions, via formal interpretation of the American Convention.

2. This provides appropriate material for the hoped-for harmonization with international human rights law. Eminent scholars – such as Julio Maier, Martín Abregú and Juan Carlos Hitters – have emitted their founded opinion that it is time to review and perhaps reconstruct criminal proceedings in our countries (which have already undergone notable developments) in light of international human rights law. Moreover, to this source of "new law" should be added (with the same rank and identical spirit), the humanist and democratic tradition that is rooted in the constitutional traditions – their application is another story – of the countries of the Americas. Consequently, this is the dual source or the broad basis of the contemporary law of criminal procedure, characteristic of a democratic society committed to human rights, the reign of justice and the preservation of public security, which also constitutes, evidently, a human right.

3. On other occasions, subsequent to the rulings of the Inter-American Court, I have referred to preventive detention which, strictly speaking, is usually repressive imprisonment, an anticipation of the punishment, a means of social control which goes far beyond the trial in which it is ordered and enforced. I have done so for example, in my concurring opinions to the judgments in *Tibi v. Ecuador* and *López Alvarez v. Honduras.* Recently, an important bibliography has emerged – or, rather, has been renewed – that examines preventive detention under the optic of its rationality (always questioned) and of its scope and limitations in keeping with inter-American case law. Among a growing number of exponents, I can cite, only as examples, the valuable contributions of Paola Bigliani and Alberto Bovino, in Argentina, and Guillermo Zepeda Lecuona, in México, authors of very recent works.

4. Preventive detention, which precedes punitive detention in the trajectory of the deprivation of liberty linked to the actual or future sanction of offenses, comes up against immense ethical and logical obstacles. It is sufficient to recall – evoking the classic Beccaria – that it constitutes a punishment which anticipates the official declaration of the criminal responsibility of the person subjected to it. This fact alerts us against the "justice" of a measure that suppresses, restricts or limits liberty (strictly speaking, several liberties or manifestations of human liberty: ambulatory, evidently, but also others, irremissibly drawn in by the former) even before the State decides, through the pertinent channels, that there are evident and firm grounds for suppressing, restricting or limiting that liberty. Hence, there is an anticipated and, therefore, undue - but not for this less effective - decision concerning the criminal responsibility of the accused.

5. Consequently, it would be difficult to maintain that preventive detention is a "just"

measure, even when it is carried out under the aegis of justice. If it is unjust to punish in order to find out whether it is possible to punish, we need to find other arguments – subject to finding, better still, alternative measures to the deprivation of liberty – to support the legitimacy of such a measure. In other words, we need to establish that the precautionary deprivation of liberty is "necessary" from the perspective of justice itself – in the specific case, evidently – and has been ordered for the reasons and considerations that allow the State to restrict the rights of the individual. There is no absolute law; any law is limited by the rights of others, the common good, the general welfare, the safety and security of all, always within the framework – strict and demanding – of a democratic society (Article 30 and 32 of the American Convention on Human Rights). Incidentally, the same observations should be made with regard to the other element of deprivation of liberty: punitive imprisonment, an authentic punishment that should be reduced to its most indispensable expression. But that is not the subject of this opinion.

6. Preventive detention is just one of the measures used by the State to ensure – in a cautionary or precautionary manner - the satisfactory administration of justice and effective compliance with jurisdictional decisions. In this regard, preventive detention obeys the same factors and should respect the same rules that regulate other precautionary measures. They all anticipate the trial to a certain extent, in order to safeguard the trial, if I may use these terms. However, preventive detention is the most intense and devastating of these measures; incomparably more severe that surveillance by the authority, or the seizure of assets, the prohibition to carry out certain operations or activities, or the limitation of freedom of movement, etc. In reality, all precautionary measures give rise to damage that it is difficult to repair, although it can be compensated: preventive detention causes an absolutely irreparable damage, which is the loss of time of life, with all that this signifies; hence the need to examine it and adopt it with infinite care.

7. Even though it has been said so often, it is worth repeating that there is an almost insoluble tension between the great contribution made by penal liberalism, which rescues the rights of the individual and curtails the powers of the authority: the presumption or principle of innocence (the root of many special rights, and the grounds for numerous public obligations) on the one hand, and preventive detention on the other. The persistence of the latter – not to mention its proliferation and exacerbation – militate directly against that principle. How can we justify the deprivation of liberty of someone who is presumably innocent and should be treated in accordance with that presumption in his favor, which guarantees his rights? How can we imprison an innocent person, render him incommunicado, restrict the exercise of other rights that are inevitably affected, and expose him to the public as presumably – or certainly – guilty?

8. Despite arguments promoting the rational reduction of preventive deprivation of liberty, in several countries we have seen the growing – even disproportionate – use of this measure, which is supposed to be precautionary. This increase is a result of what I have called the "desperation and exasperation" of society (public opinion or the sources that inform and manage it), in the face of the growth in crime. The fear that this imposes on society, as a result of the impotence of the formal and informal instruments of social control – inefficiency, insufficiency, indifference, collusion – suggests a simple and expedient, although questionable and usually ineffective, mechanism to the legislator: the imposing of preventive detention in a growing number of situations. And this is almost always under conditions that are equal to or worse than those that exist in the elevated number of places of confinement that dishonor their designation as centers of readaptation, rehabilitation, re-education, reinsertion, etc. and which are constantly denounced in the rulings of the Inter-American Court.

9. The legal doctrine of the Inter-American Court concerning preventive detention (which includes and clarifies the prevailing standards in this regard in accordance with the circumstances of this hemisphere), is based on several principles that should be recalled and on which it is necessary to insist in order to contain and reduce the tendency to carry to extremes the hypotheses for precautionary deprivation of liberty. It is evident that, under the rule of law, any deprivation of liberty – detention, preventive or precautionary detention, educational or therapeutic internment, administrative or criminal sanction – should be clearly established by law, with moderation and precision. Thus, in this regard, there is a space for the "legal reservation," the principle of legality strictly speaking (formal and substantive law: concepts that the case law of the Inter-American Court has also developed), which precludes authoritarian discretion, as well as lesser norms that are not enveloped in the guarantees that a real law requires: administrative and regulatory provisions; "autonomous" regulations, whose issue depends on regulatory authorities, which determine the hypotheses for deprivation of liberty – the offenses – the corresponding consequences and the procedures for applying the latter.

10. The paramount rule of minimum penal intervention – which has special implications in the matter that I am now examining – leads to reducing the hypotheses for precautionary deprivation of liberty to their minimum expression: not the most, but the least; not the system or the rule, but the exception. This would lead to a deliberate re-formulation of the law to elucidate the space currently occupied by preventive detention. According to case law, this objective is interrelated with the decision that preventive detention is only contemplated when it is truly necessary. However, we can require more – as has been required at times: that it is only contemplated when it is essential.

11. Obviously, the condition of being necessary or "essential" is not left to the whim of the authority or of public opinion, which could characterize as necessary or essential a measure that, in reality, is unnecessary or can be substituted. To comply with the obligation to respect and ensure human rights, the State must organize the public apparatus to this end, using all possible means, with the broadest – not the most restrained or most modest – application of available resources. The same is true as regards the liberty or control of the accused, the development of the investigation, and the preservation of the evidence during the criminal proceedings. Consequently, the State must use as frequently as possible – which is often – precautionary measures other than deprivation of liberty. Is this easy? Is this inexpensive? Perhaps not; but nor is preventive detention simple or economical and, in addition, it is founded on a delicate compromise – a complex transaction – between justice and necessity, which functions in an unstable equilibrium.

12. Preventive detention, I have reiterated, is a precautionary measure; it serves the immediate purposes of the trial; it caters to the latter's most urgent needs; it allows the trial to evolve and conclude in reasonable terms and the judgment to be executed, not evaded. Even though it evidently entails oppressive force, it should not acquire this quality formally: it should not constitute a penal measure or punishment that imposes on the individual the loss or the violation of a fundamental right to respond to other, often remote, purposes of the proceedings against him. Thus, it obeys urgent and immediate procedural requirements, namely: the effective subjection of the accused to the proceedings against him and their satisfactory evolution – the undesirable alternative is a trial *in absentia*, which gives rise to another set of problems. Obviously, both factors for the deprivation of liberty must be sufficiently established; the accuser's allegations or the superficial impression of the judge are not sufficient. It is necessary to prove the real risk that the accused will escape justice and the danger, also real, for the normal evolution of the proceedings. Deprivation of liberty restricts a fundamental right; this is why it must be duly motivated and founded.

13. Other purposes are excluded; even though they may be plausible in themselves and concern State obligations, but they do not figure in the strict – and restricted – nature of the precautionary procedural measure. They include, for example, general crime prevention or social training; even though crime is prevented and society considers that the public powers provide collective security and reduce impunity. The State can and must use different means to deal with these and other aspects of combating crime. Therefore, the Court's case law has rejected provisions that exclude the liberty of the accused in general, based only on the offense that has been committed without respecting the needs of the specific case. This entails a form of legislative "prejudice" with regard to the pertinence of liberty or prison that should be decided in each case – not generically – in keeping with the proven circumstances of each case, considering the presence of the accused at the trial and the normal evolution of the trial.

14. The delicate, difficult, compromising public determination to deprive an individual identified as a "possible or probable" author of a "possible or probable" offense of his liberty, calls for great care in proving the punishable act and linking the accused to it. I am not saying that there must be a firm conviction – which is a requirement for handing down a conviction. Nevertheless the existence of a punishable fact must be sufficiently authenticated (under the denomination provided for by each national system), on condition that it does not exclude constituent elements of the offense that convert admissible conduct into punishable conduct; and the probable participation of the subject in this punishable fact must be reasonably established. These are crucial, essential guarantees, if we do not want to subject liberty to the whim of a tyrannical legislator or an arbitrary enforcer. The reduction of the probative requirements in either extreme – the act and the probable responsibility – is an affront to liberty and a constraint on justice. It is unreasonable to adduce that all will be decided at the hour of judgment, perhaps a long time after the start of the trial and after weeks, months or years of irreparable deprivation of liberty. It is essential that the rights of the individual – that extend to the rights and guarantees of all society – are well protected from the moment in which the power of the State takes away the liberty of the citizen.

15. The foregoing gives rise to other consequences, which also embody principles concerning preventive detention. They include its provisional and limited nature, restricted by both time and the way it is executed. It is inadmissible to lengthen preventive detention when the conditions for imposing it have ceased or when the time needed for a reasonable investigation, conducted seriously and effectively, proves the existence of the offense and the criminal responsibility and thus allows the proceedings to be concluded and a judgment delivered.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary