

**REPORT No. 172/10**  
CASE 12.561  
CÉSAR ALBERTO MENDOZA *ET AL.*  
(JUVENILES SENTENCED TO LIFE TIME IMPRISONMENT)  
MERITS  
ARGENTINA  
November 2<sup>nd</sup>, 2010

**I. SUMMARY**

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) began processing the petition in this case after receiving a series of complaints filed between April 9, 2002 and December 30, 2003, on behalf of: Guillermo Antonio Álvarez, César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández (hereinafter “the alleged victims”). Because the complaints received were all premised on the same allegation, i.e., that an adolescent had been sentenced to life in prison, the complaints were joined into a single petition classified as P-270-02.<sup>1</sup> Mr. Fernando Peñaloza served as petitioner in the case of Ricardo David Videla Fernández; the petitioner for the other complainants was the Chief National Public Defender, Stella Maris Martínez.

2. The petitioners alleged that the Argentine Republic (hereinafter “the State,” “the Argentine State” or “Argentina”) incurred international responsibility for violation of the rights recognized in articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), and 19 (rights of the child), in relation to articles 1(1) (obligation to respect rights) and 2 (duty to adopt domestic legal measures) of the American Convention on Human Rights (hereinafter “the American Convention,” “the Convention” or “the ACHR”). The petitioners alleged that: i) the alleged victims were sentenced to life in prison for events that occurred when they were between 16 and 17 years old, in other words, when they were still children;<sup>2</sup> ii) the cassation motions filed to challenge the life sentences were not the proper remedies to guarantee the right to appeal a court ruling; iii) the alleged victims did not have adequate defense counsel; iv) two of the alleged victims were subjected to torture by guards at the penal institution where they were being held; v) one of the alleged victims, Ricardo David Videla Fernández, died in the Mendoza Penitentiary under circumstances in which his death could have been prevented; and vi) the death of Ricardo David Videla Fernández has never been duly investigated. They further alleged violation of the right to education, recognized in Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador.”

3. For its part, on several occasions the State expressed its willingness to arrive at a friendly settlement. The petitioners, however, closed off any possibility of a friendly settlement.<sup>3</sup> Furthermore, the State refrained from submitting any arguments to defend the merits of the life sentence given to César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández. Nor did the State answer the allegations regarding the rights to appeal the court ruling and the right to an effective defense. The State did,

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<sup>1</sup> The petition concerning Guillermo Antonio Álvarez was subsequently separated when it was found that he was not under 18 at the time of the events for which he was criminally convicted.

<sup>2</sup> Hereinafter, the Commission will use the terms “children” and “adolescents” interchangeably when referring to the situation of the alleged victims when they were under 18 years of age.

<sup>3</sup> The Admissibility Report on this case includes a detailed account of the efforts to arrive at a friendly settlement. See, IACHR. Report No. 26/08, Petition 270-02. Admissibility. César Alberto Mendoza *et al.* Argentina. March 14, 2008, paragraphs 7-30.

however, present information related to the injuries sustained by Claudio David Núñez and Lucas Matías Mendoza, and the death of Ricardo David Videla Fernández.

4. After examining the parties' positions, the Inter-American Commission concluded that the Argentine State bears international responsibility for maintaining a juvenile justice system under which juvenile offenders can be treated the same as adult offenders. As a result, César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández were sentenced to prison time and life imprisonment for events that occurred when they were still children. These sentences were imposed in blatant disregard for the international standards that apply in the case of juvenile criminal justice, particularly that imprisonment shall only be used as a measure of last resort and for the shortest appropriate period of time; they also disregard the State's obligation to ensure a regular review with a view to the possibility of release, giving special consideration to the rehabilitative purpose that a sentence is intended to serve to allow juvenile offenders to become constructive members of society. Thus, the sentences of prison time and life imprisonment were imposed arbitrarily and were incompatible with the American Convention. The problem was compounded by the restrictive interpretation of the scope of the review possible by means of the motions of cassation that the victims filed, which was that issues of fact and the weighing of evidence could not be examined by means of such motions. This sealed the injustice done with the sentences of prison time and life imprisonment that the adolescents received.

5. The Commission also concluded that Ricardo David Videla Fernández and Saúl Cristián Roldán Cajal were subjected to inhumane conditions of imprisonment incompatible with human dignity, a situation that resulted in the death of Ricardo David Videla Fernández without the State having taken reasonable measures to prevent his death and, once it happened, to properly investigate it. The Commission further concluded that Lucas Matías Mendoza lost his sight because the State failed to provide him with medical treatment to prevent his vision from deteriorating further. Finally, the Commission concluded that Claudio David Núñez and Lucas Matías Mendoza were victims of acts of torture which the State never properly investigated.

6. After examining the parties' positions, the Commission concludes that the Argentine State is responsible for violation of the rights recognized in articles 5, 7, 8, 19 and 25 of the American Convention in relation to the obligations established in articles 1(1) and 2 thereof. Furthermore, in keeping with the principle of *jura novit curia* the Commission also finds that the State is responsible for violation of Article 4<sup>4</sup> of the American Convention, and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture<sup>5</sup>, all to the detriment to the victims named in the respective sections of the present report.

## **II. PROCESSING BY THE COMMISSION**

### **A. Processing of the case subsequent to Admissibility Report 26/08**

7. On March 14, 2008, during its 131<sup>st</sup> regular session, the Commission approved Admissibility Report No. 26/08, in which it decided to declare the petition admissible with respect to

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<sup>4</sup> The Commission included an analysis of Article 4 of the American Convention in this report because once the merits phase of the case was underway, it received additional information, including the court record supplied by the State in connection with the internal investigations conducted into the death of Ricardo David Videla Fernández. The Commission should also point out that the State had the opportunity to contest the petitioners' allegations regarding the failure to protect the victim prior to his death and its failure to conduct a serious investigation into his death.

<sup>5</sup> The Commission is including an analysis of articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture inasmuch as there is a sufficient nexus to the allegations made with regard to Article 5 of the American Convention, included in the admissibility phase.

the alleged violations of articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 19 (rights of the child), and 25 (right to judicial protection) of the American Convention, all in relation to articles 1(1) (obligation to respect and ensure rights) and 2 (the obligation to adopt measures under domestic law) thereof.

8. Notification of the admissibility report was sent to the parties on March 17, 2008. In that same communication, they were informed that the petition had been registered as Case No. 12,651. The petitioners were further advised that under Article 38(1) of the Commission's Rules of Procedure) they had two months in which to submit any additional observations they might have regarding the merits. Under Article 38(2) of its Rules of Procedure, the Commission also placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter, pursuant to Article 48(1)(f) of the American Convention. Accordingly, it asked that the parties submit their response to the Commission's offer as soon as possible.

9. The petitioners submitted their observations on the merits on May 27, 2008. That information was conveyed to the State, which was asked to submit its observations within two months, in keeping with Article 38 of the Commission's Rules of Procedure. The State replied on August 5, 2008, requesting an extension. On October 14 and December 5 and 23, 2008, the petitioners submitted additional documents.

10. A hearing was held on the merits on March 24, 2009, during the Commission's 134<sup>th</sup> regular session. At that hearing, the State asserted that it would not be presenting any arguments on the merits. On March 31, April 15, June 29 and July 21, 2009, the petitioners submitted additional information. All those communications were forwarded to the State.

11. By notes of April 28 and October 21, 2009, the State reiterated its decision not to present arguments on the merits of the case relating to the sentence of life imprisonment imposed and the alleged violation of the right recognized in Article 8(2)(h) of the American Convention. However, the State did provide information related to the death of Ricardo Videla Fernández and the injuries sustained by Claudio David Núñez and Lucas Matías Mendoza.

#### **B. Request seeking precautionary measures**

12. On January 2, 2008, the Commission received a request seeking precautionary measures, filed by the National Public Defender's Office. The request was filed on behalf of Claudio David Núñez, Lucas Matías Mendoza and César Alberto Mendoza, alleging that the first two had been victims of abuse in the Federal Penitentiary Complex No. 1. The Public Defender's Office requested, *inter alia*, that the proposed beneficiaries be immediately transferred to the Federal Penitentiary Complex No. 4: Santa Rosa Penal Colony.

13. On January 8, 2008, the Commission requested information from the State, giving it 7 days in which to reply. The State sent its response to the Commission on January 22, 2008. On February 15, 2009, the petitioners supplied additional information. The State forwarded new information on March 28, 2008. The petitioners, for their part, filed briefs containing additional information on May 27 and 29, 2008. The State, for its part, supplied information on June 30 and again on August 15, 2008; the petitioners provided further information on August 25, 2008.

14. During the first months while the request seeking precautionary measures was being processed, the State ordered that the proposed beneficiaries be transferred to other penal institutions; thereafter, no reports were received alleging further assaults upon them. On October 6, 2008, the IACHR requested additional information from the petitioners, who replied on October 14, 2008. This communication was forwarded to the State, which replied via notes dated December 5, 2008 and January 27, 2009. On March 31, 2009, the IACHR informed the parties that "from the

information received regarding the situation, there does not appear to be any basis to resort to precautionary measures.”

### III. THE PARTIES' POSITIONS

#### A. The petitioners

15. The petitioners' basic complaint has to do with the life sentences given to persons who were alleged to have committed crimes when they were under the age of 18, i.e., when they were still classified as children under international law. The arguments made by the petitioners with regard to the basic facts are the same for all five alleged victims and are summarized below:

- (a) Argentina has not adapted its domestic laws to conform to the international standards set by the American Convention and the Convention on the Rights of the Child in the matter of juvenile criminal justice. They contend that the criminal justice system for juvenile offenders is governed by a law (Law 22,278 on the Juvenile Criminal Justice System) enacted on August 20, 1980, under the last military dictatorship, and amended by Law 22,803. The petitioners add that under the provisions of the law, persons between the ages of 16 and 18 who commit crimes face the same penalties that adult offenders face; the law does not establish any ceiling on the length of the sentence.
- (b) Judges have disregarded the meaning and sense of Article 37(b) of the Convention on the Rights of the Child, which provides that imprisonment of a child "... shall be used only as a measure of last resort and for the shortest appropriate period of time," even though Article 4 of Law 22,278 (which establishes the Juvenile Criminal Justice System) gives the judge the authority to reduce a juvenile's sentence for a given crime to the punishment called for in the case of an attempt to commit the same crime.
- (c) Judges have not heeded the principles of *exceptionality [last resort] and brevity [shortest appropriate period of time]* and, when imposing sentences of life imprisonment, have disregarded other guiding principles of juvenile criminal justice such as: the best interests of the child; the need for the minimum intervention under criminal law, and the principle of proportionality in the application of criminal punishments to children. In their rulings, judges have not explained the reasons why they discarded the possibility of lighter sentences, a possibility that the law itself allowed.
- (d) Argentina is the only Latin American country that imposes this type of sentence on persons who have committed crimes as children; the maximum sentences in the other countries of the region are not nearly as severe as they are under Argentine law.
- (e) Judges have not taken into account the good conduct reports presented in connection with these juveniles while they were confined to detention centers for children and adolescents. Nor have they factored in other personal circumstances.
- (f) The sentence that the alleged victims are to serve is no different –either in length or the way in which it will be served- from a similar sentence given to an individual who committed a crime as an adult, as the judges gave the alleged victims the most severe sentence allowed under Argentine law.
- (g) Sentences of life imprisonment have a serious, harmful, alienating effect on adolescents. In Argentina, when one receives a life sentence, one cannot apply for parole until one has served 20 years, which is excessively harsh for offenders under the age of 18. In principle, the latter will spend part of their adolescence, youth and adult life in maximum security prisons, which takes a very heavy toll on their physical and moral well being and limits their personal growth and development.

- (h) A life sentence constitutes cruel, inhuman and degrading treatment as it denies the person so sentenced any possibility of growing up in society. The opportunity for parole does not materialize until after the person has served 20 years of his/her life sentence; there is no possibility of a review by a judge before that 20 years have been served, no matter how the prisoner's conduct may have improved; to a large extent parole depends on how the prisoner has conformed to the conditions imposed by the Federal Penitentiary Service, which would appear to be basically a security force.
- (i) The uncertainty and the possibility that one could spend one's life in prison for deeds committed at a time when one's personality was not fully developed, leave persons sentenced to life in prison in a constant state of tension and anxiety.
- (j) Although the general consensus in Argentina is that the Juvenile Criminal Justice System needs to be amended, the country has not yet embarked upon a serious and probing discussion of the basic principles that should steer the system's reform. For the last thirty years, the kind of strong, determined political resolve necessary to bring the country's domestic laws in line with the international standards that the State has accepted has been lacking.
- (k) The petitioners therefore conclude that the imposition of sentences of life imprisonment in the case of persons who committed crimes when they were under the age of 18 is a violation of articles 5(1), 5(2), 5(6), 7(3) and 19 of the American Convention, read in combination with articles 3, 37(a), 37(b), 40(1), and 40(4) of the Convention on the Rights of the Child.
- (l) The petitioners supplied a list of the next of kin and persons who were also victims as a result of the sentences imposed on the alleged victims. In the case of **César Alberto Mendoza**: his mother, Isolina del Carmen Herrera, his partner between 1999 and August 2007, Romina Beatriz Muñoz, and their children, Isolina Aylene Muñoz, Sanira Yamile Muñoz and Santino Gianfranco Muñoz; his brothers and sisters: María del Carmen Mendoza, Roberto Cristian Mendoza, Dora Noemí Mendoza and Juan Francisco Mendoza; and his current partner, Gabriela Angela Videla. In the case of **Claudio David Núñez**: his mother, Ana María del Valle Britos, his partner Jorgelina Amalia Díaz and their daughter Saída Luján Díaz; his siblings Yolanda Elizabeth, Emely de los Angeles, María Silvina and Dante, and his stepfather Pablo Castaño. In the case of **Lucas Matías Mendoza**: his grandmother, Elba Mercedes Pajón, his mother Marta Graciela Olguín, his partner since 2006, Romina Vanessa Vilte, their son Lautaro Lucas Vilte and Romina's children, Junior González Neumen, Jazmín Adriadna Martínez and Emmanuel Martínez; Lucas' siblings: Omar Maximiliano Mendoza, Paola Elizabeth Mendoza, Verónica Albana Mendoza and Diana Salomé Olguín. In the case of **Saúl Cristian Roldán Cajal**: his partner Alejandra Garay, his mother Florinda Rosa Cajal and her partner Juan Caruso; his eleven siblings: Evelyn Janet Caruso Cajal, Juan Ezequiel Caruso Cajal, Cinthia Carolina Roldán, María de Lourden Roldán, Rosa Mabel Roldán, Albino Abad Roldán, Nancy Amalia Roldán, Carlos Roldán, Walter Roldán and Yohana Elizabeth Roldán. In the case of **Ricardo David Videla Fernández**: his parents Ricardo Roberto Videla and Stella Maris Fernández, and his siblings: Juan Gabriel Videla, Marilín Estefanía Videla, Esteban Luis Videla, and Roberto Damián Videla.

16. The petitioners also assert that the cassation motions filed to challenge the convictions were denied on procedural grounds. In those cases in which the courts agreed to hear the motions or appeals filed, the courts simply confirmed the lower court rulings, stating that the lower court rulings had been delivered in accordance with domestic law and international treaties with the rank of constitutional law. The petitioners contend that the alleged victims were denied effective enjoyment of the right to have their convictions reviewed by a higher court. The arguments made the petitioners on this point can be summarized as follows:

- (a) The respective defense counsels for the alleged victims filed cassation motions seeking review of the facts in dispute, the evidence and the sentences imposed. However, the courts with jurisdiction did not conduct a full review and systematically denied the cassation motions on the grounds that they were seeking to have matters of fact and of evidence reviewed, functions that were the province of the court *a quo*.
- (b) Under the laws of the Province of Mendoza and of the autonomous city of Buenos Aires, cassation motions have a narrowly-defined scope, despite the fact that in the well-known 2005 *Casal* ruling, the Supreme Court of Justice of the Nation ordered the courts to change the scope traditionally assigned to this type of motion to bring it in line with standards set by Article 8(2)(h) of the American Convention and 14(5) of the International Covenant on Civil and Political Rights.
- (c) In the case of Mendoza Province, the Code of Criminal Procedure lists cassation as an extraordinary appeal, thereby disallowing the possibility of a higher court's full review of a final judgment.
- (d) Based on the foregoing, the petitioners conclude that the denial of the cassation motions filed to challenge the sentences of life imprisonment were in violation of articles 2, 8(2)(h), 19 and 25 of the American Convention, read in combination with Article 40(2)(b)(v) of the Convention on the Rights of the Child.

17. For each alleged victim, the petitioners give a detailed account of the criminal proceedings that led to the sentence of life imprisonment. The details will be examined in the section of this report that concerns proven facts and will be based on the evidence in the case record.

18. In addition to the above arguments which the petitioners made with respect to all the alleged victims, they also introduced arguments on the specific conditions of each individual alleged victim. The Commission will summarize those arguments below.

19. In the case of **César Alberto Mendoza**, the petitioners contend that he was prevented from filing a complaint motion with the Supreme Court of Argentina because he was not personally notified that his special federal appeal had been denied. They point out that notification was sent to the penitentiary in which he was incarcerated; however, there is no record that Mr. Mendoza himself was notified; his court-appointed attorney was notified, but failed to bring the matter to the alleged victim's attention and unilaterally decided not to pursue further appeals. The petitioners state that some months later, the alleged victim sent a letter to the Office of the Supreme Court's Court-appointed Attorney Services expressing his desire to be informed of the status of the proceedings; only then did he learn that his conviction and sentence had been upheld and had thus become final.

20. The petitioners assert that it was not until late April 2002 that **Claudio David Núñez** and **Lucas Matías Mendoza** learned of the final ruling in their case; the only parties to be notified had been their respective defense attorneys, who failed to bring the decision to the attention of the alleged victims.

21. The petitioners state further that when **Lucas Matías Mendoza** was incarcerated at the *Instituto Dr. Luis Agote*<sup>6</sup> a blow to his left eye left him with a detached retina. The injury was not immediately treated, with the result that he lost his vision in that eye. The petitioners point out that before being taken into custody, Lucas Matías Mendoza was already suffering from progressive

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<sup>6</sup> A youth detention facility under the authority of the National Secretariat for Children and Adolescents.

toxoplasmosis in the right eye, which meant that after the injury sustained during his stay at the *Instituto Dr. Luis Agote*, he would end up blind in both eyes. The petitioners contend that the State's failure to provide immediate medical care when the injury to the alleged victim's left eye was sustained did irreversible damage to his physical health and wellbeing. They add that it was not until mid 2003, approximately five years after he entered the Federal Penitentiary System that Lucas Matías Mendoza allegedly began to be taught how to read in Braille.

22. While the petitioners' request seeking precautionary measures was in process, they reported that on December 9, 2007, **Lucas Matías Mendoza** and **Claudio David Núñez** were beaten up by staff of the Federal Penitentiary Service, who entered their cell and, after beating them and putting them in handcuffs, led them to a cell referred to in prison slang as "the lion's den". There, Lucas and Claudio allegedly sustained between 20 and 30 blows to the soles of their feet and on other parts of the body, including the back, the waist and the head. The petitioners recount that after the beating had ended, both men were taken to another sector where they were ordered to stand up and walk, which they were naturally unable to do because of the pain, whereupon Lucas was reportedly thrown to the floor and beaten again on the soles of his feet.

23. According to the petitioners, the Federal Penitentiary System argued that this was a fight among inmates. The petitioners also report that on December 26, a complaint was filed in connection with these events, which was heard by Lomas de Zamora Federal Criminal and Correctional Court No. 2. The court had allegedly closed the investigations into the complaint on February 29 and July 2, 2008; no serious and rigorous investigations of the complaint were conducted.

24. The petitioners state that it was not until June 18, 2003 that **Saúl Cristián Roldán Cajal** learned of the decision on the cassation motion, by which time it was too late for him to file another appeal or motion with the domestic courts.

25. The petitioners allege that during his incarceration in the Mendoza prison institutions, young Roldán suffered severe injuries. They observe that in March 2000, during a prison riot, prison personnel or members of the Infantry Guard Corps (CGI) fractured his upper jaw, broke his teeth and injured his foot. The injury he sustained when another inmate stabbed him in the back allegedly went untreated. He was allegedly assaulted by another inmate on March 21, 2008, as a result of which he reportedly sustained a fractured nasal septum; to this day, he still has difficulty breathing.

26. In a communication dated July 12, 2005, the petitioners reported the death of **Ricardo David Videla Fernández** in his cell in the Cellblock No. 11 of the Mendoza Penitentiary. They reported that while the circumstances surrounding his death had not yet been determined, they believed that the decisive factors were the inhuman conditions of his incarceration and the anguish he suffered knowing that he was sentenced to life in prison<sup>7</sup>.

27. Later, a brief written by the parents of Ricardo David Videla was received on August 3, 2009, in which they allege that he had been hung by prison personnel and that it was not a suicide as the prison staff had reported. They also underscored the fact that he was being held in a very small cell, without recreation time and was never allowed out of his cell. They allege further that the Second Criminal Court of Mendoza closed the investigation and that there had never been any real interest in determining the real reasons and true cause of their son's death.

28. Apart from the petitioners' allegations, as recounted in the preceding paragraphs, regarding the violence and insecurity in prisons, the lack of necessary medical attention and poor

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<sup>7</sup> Here the Commission took note of the official version to the effect that Ricardo David Videla Fernández had allegedly committed suicide.

physical conditions of the prisons, the petitioners also allege that in the process of serving their sentences, the alleged victims have been transferred several times from one facility to another. They reportedly received the minimum in the way of education and almost no training in trades that might improve their employment opportunities and general rehabilitation. The petitioners contend that the constant transfers had allegedly had an adverse effect on their affective relationships, had repeatedly disrupted their studies and had done nothing to help these young men become fully immersed in the productive activities they embarked upon. The petitioners argue that the State's actions were detrimental to the alleged victims' physical wellbeing and that the State failed to comply with its obligations under the law on execution of sentence requiring prison treatment that will serve to prepare the prisoner to rejoin society.

29. In the particular cases of Claudio David Núñez and Lucas Matías Mendoza, it is alleged that before transferring them to the Federal Penitentiary System when they reached the age of 18, the State had them in juvenile detention facilities but failed to provide them with any formal education during that time, which constitutes a violation of articles 5(1) and 19 of the American Convention, read in conjunction with articles 28, 29, 31, and 40(1) of the Convention on the Rights of the Child, and Article 13 of the Protocol of San Salvador.

30. Finally, as measures of restitution, the petitioners argue that consideration should be given to just compensation for the pecuniary and non-pecuniary damages sustained, and to the adoption of other non-pecuniary measures. As measures of satisfaction and guarantees of non-repetition, the petitioners are seeking: public acknowledgement by the State of its international responsibility; implementation of amendments to the laws governing the juvenile criminal justice system and to procedural systems; training of state officials whose job it is to work with children and adolescents, and strengthening of educational, job-training and formative programs in penal institutions.

## **B. The State**

31. By a communication received on June 30, 2004, the State expressed its willingness to enter into dialogue with the petitioners to explore the possibility of arriving at a friendly settlement of the case. While the parties were able to meet a number of times, no final settlement agreement was reached. Finally, by note of June 19, 2007, the main petitioner Stella Maris Martínez informed the Commission that her participation in the friendly settlement process was at an end. On several occasions the State has reported on legislative initiatives aimed at reforming the legal framework of the juvenile criminal justice system.

32. On June 23, 2005, the State reported that Ricardo Videla Fernández had died on June 21, 2005, at approximately 1:30 p.m., while in the cell 17 of cellblock 11 of the Mendoza Penitentiary's Young Adults Maximum Security Facility. The State reported that he was alone at the time and that the administrative and judicial inquiries had concluded that his death was a suicide. This hypothesis was said to be supported by inspections done by professionals with the Forensic Medical Corps, the Police and the Prosecutor in charge of the investigations. Later, in a communication dated October 21, 2009, the State sent copies, in electronic format, of the files in the criminal and administrative investigations conducted in the wake of Ricardo Videla Fernández' death.

33. Throughout the processing of the case, the State asserted that it would not submit arguments on the merits of the case. Accordingly, in the hearing held on the case on March 24, 2009, during the Commission's 134<sup>th</sup> regular session, the representatives of the State asserted that they would abstain from making any observations regarding the petitioners' allegations, as it was their expectation that the Commission would ultimately decide the case based on the principles of the American Convention and of international law. The State repeated this position in its brief of



observations on the merits, dated April 28, 2009, and in its final communication dated October 21, 2009.

34. As previously noted, on December 27, 2007, a request was received from the petitioners seeking precautionary measures for Lucas Matías Mendoza, Claudio David Núñez and César Alberto Mendoza, due to the beatings that the first two had allegedly suffered at the hands of the prison staff at Ezeiza Federal Penitentiary Complex No. 1 on December 9, 2007. Throughout the processing of their request seeking precautionary measures, the petitioners filed additional allegations pertaining to the conditions in which the alleged victims were being held.

35. The State's contention in this regard was that the injuries sustained by Lucas Matías Mendoza and Claudio David Núñez were the result of a fight among inmates and not assaults by the guards at Ezeiza Federal Penitentiary Complex No. 1.

36. As for the petitioners' contention that none of the alleged victims had served on his sentence because they were being continuously transferred, the State reported that many of the transfers were done at the request of the defense attorneys, who made the case that their clients had to be in the proximity of the city of Buenos Aires to facilitate communication with them and preparation of their defense. The State added that the defense attorneys also requested that the three be held in the same facility, regardless of what might be in each one's best interests given the individualized treatment that the law requires.

37. In its final report on the request of precautionary measures, received on December 5, 2008, the State reported on the situation of Lucas Matías Mendoza, Claudio David Núñez and César Alberto Mendoza:

- (a) Lucas Matías Mendoza: since June 11, 2008, he has reportedly been "going through the consolidation phase of the treatment period under the prison system's regime for progressive advancement toward re-socialization," and in November 2008 he was in the third year of high school.
- (b) Claudio David Núñez: is at the Santa Rosa Prison Colony in the La Pampa Province (Unit No. 4 of the Federal Penitentiary Service); "since January 2008 he has been in the trust phase of the treatment period under the prison system's regime for progressive advancement toward re-socialization" while working in the tailor shop and studying Module III of the Polymodal Level.
- (c) César Alberto Mendoza: has been at the Santa Rosa Penal Colony in La Pampa Province since November 10, 2008 (Unit No. 4 of the Federal Penitentiary Service); since "September 4, 2008 he has been in the test period under the prison system's regime for progressive advancement toward re-socialization." He is reportedly not working, but is in the seventh year of the third common cycle of basic general education.

#### **IV. PROVEN FACTS**

38. The present case concerns a series of events of various kinds all of which began when the adolescents César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández stood trial, were convicted and sentenced to prison time or life imprisonment. Once sentenced, the victims were in the custody of the State, and it was while they were in State custody that a series of events transpired about which the petitioners submitted additional arguments. The Commission will present the facts that it takes as proven based on the evidence in the case file, in the following order: i) Framework of relevant laws in the juvenile criminal justice system; ii) Framework of relevant criminal procedural law on the matter of remedies; iii) The criminal proceedings prosecuted against the alleged victims; iv) The

death of Ricardo David Videla Fernández; v) Lucas Matías Mendoza's loss of vision; vi) Injuries sustained by Lucas Matías Mendoza and Claudio David Núñez; and vii) Injuries sustained by Saúl Cristian Roldán Cajal.

#### **A. Framework of relevant laws governing the juvenile criminal justice system**

39. At the time of the events of the present case and to this day, Argentina's juvenile criminal justice system has been governed by Law 22,278 of August 25, 1980, amended by Law 22,803. The provisions of this law that were applied in the cases prosecuted against the five alleged victims and that are relevant for an examination of the merits of the present case are as follows:<sup>8</sup>

Article 1: A minor under the age of 16 years is not punishable. Nor is a minor under the age of 18 years punishable in the case of privately actionable offenses or offenses for which the maximum prison sentence is two years, with a fine or disqualification from exercise of certain civil rights. If there are charges against any such person, the judicial authorities shall make a provisional decision as to the course of action, shall proceed to establish the crime, shall hear directly from the minor, his or her parents or guardian and order any necessary reports and expert testimony to determine the individual's personality, family, and environmental conditions.

(...)

Article 2: A minor between the ages of 16 and 18 who commits any of the crimes not listed in Article 1 is punishable.

In such cases, the judicial authority shall prosecute accordingly, and shall order a provisional arrangement during prosecution of the case in order that the authorities given in article four may be exercised.

(...)

Article 4: The following conditions must be present in order to impose punishment in the case of a juvenile offender between the ages of 16 and 18:

1. The person's criminal culpability –and civil liability if there is any- must be established according to the rules governing procedure.
2. The person concerned must be 18 years of age.
3. The person must have undergone a period of remedial custodial treatment for a period of not less than one year, which period may be extended if necessary until the person reaches the age of majority.

Once these requirements have been met, if the nature of the crime, the minor's background, the result of the remedial custodial treatment and the direct impression made on the judge are such that punishment is deemed necessary, then it shall be so resolved; the penalty may be reduced to the penalty dictated for attempts to commit the same crime.

(...)

Article 6: When judges sentence minors to deprivation of liberty, said sentence shall be served in specialized institutions. If the person attains his/ her majority while serving sentence in a juvenile facility, he/she shall serve the remainder of his/her sentence in adult institutions.

(...)

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<sup>8</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 1. Legislation. Original petition filed on behalf of Claudio David Núñez received on July 1, 2002. Attachment 1. Legislation; Original petition filed on behalf of Lucas Matías Mendoza received on July 1, 2002. Attachment 1. Legislation.

40. While Law 22,278 establishes certain special conditions for applying criminal law in the case of a juvenile offender, it is the Nation's Penal Code that contains the catalogue of crimes and sentences, the essentials pertaining to enforcement of sentence and the parole system. Thus, the provisions of the Penal Code that are relevant to the examination of the merits of this case are as follows:<sup>9</sup>

Article 13. Anyone sentenced to prison or life in prison who has served twenty years of his/her sentence, anyone sentenced to temporary confinement or to prison for more than three years and who has served two thirds of his/her sentence, and anyone sentenced to confinement or prison for three years or less and who has served at least one year of his/her sentence of confinement or eight months of his/her prison sentence, all the while routinely observing the prison rules, may obtain his/her release by decision of a judge, following a report from the directors of the institution, under the following conditions:

(...)

Article 44:

(...)

If the sentence is confinement for life, then the sentence for the attempted crime shall be confinement for a period of fifteen to twenty years.

If the penalty is imprisonment for life, the penalty for the attempted crime shall be imprisonment for a period of ten to fifteen years.

Article 80. A sentence of confinement for life or imprisonment for life shall be imposed, and the provisions of Article 52 may be applied to anyone who murders:

1. His/her parent, offspring or spouse, knowing that they are parent, offspring or spouse;
2. With rage, premeditation, poison or by other insidious means;
3. For a price or a promise of remuneration;
4. For pleasure, greed, or out of racial or religious hatred;
5. By any means capable of posing a threat to society;
6. Through a premeditated conspiracy of two or more persons;
7. To prepare the way for, facilitate, consummate or conceal another crime or to ensure its outcome or procure impunity for oneself or for another, or by not having achieved one's ends in an attempt to commit another crime.

(...)

**B. The framework of relevant laws governing criminal procedure in the matter of appeals and other remedies.**

41. In this section, the Commission will describe the framework of relevant laws governing the various remedies that the alleged victims filed to challenge the sentences that ordered that they be imprisoned or confined for life.

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<sup>9</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 1. Legislation.

## 1. Autonomous City of Buenos Aires

42. The National Code of Criminal Procedure, Law 23,984 of September 4, 1991, was in force at the time of the events that transpired in the autonomous city of Buenos Aires. In articles 456 to 489, that code regulates the cassation motions, constitutionality challenges, complaint motions and appeals for review. Inasmuch as the first three of these remedies were used with respect to some of the alleged victims, the pertinent provisions of those articles are transcribed below.

43. In the case of the cassation motion, Article 456 of the National Code of Criminal Procedure sets out the circumstances under which cassation is the proper remedy, as follows:

The cassation motion may be filed for the following causes:

- 1) Failure to observe or correctly apply the substantive law.
- 2) Failure to observe the provisions that this Code sets forth, on pain of inadmissibility, lapsing of legal action or nullity, provided the petitioner –save in cases of absolute nullity- has demanded, within the prescribed period of time, that the error be corrected, if correction is possible, or has entered an objection for cassation.

44. As for the procedure through which a cassation motion is to be filed, Article 463 of the National Code of Criminal Procedure provides that:

The cassation motion shall be filed with the court that delivered the ruling, within ten (10) days of notification and by means of a brief signed by a barrister setting forth the specific legal provisions deemed to have been violated or erroneously applied and spelling out how the petitioner would have the law applied. Each cause must be set forth separately. This is the petition of last resort and once filed no other petition may be brought.

45. Article 467 of the National Code of Criminal Procedure reads as follows:

The parties must be represented by a barrister. When a remedy has been filed by another party and the accused does not appear for court or is unrepresented, the president of the court will name a court-appointed attorney to represent the accused.

46. As for what transpires when the motion is admitted, Articles 470 to 473 of the National Code of Criminal Procedure provide for a number of possibilities depending on whether a violation of substantive law was found (Article 470), a violation of procedural rules was shown (Article 471), or the legal errors had no impact on the decision (Article 472). Those provisions read as follows:

Art. 470. – If the ruling being challenged has failed to observe the substantive law or misapplied it, the tribunal shall void the ruling and decide the case in accordance with the law and the precedents that it cites.

Art. 471. – In a case in which procedural rules have not been observed, the tribunal shall nullify the proceedings and remit the case to the appropriate tribunal to retry the case.

Art. 472. – Errors of law in the court's explanation of the ruling being challenged that have not impacted the ultimate decision shall not have the effect of nullifying the decision, but must be corrected, as must any material errors in the determination or computation of sentence.

47. As for the remedy challenging the constitutionality of a ruling, the pertinent part of Article 474 provides that the constitutionality challenge is permissible in the case of final rulings (...) if there has been any question as to the constitutionality of a law, ordinance, decree or rule that

regulates a matter governed by the Constitution, and the ruling or the order of the court is not in the petitioner's favor.

48. Under Article 476 of the National Code of Criminal Procedure, the complaint motion is admissible in the following case:

When an appeal that can be filed with another court is denied, the petitioner may immediately file a complaint motion seeking a finding to the effect that the original appeal was improperly denied.

## **2. Mendoza Province**

49. The Mendoza Provincial Code of Criminal Procedure, Law 6730 of November 16, 1999, which was in force at the time of the events in this case, regulates the cassation motions, constitutionality challenges, complaint motion and appeal seeking review in articles 449 to 505. The pertinent provisions appear below.

50. Article 455 applies to four types of remedy and prescribes the conditions under which any one of them is to be filed:

Remedies shall be filed within the prescribed time period and in the prescribed manner and shall specify the points of the decision that are being challenged; failure to observe these conditions shall render the remedy inadmissible.

51. As for the cassation motion, Article 474 of the Mendoza Provincial Code of Criminal Procedure establishes the grounds for filing such a remedy as follows:

The cassation motion may be filed for the following cause:

- 1) Nonobservance or misapplication of the substantive law.
- 2) Nonobservance of the provisions that this Code sets forth, on pain of inadmissibility, lapsing of legal action or nullity, provided the petitioner –save in cases of absolute nullity- has demanded, within the prescribed period of time, that the error be corrected, if correction is possible, or has entered an objection for cassation.

52. The procedure and formalities for filing the cassation motion are prescribed in Article 480 of the Mendoza Provincial Code of Criminal Procedure as follows:

The cassation motion shall be filed with the court that delivered the ruling, within fifteen days of notification. It shall be in writing and signed by a barrister and shall cite the specific provisions of the law deemed to have been violated or misapplied. It shall also state how the petitioner would have the law applied.

Each cause and its grounds shall be indicated separately.

After this filing, no other cause may be alleged.

The petitioner shall indicate whether he/she shall make an oral presentation.

53. If the cassation court grants relief, Article 485 of the Mendoza Provincial Code of Criminal Procedures describes what the consequences will be, as follows:

If the ruling being challenged has violated or misapplied the substantive law, the Court of Cassation shall void said ruling and then decide the case in accordance with the applicable

law and precedents; however, it shall proceed in accordance with the following article, even *ex officio*, whenever subparagraph 3 of Article 411 has not been observed.

54. Article 486 of the Mendoza Provincial Code of Criminal Procedure states the following:

In the case of Article 474, subparagraph 2, the Court shall nullify the ruling being challenged and shall proceed in accordance with articles 203 and 204.

55. For its part, Article 487 of the Mendoza Provincial Code of Criminal Procedure provides that:

Errors of law in the legal reasoning applied to the facts of the ruling being challenged that have not influenced the court's ruling shall not have the effect of nullifying it but must be corrected.

The same can be said of any material errors in the determination or computation of sentence.

56. As for the grounds for a constitutionality challenge, Article 489 of the Mendoza Provincial Code of Criminal Procedure prescribes the conditions under which such appeals may be filed:

An appeal on constitutionality grounds may be filed against the final judgments or decrees mentioned in Article 475, when the constitutionality of a law, decree, regulation or decision that regulates a matter governed by the Constitution is being challenged and the ruling or the order of the court is not in the petitioner's favor.

57. On the complaint motion, Article 491 of the Mendoza Provincial Code of Criminal Procedure reads as follows:

When a petition to be filed with another court is improperly denied, the petitioner may file a complaint with that court to have it declare that the petition was improperly denied.

### **3. Judicial practice in Argentina and the "Casal" ruling in 2005**

58. Thus, at the time of the events in this case and under the applicable laws in the Autonomous City of Buenos Aires and Mendoza Province, the cassation motion was the appropriate remedy to appeal a conviction by a lower-court judge. The Commission notes that the language of the National Code of Criminal Procedure and the Mendoza Provincial Code of Criminal Procedure is virtually identical in setting forth the circumstances under which a cassation motion may be filed. The Commission believes that some discussion of the generalized interpretation of the scope of a cassation motion might be instructive in this section for purposes of its assessment, in the legal analysis section, as to whether the facts of the case fit within the practice of the courts.

59. In the ruling known as the "Casal judgment," the Supreme Court of the Nation made reference to how narrowly judges –particularly those in the National Chamber of Criminal Cassation– define which matters are subject to review on a cassation motion. In the words of the Supreme Court:

For expository purposes, it might be useful to show that this distinction between matters of fact and matters of law, judicial error and procedural error, procedural flaws and flaws in a ruling, or any other kind of distinction on matters for consideration, has perverted the practice of motions filed with the National Court of Cassation.

In general, petitioners are aware of the narrow admissibility policy, and therefore endeavor to file their motions on the grounds set forth in subparagraph 1 of Article 456 of the National Code of Criminal Procedure, i.e., as a claim of a failure to observe or correctly apply the substantive law, in cases in which subsumption issues are discussed. The truth is that the vast majority of these cases raise and discuss problems related to the facts, the evidence, and the assessment of both the facts and the evidence, to demonstrate either the existence or nonexistence of any objective element, of any willful misconduct or subjective elements apart from willful misconduct that are part of the definition of a criminal offense.

(...)

Knowing that the courts of cassation are reluctant to examine grievances having to do with the facts or the evidence and their assessment, defense attorneys have a tendency to stretch the scope of subparagraph of Article 456 of the National Code of Criminal Procedure.<sup>10</sup>

60. Precisely after observing that the distinction between matters of law on the one hand and matters of fact or assessment of evidence on the other ought not to determine the scope of review on cassation, on September 20, 2005 the Supreme Court of the Nation issued the Casal judgment in which it delivered a broader interpretation when compared to the practice described in the preceding paragraph. Because the pertinent proceedings in the present case had already culminated at the time the Casal judgment was delivered, the Commission deems it unnecessary to elaborate upon the scope of that decision at this time, notwithstanding any observations included below at paragraphs XX –XX.

### **C. The criminal proceedings prosecuted against the alleged victims**

#### **1. César Alberto Mendoza**

61. On October 28, 1999, Juvenile Court for Oral Proceedings No. 1 of the autonomous city of Buenos Aires delivered its ruling in case No. 1048, in which it convicted César Alberto Mendoza of co-authorship of four counts of aggravated robbery, committed with a firearm, two counts of aggravated homicide and aggravated battery, all of which were materially concurrent. Under Law 22,278, César Alberto Mendoza was sentenced to imprisonment for life.<sup>11</sup> The crimes of which César Alberto Mendoza was convicted occurred when he was 17 years, 10 months old.

62. On November 16, 1999, the court-appointed public defender filed a cassation motion to challenge the lower-court decision. As grounds for the motion, the defense attorney cited “the arbitrary nature of the ruling because of the failure to give sufficient grounds for the punishment imposed”; defense counsel asserted that “the ruling delivered failed to give sufficient justification for the penalty imposed [...] and failed to explain why it did not apply the reduced sentencing provision contained in Article 4 of Law 22,278.” The attorney filing the motion concluded that her client was given an excessive and unsubstantiated sentence.<sup>12</sup>

63. That same day, November 16, 1999, the court-appointed public defender filed a motion challenging the constitutionality of the ruling, alleging that the sentence imposed constituted “cruel, inhuman and degrading punishment, incompatible with social re-adaptation” and, therefore, in violation of the National Constitution and the other human rights treaties to which the State is

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<sup>10</sup> Supreme Court of Justice of the Nation. Case No. 1681. Matías Eugenio Casal *et al.* Ruling of September 20, 2005.

<sup>11</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Ruling of Juvenile Court for Oral Proceedings No. 1, dated October 28, 1999, case No. 1048.

<sup>12</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Cassation motion filed by the court-appointed public defender Nelly Allende on November 16, 1999, case no. 1048.

party.<sup>13</sup> The head of Juvenile Public Defender's Office No. 3 filed a motion challenging the constitutionality of the conviction on November 18, 1999.<sup>14</sup>

64. The Juvenile Court for Oral Proceedings, serving as the court that decides whether an appeal will proceed to a higher court, delivered its decision on November 30, 1999, in which it denied the cassation motion on the grounds that the magistrates' justifications for the severity of the punishment imposed are not, as matter of principle, subject to cassation review.<sup>15</sup>

65. The court-appointed public defender filed a complaint motion to challenge the denial of cassation. There again, she raised the issue of the failure to apply Article 4 of Law 22,278, on the grounds that the lower court did not justify the reasons why the sentence of life imprisonment was imposed.<sup>16</sup> The National Chamber of Criminal Cassation dismissed this motion in a ruling of June 23, 2000. This court reached its conclusion after considering the following:

Having examined the court ruling at 3105/3134, this Chamber does not find any basis for the defense counsel's claim that the court failed to state the grounds for and justification of the sentence, nor does it find any deviation from the provisions of Article 4, paragraph 3 of Law 22,278. In fact, under the article in question, once the defendant reaches the age of 18, the court has the authority to impose sentence upon a person convicted of a crime committed while still a minor, when the facts of the case so dictate; it may reduce the sentence to the penalty imposed for an attempt to commit the same crime. This was the framework in which the Juvenile Court for Oral Proceedings operated when (at 313, paragraph 8) it explains the unavoidable need to impose punishment on César Mendoza, as the court realized the number and severity of the criminal acts which he co-authored [...]. Given the specifics and consequences of his criminal behavior, his conduct in prison is not sufficient to exempt him from sentencing or to apply a lesser sentence.

Furthermore, the mere fact that the court mentioned favorable circumstances does not constitute a contradiction, as this does not necessarily signal that those positives are sufficient to offset the abundant factors that –in the judgment of the court *a quo*– made César Mendoza deserving of the penalty imposed; this argument, therefore, has to be dismissed.

As for the questions raised suggesting that the penalty was excessive, it is worth recalling that, as this Chamber has held time and time again, the rules governing the individualization of the penalty are to be applied by the judges hearing the case and are therefore in principle not subject to review on cassation. The assessment is a function of the discretionary authorities of the trial court, except when it can be shown that a ruling is arbitrary and thus in blatant violation of constitutional guarantees [case law citations]. In the case *sub judice*, given the

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<sup>13</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Constitutionality challenge filed by the court-appointed public defender Nelly Allende on November 16, 1999, case no. 1048.

<sup>14</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Constitutionality challenge filed by the Juvenile Court Public Defender Claudia López Reta on November 18, 1999, Case No. 1048.

<sup>15</sup> In this decision the court emphasized the point that: "the court hearing the case has the authority to review every motion to determine whether it satisfies the formal requirements that the law prescribes; its decision must not be based entirely on a summation of the requirements but must also delve into the admissibility requirements and shall stop the motion from going forward if it becomes apparent that the motion is improper. This does not mean that the court should become the judge of its own ruling; instead, it must participate in determining whether the motion qualifies to proceed to a higher court [...]". Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Decision of the Juvenile Court for Oral Proceedings No. 1 of November 30, 1999, Case No. 1048.

<sup>16</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Complaint motion filed to challenge the denial of the cassation motion filed by the court-appointed public defender Nelly Allende (the filing date is not visible on the document), case No. 1048.



facts and circumstances weighed by the Juvenile Court of Oral Proceedings, which were examined in earlier paragraphs, the penalty does not appear to be either excessive or arbitrary.

This having been said, this Chamber does not find grounds for the petitioner's claims of arbitrariness [...] since the decision being challenge has been reasonably substantiated [...] and, moreover, sets forth the minimum necessary and sufficient legal grounds [...].<sup>17</sup>

66. The Juvenile Court for Oral Proceedings admitted the two motions challenging the constitutionality of the ruling and referred them to the National Chamber of Criminal Cassation, which dismissed them in its ruling of June 23, 2000, in which it also dismissed the cassation motion filed. Summarizing, the National Chamber of Criminal Cassation based its decision on the following reasoning:

When international treaties speak of torture or other cruel, inhuman or degrading treatment, they are not referring to penalties that deprive an individual of his/her liberty or to the length of the sentences ... The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not apply to the pain or suffering that are experienced as a result of lawfully applied penalties, or that are inherent or incidental to them.

Because our laws provide for the possibility of parole for those sentenced to life imprisonment, the application of a life sentence in the case of a minor does not violate Article 37(a) of the Convention on the Rights of the Child.

Under our legal system, the only sentence of life imprisonment that does not allow for the possibility of parole is a life confinement [...] the particular situation of César Alberto Mendoza is not contemplated in Article 14 of the Penal Code.

The court trying the case determines the sentence, in exercise of its authorities, as it alone weighs the aggravating and mitigating circumstances. As a matter of principle, these matters are not subject to review on cassation except in the case of an obvious absurdity or arbitrariness, which is not present in the case *sub judice*.<sup>18</sup>

67. César Alberto Mendoza's court appointed public defender filed a special federal appeal<sup>19</sup> which the National Chamber of Criminal Cassation declared inadmissible in a ruling dated August 24, 2000, on the grounds that the appeal "lacks any autonomous basis in law."<sup>20</sup> On August 24, 2000, the office of the clerk of the National Chamber of Criminal Cassation issued notification of this decision, of which the court-appointed public defender was informed.<sup>21</sup> The Commission does not have information to the effect that César Alberto Mendoza was ever personally notified of this decision.

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<sup>17</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Ruling of Section II of the National Chamber of Criminal Cassation on June 23, 2000, Case No. 2544.

<sup>18</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Ruling of Section II of the National Chamber of Criminal Cassation on June 23, 2000, Case No. 2557.

<sup>19</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Special federal appeal filed by court appointed public defender Guillermo Lozano (the filing date is not visible on the document), case No. 2557.

<sup>20</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Decision of Section II of the National Chamber of Criminal Cassation dated August 24, 2000, Case No. 2557.

<sup>21</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Notification issued by the Office of the Clerk of the National Chamber of Criminal Cassation on August 24, 2000, Case No. 2557.

## 2. Claudio David Núñez and Lucas Matías Mendoza

68. Claudio David Núñez and Lucas Matías Mendoza were tried jointly by the Juvenile Court for Oral Proceedings No. 1 of the Autonomous City of Buenos Aires.

69. On April 12, 1999, the Court found Claudio David Núñez guilty of five counts of aggravated homicide, eight counts of aggravated robbery in which a firearm was employed, unlawful possession of a military firearm and association to commit crime. He was sentenced to life in prison.<sup>22</sup>

70. In the same ruling, the court found Lucas Matías Mendoza guilty of two counts of aggravated homicide, eight counts of aggravated robbery in which a firearm was employed, association to commit crime, and illegal possession of a military firearm. Lucas David Núñez was sentenced to life in prison.<sup>23</sup> The crimes for which Claudio David Núñez and Lucas Matías Mendoza were convicted occurred when they were 17 and 16 years of age, respectively.

71. Three cassation motions were filed against the conviction handed down by the Juvenile Court for Oral Proceedings No. 1: (a) on behalf of Lucas Matías Mendoza, filed by his private defense attorney;<sup>24</sup> (b) on behalf of Claudio David Núñez, filed by his court-appointed public defender;<sup>25</sup> and (c) on behalf of Lucas Matías Mendoza and Claudio David Núñez, filed by the Juvenile Public Defender's Office.<sup>26</sup>

72. As grounds for her cassation motion the private attorney representing Lucas Matías Mendoza cited the court's erroneous assessment of the facts and the evidence and the fact that some of evidence introduced had been improper.<sup>27</sup> For its part, the Juvenile Public Defender's Office's cassation motion alleged an error in the application of Article 4 of Law 22,278. It argued that under that law, the judge hearing the case has the authority to keep Lucas Matías Mendoza and Claudio David Núñez under observation for a longer period, which would have enabled them to demonstrate whatever progress they had made in their re-socialization, a factor that would then have

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<sup>22</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Judgment in Case No. 833/838/839/851/910/920/937/972/1069. In the specific case of Claudio David Núñez, the Commission notes that he was sentenced to confinement for life. The differences that distinguish it from life imprisonment make it the harsher of the two penalties. Article 24 of the Federal Penal Code captures some of those differences: Imprisonment pending trial shall be computed as follows: for every two days of detention pending trial, one day of confinement; for every day of detention pending trial, one of imprisonment, or two years of disqualification or a fine set by the Court, from \$35 to \$175. The Commission does not have detailed information as to how this regulation was enforced in the case Claudio David Núñez.

<sup>23</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Judgment in Case No. 833/838/839/851/910/920/937/972/1069.

<sup>24</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by attorney Mirta Beatriz López on May 3, 1999, cases Nos. 833/838/839/851/910/920/937/972/1069

<sup>25</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by the court-appointed public defender Nelly Allende on May 3, 1999, cases No. 833/838/839/851/910/920/937/972/1069.

<sup>26</sup> Original petitions filed on behalf of Claudio David Núñez and Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by Juvenile Public Defender María Luz de Fazio on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

<sup>27</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by attorney Mirta Beatriz López on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

to be taken into account in sentencing.<sup>28</sup> The court-appointed public defender representing Claudio David Núñez filed a cassation motion on the grounds that “the ruling handed down did not make a sufficient case for the sentence given to Claudio David Núñez, as it failed to explain why it did not apply Article 4 of Law 22,278 to reduce the sentence.” She alleged further that the evidence taken together was improperly and arbitrarily weighed, and argued that the evidence “is deceptive, insufficient and conflicting [...] the circumstantial evidence upon which the ruling in question relies has not been corroborated by direct evidence; instead, with all of the facts in this case, they have had to resort to “flexible links” (*vasos comunicantes*) that allow them to create a hypothetical relationship implicating the Núñez brothers in the commission of the criminal rampage.”<sup>29</sup>

73. Two constitutionality challenges were filed to challenge the ruling: one<sup>30</sup> filed by the Juvenile Public Defender on behalf of Lucas Matías Mendoza and Claudio David Núñez, and the other filed by the court-appointed public defender representing Claudio David Núñez and on his behalf.<sup>31</sup>

74. In the case of the constitutionality motions, the Juvenile Public Defender argued that sentences of life confinement and imprisonment given to persons who committed crimes when they were still under the age of 18 was a violation of Article 37(a) of the Convention on the Rights of the Child and, by extension, a violation of the National Constitution, which prohibits torture and other cruel, inhuman or degrading treatment in the case of children.<sup>32</sup> The court-appointed defender also used this argument in the constitutionality challenge she filed, stating that sentences of this kind violated similar provisions of other international treaties that Argentina had ratified, such as the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>33</sup>

75. In its May 6, 1999 ruling, the Juvenile Court for Oral Proceedings No. 1 of the Autonomous City of Buenos Aires denied these five motions (the three cassation motions and the two constitutionality challenges). Summarizing, the court ruled as follows:

- (a) In the case of the cassation motion that the Juvenile Public Defender filed, the court deemed that the argument made therein confined itself to questioning the imposition of the sentences; on the substance of the motion, the court held that “the sentences imposed were in strict accordance with the law, inasmuch as the minors had spent

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<sup>28</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by Juvenile Public Defender María Luz de Fazio on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069. Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by Juvenile Public Defender María Luz de Fazio on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

<sup>29</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by the court-appointed public defender Nelly Allende on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

<sup>30</sup> Original petition filed on behalf of Lucas Matías Mendoza received on July 1, 2002. Attachment 2: Court Rulings. Constitutionality challenge filed by the Juvenile Court Public Defender María Luz de Fazio on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

<sup>31</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Constitutionality challenge filed by court-appointed public defender Nelly Allende on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

<sup>32</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Constitutionality challenge filed by the Juvenile Court Public Defender María Luz de Fazio on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

<sup>33</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Constitutionality challenge filed by the court-appointed public defender Nelly Allende on May 3, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

over two years in remedial custodial treatment, and had reached the age of 18, whereupon they had been found criminally culpable; hence, one can hardly contend that the substantive law was wrongly applied.”

- (b) As for the cassation motion that the court-appointed public defender filed, the court ruled that “it raises matters of fact, interpretation and assessment of the evidence, which are all issues that cannot be challenged by means of a cassation motion.” On this point, the court observed that the motion filed is a recitation of “each of the facts debated”, that issues related to the assessment of the evidence are the province of the court hearing the case and cannot be addressed via a cassation motion, and that the ruling is in fact well reasoned and well founded; only the trial court can decide the severity of the sentence.
- (c) As for the cassation motion filed by the attorney representing Lucas Matías Mendoza, the court held that the issues it raised had to do with “question of fact and the weighing of evidence, which were not issues that could be challenged by means of a cassation motion.” As to the Convention on the Rights of the Child, the court wrote that “it is unclear how the petitioner wanted the law applied and how, in her judgment, it was misapplied” [...] “she confuses matters of fact that the cassation motion cannot address, with poorly argued matters of law that are not among the grounds that the law requires.”
- (d) In the case of the constitutionality motions filed, the court held that “the conflict being alleged between the law invoked to impose a sentence of life confinement and imprisonment in the case of the minors Núñez and Mendoza and Article 37(c) of the Convention on the Rights of the Child, which is part of the Constitution, does not exist.” It added that “none of the international treaties invoked describes a sentence of life confinement or imprisonment as “cruel, inhuman and degrading” or expressly prohibits such a sentence –except in the case of minors-.” As for the question raised concerning parole, the court wrote that “parole is more than likely when the time comes, given the generosity of Argentina’s laws [...],” which means that the State is in compliance with the requirement set forth in Article 37(a) of the Convention on the Rights of the Child, inasmuch as the possibility of release on parole is there.<sup>34</sup>

76. The attorney of Lucas Matías Mendoza,<sup>35</sup> the National Public Defender’s Office<sup>36</sup> and the Juvenile Public Defender’s Office<sup>37</sup> filed the corresponding complaint motions with the National Chamber of Criminal Cassation to challenge the denial of the cassation motions.

77. On October 28, 1999, the National Chamber of Criminal Cassation issued three decisions wherein it resolved the following:

- (a) On the first complaint motion: i) to declare the complaint filed by the National Public Defender’s Office in the case (the legal representative for Claudio David Núñez) to be partially admissible; the only part of the motion it

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<sup>34</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Ruling of the Juvenile Court for Criminal Proceedings No. 1, dated May 6, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069. Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Ruling of the Juvenile Court for Criminal Proceedings No. 1, dated May 6, 1999, Cases Nos. 833/838/839/851/910/920/937/972/1069.

<sup>35</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Cassation motion filed by attorney Mirta Beatriz López on May 17, 1999, in cases 833/838/839/851/910/920/937/972/1069.

<sup>36</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Complaint motion filed upon denial of a cassation motion filed by the court-appointed public defender Nelly Allende on May 3, 1999, Cases 833/838/839/851/910/920/937/972/1069.

<sup>37</sup> Original petition filed on behalf of Lucas Matías Mendoza received on July 1, 2002. Attachment 2: Court Rulings. Complaint motion that Juvenile Public Defender María Luz de Fazio filed on May 13, 1999, in response to dismissal of the cassation motion, in cases 833/838/839/851/910/920/937/972/1069.

admitted was the argument claiming a failure to apply Article 4 of Law 22,278 in the sentencing of the adolescents, and ii) to dismiss the rest of the complaint as the National Chamber of Criminal Cassation held that the “grounds outlined by the party filing the complaint motion are a repetition of the arguments that the court already answered in earlier proceedings without the defense offering counter-arguments to refute the court’s arguments,” and that the issues raised “concern the weighing of the evidence – identifications and testimony-; these are not issues that can be challenged via a cassation motion as these matters are up to the trial judge to decide because it is the judge who weighs the evidence [...] the complainant’s grievances only reveal a difference of opinion on issues already litigated and decided.”<sup>38</sup>

- (b) In the case of the second complaint motion, the Chamber held that the cassation and constitutionality motions that the Juvenile Public Defender filed had been “wrongfully denied inasmuch as the trial court overstepped its authority in analyzing whether the motions filed against its own ruling were admissible, and ventured into an assessment of the merits which only this Chamber has the authority to review.” Therefore, it decided to admit those motions.<sup>39</sup>
- (c) On the third complaint motion, to declare that the cassation motion filed by the private defense attorney representing Lucas Matías Mendoza was inadmissible with respect to all issues having to do with the assessment and weighing of the testimony, the identification of persons in custody and other evidence taken by the court *a quo*; however, the complaint motion had to be admitted on the issue of the possible harm resulting from the sentence of life imprisonment, given the provisions of the Convention on the Rights of the Child.<sup>40</sup>

78. In a ruling dated April 4, 2000, the National Chamber of Criminal Cassation ruled on the specific point of the complaint motion filed by the National Public Defender’s Office on behalf of Claudio David Núñez, which it had declared admissible. In the April 4, 2000 ruling, it held that the court *a quo* had in fact complied with the requirements established in Article 4 of Law 22,278. The Court held further that “the ruling being challenged is sufficiently well reasoned and well founded regarding the individualization of the sentence given to Claudio David Núñez”; the court also found that the sentence imposed was entirely proportional to the magnitude and severity of the crimes of which he was convicted.<sup>41</sup>

79. In decisions handed down on April 19, 2000, the National Chamber of Criminal Cassation ruled on the merits of the motions filed by the Juvenile Public Defender and the attorney representing Lucas Matías Mendoza:

- (a) In the case of the cassation and constitutionality motions filed on behalf of Claudio David Núñez and Lucas Matías Mendoza by the Juvenile Public

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<sup>38</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Decision of Section II of the National Chamber of Criminal Cassation on October 28, 1999, Case No. 2209.

<sup>39</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Decision of Section II of the National Chamber of Criminal Cassation on October 28, 1999, Case No 2211.

<sup>40</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Decision of Section II of the National Chamber of Criminal Cassation on October 28, 1999, Case No 2215.

<sup>41</sup> Original petition filed on behalf of Claudio David Núñez received on July 1, 2002. Attachment 2. Court Rulings. Decision of Section II of the National Chamber of Criminal Cassation on April 4, 2000, Case No. 2209.

Defender's Office, the Chamber decided that with respect to the cassation motions, the trial court had complied with the requirements set forth in Article 4 of Law 22,278,<sup>42</sup> and "discarded that they should have received a reduced sentence or been exempt from any penalty (paragraphs two and three of the article in question); the court found no evidence that the decision was in any way arbitrary." As for the constitutionality motion, the court reiterated that under Argentine law, persons sentenced to life imprisonment do have the possibility of parole; hence, a life sentence for a minor is not a violation of Article 37(a) of the Convention on the Rights of the Child.<sup>43</sup>

- (b) In the case of the cassation motion filed by the private defense attorney representing Lucas Matías Mendoza, the Chamber reiterated its established position, which is that a sentence of life imprisonment is not a violation of the Convention on the Rights of the Child inasmuch as Argentine law comports with the requirement set forth in Article 37(a) of that Convention, by providing for the possibility of release on parole.<sup>44</sup>

80. The National Public Defender's Office, representing Claudio David Núñez, filed a special appeal challenging the Chamber's April 19, 2000 ruling, which denied the constitutionality and cassation motions that the Juvenile Public Defender's Office had filed.<sup>45</sup> The National Chamber of Criminal Cassation declared this appeal inadmissible on August 3, 2000.<sup>46</sup> Claudio David Núñez was notified of the decision on September 6 of that year.<sup>47</sup> The National Public Defender filed a complaint motion with the Supreme Court on September 19, 2000, challenging the decision to deny the special appeal.<sup>48</sup> The Supreme Court denied the motion on August 23, 2001, on the grounds that it was filed after the statutory deadline.<sup>49</sup>

81. The attorney representing Lucas Matías Mendoza filed a special appeal to challenge the definitive dismissal of the cassation motion.<sup>50</sup> The National Chamber of Criminal Cassation, in its

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<sup>42</sup> Under Article 4 of Law 22,278, the following conditions must be present in order to impose sentence on a minor: a) the person's criminal culpability –and civil liability if there is any- must be established according to the rules governing procedure- 2) the person concerned must be 18 years of age; 3) the person must have undergone a period of remedial custodial treatment of no less than one year, a period that may be extended if necessary until the person attains his/her majority..

<sup>43</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Ruling of Section II of the National Chamber of Criminal Cassation dated April 19, 2000, Case No. 2211. Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2. Court Rulings. Ruling of Section II of the National Chamber of Criminal Cassation dated April 19, 2000, Case No.2211.

<sup>44</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Ruling of Section II of the National Chamber of Criminal Cassation, dated April 19, 2000, case 2215.

<sup>45</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Special appeal filed by the court appointed public defender Guillermo Lozano on June 15, 2000, Case No. 2211.

<sup>46</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Ruling of Section II of the National Chamber of Criminal Cassation dated August 3, 2000, Case No. 2211.

<sup>47</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Notification Form dated September 6, 2000 and signed by Third Clerk María Cristina Hassan, Assistance Section Office.

<sup>48</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Communication received on September 20, 2000, in which court-appointed public defender Guillermo Lozano notifies the National Chamber of Criminal Cassation that he has filed a special appeal with the Supreme Court of the Nation, case No. 2211.

<sup>49</sup> Original petition filed on behalf of Claudio David Núñez, received on July 1, 2002. Attachment 2: Court Rulings. Federal Supreme Court ruling of August 23, 2001, Case No. 193/00.

<sup>50</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Special federal appeal filed by attorney Mirta Beatriz López on May 10, 2000, case No. 2215.

capacity as the court that decides whether the appeal will go to a higher court,<sup>51</sup> denied this appeal; thereafter, the Supreme Court formally dismissed the appeal on the grounds that the complaint does not refute the arguments given in the decision to deny the special appeal.<sup>52</sup>

### **3. Saúl Cristián Roldán Cajal**

82. On March 8, 2002, the Juvenile Criminal Court of the First Judicial Circuit of Mendoza Province sentenced Saúl Cristián Roldán Cajal to life imprisonment as the “author of the crimes of aggravated homicide, committed concurrently with aggravated robbery.”<sup>53</sup> The crimes for which Saúl Cristián Roldán Cajal was convicted occurred when he had not yet reached the age of 18.

83. The court-appointed defense attorney in the case filed a cassation motion against the ruling, arguing that sufficient weight had not been given to the results of the remedial custodial treatment that Saúl Cristián Roldán had undergone and the progress he had made. The defense counsel argued that the ruling did not offer any valid reasoning on this point and observed that her client should be given the reduced sentence allowed under Article 4 of Law 22,278.<sup>54</sup>

84. By a ruling dated August 5, 2002, the Mendoza Province Supreme Court denied this cassation motion. The court deemed that what the defense was seeking was a review of matters of fact and evidence. Accordingly, the Mendoza Province Supreme Court ruled that “the assessment of the facts and evidence of a case is the exclusive purview of the court *a quo*; it further held that if, when the facts and evidence were assessed, the principles governing correct human understanding were observed, then the ruling cannot be voided in cassation.” It also observed that the allegation of a lack of legal grounds did not hold up. In the paragraphs introducing its findings in the case, the trial court stated the reasons for its decision (...) “The weight that the court *a quo* has assigned to the remedial custodial treatment cannot be challenged via a cassation motion ...”<sup>55</sup>

### **4. Ricardo David Videla Fernández**

85. On November 28, 2002, the Juvenile Criminal Court of the First Judicial Circuit of Mendoza Province sentenced Ricardo David Videla Fernández to imprisonment for life as punishment for the following crimes: two aggravated homicides; five aggravated robberies; one attempt at aggravated robbery; aggravated coercion; possession of a military firearm and unlawful carriage of a civilian firearm. Nine criminal cases were instituted for these crimes.<sup>56</sup> The crimes of which Ricardo David Videla Fernández was convicted took place when he was 17 years nine months old.

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<sup>51</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Decision of Section II of the National Chamber of Criminal Cassation dated June 1, 2000, case No. 2215.

<sup>52</sup> Original petition filed on behalf of Lucas Matías Mendoza, received on July 1, 2002. Attachment 2: Court Rulings. Federal Supreme Court ruling of April 3, 2001, Case 768/00.

<sup>53</sup> Original petition filed on behalf of Saúl Cristián Roldán Cajal, received on August 15, 2003. Attachment 2. Court Rulings. Judgment of the Juvenile Criminal Court of the First Circuit, dated March 8, 2002, case 5/00.

<sup>54</sup> According to the account given in the decision on the cassation motion, dated August 5, 2003. Original petition filed on behalf of Saúl Cristián Roldán Cajal, received on August 5, 2002. Attachment 2. Court Rulings.

<sup>55</sup> Original petition filed on behalf of Saúl Cristián Roldán Cajal, received on August 15, 2003. Attachment 2. Court Rulings. Ruling of the Mendoza Supreme Court, dated August 5, 2002, case No. 73.771.

<sup>56</sup> Criminal case numbers: 109/02, 110/02, 111/02, 112/02, 113/02, 116/02, 117/02, 120/02 and 121/02. Original petition filed on behalf of Ricardo David Videla Fernández, received on December 30, 2003. Attachments. Judgment No. 107 of the Criminal Court of the First Circuit of Mendoza Province, dated November 28, 2002.

86. On December 19, 2002, the private defense attorney representing Ricardo David Videla Fernández filed a cassation motion for each of the joined causes of action, alleging a misapplication of the law in the judgment. Specifically, the violations alleged included a failure to nullify some of the evidence brought to bear in the case, misapplication of the substantive law in determining the classification of the crime for the conduct displayed, the lack of legal reasoning, the illogical reasoning, and the arbitrary nature of the sentence.<sup>57</sup>

87. The Mendoza Province Supreme Court formally dismissed these motions and appeals by a decision of April 24, 2003. As for the arguments made regarding nullity, the Mendoza Province Supreme Court held that:

To vacate a judgment because it is alleged to be based on unlawful or invalid evidence, the complainant must show **clearly and concretely** how that so-called invalid or unlawful evidence had a decisive and essential impact on the decision (emphasis in the original).

(...)

It is not enough to point to an alleged irregularity; instead, the defect must be shown to be determinative in the process. The emphasis must be on how that defect caused the ruling to go against the allegedly vulnerable rights. Another essential requirement is to explain how and why the laws the complainant cites have not been applied and how that error has led to a ruling that is contrary to the complainant's interests.<sup>58</sup>

88. The Mendoza Province Supreme Court had additional observations regarding the other allegations, to the effect that "(...) the complainant has not accepted the basic facts that the lower court established as proven (...); the complaint does not acknowledge matters that the court took as established facts. A corpus of established facts is essential inasmuch as the judicial oversight function that this body is called upon to perform presupposes acceptance of the facts established by judicial assertion (*dictum*).” It also wrote that “the goal is a re-examination of the case from the beginning, which is procedurally not feasible because this special phase is exceptional and narrow in nature.”<sup>59</sup>

89. The attorney who represented Ricardo David Videla Fernández filed a special federal appeal with the Mendoza Province Supreme Court to challenge its decision.<sup>60</sup> This appeal was denied by a ruling of June 25, 2003, when the court held that the grievances presented by the complainant were nothing more than a statement of his disagreement with the court's previous finding on the matter of compliance with the formal requirements for filing the cassation motion.<sup>61</sup> The attorney representing Ricardo Videla then filed a complaint motion with the Supreme Court of the Nation, which was denied in a decision delivered on October 14, 2003.<sup>62</sup>

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<sup>57</sup> Original petition filed on behalf of Ricardo David Videla Fernández and received on December 30, 2003. Attachments. See the successive cassation motions that private defense attorney Fernando Gastón Peñaloza filed on December 19, 2002, cases Nos.: No. 121/02; 116/02; 112/02; 109/02; 110/02; and 117/02.

<sup>58</sup> Original petition filed on behalf of Ricardo David Videla Fernández and received on December 30, 2003. Attachments. Ruling of the Mendoza Supreme Court dated April 24, 2003, Case No. 76,063.

<sup>59</sup> Original petition filed on behalf of Ricardo David Videla Fernández and received on December 30, 2003. Attachments. Ruling of the Mendoza Supreme Court dated April 24, 2003, Case No. 76,063.

<sup>60</sup> Original petition filed on behalf of Ricardo David Videla Fernández and received on December 30, 2003. Attachments. Special federal appeal filed by attorney Fernando Gastón Peñaloza on May 22, 2003, Case No. 76,063.

<sup>61</sup> Original petition filed on behalf of Ricardo David Videla Fernández and received on December 30, 2003. Attachments. Ruling of the Mendoza Supreme Court dated June 25, 2003, Case No. 76,063.

<sup>62</sup> Original petition filed on behalf of Ricardo David Videla Fernández and received on December 30, 2003. Attachments. Ruling of the Mendoza Supreme Court, dated October 14, 2003, Case No. 109 *et al.*



#### **D. Detention conditions at the Mendoza Provincial Penitentiary**

90. Detention conditions at the Mendoza Provincial Penitentiary have been monitored closely by the organs of the inter-American system. The issues addressed in various pronouncements of the Inter-American Court and the Inter-American Commission are the violence inside the prison walls, the fires, fights among inmates, poor security and infrastructure, overcrowding and unhealthy and unsanitary conditions.

91. Between 2000 and 2004 a number of mechanisms were attempted in an effort to improve the situation. Thus, in the year 2000, a petition of *habeas corpus* was filed and decided by the First Examining Court of Mendoza on July 15, 2000. In its decision, that Court established a number of measures that the Mendoza provincial government was to take to relieve the overcrowding and improve the poor hygienic conditions and the health of the inmate population. Thereafter, on November 28, 2002, the Eighth Court of the First Judicial Circuit upheld another petition of *habeas corpus*.<sup>63</sup>

92. Despite these measures and the court orders issued, the situation continued to deteriorate, whereupon the Inter-American Commission decided to request provisional measures of the Inter-American Court. The provisional measures have been in force since November 22, 2004. In the matter of the Mendoza provincial prisons, the Argentine State itself has acknowledged the seriousness of the situation.

93. During the Commission's visit to Argentina between December 13 and 17, 2004, the Commission was able to corroborate how serious the security situation is for the inmates in the Mendoza prisons and the deplorable detention conditions that they endure. The following were among the Commission's principal findings:

- The deplorable security conditions at the Mendoza Provincial Penitentiary breed high rates of inmate violence. During the meeting that preceded the Commission's visit to the Penitentiary's facilities, the new director of the establishment acknowledged that the security system was deficient;
- Because of the poorly controlled security and the overcrowding at both establishments, activities as basic as food distribution or cell assignments cause fights among inmates. According to what the inmates themselves told the Commission, the guards themselves induce the fighting by switching violent inmates from one cellblock to another.
- The overcrowding problem is serious at both prisons visited; this creates a tense climate as the inmates have to fight for everything, from a place to sleep to a little water to drink.
- The cells, aisles and hallways have no artificial lighting and very little natural light gets in. There is no ventilation system, so that the smell of food, excrement and urine is constantly in the air.
- The Commission observed that some of the passageways were partially flooded with wastewater.
- The hygienic conditions are deplorable, since the prison officials themselves pay no heed to the question of cleanliness and do not provide the inmates with the materials they

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<sup>63</sup> I/A Court H.R., Matter of the Mendoza Prisons. Provisional Measures. Order of the Inter-American Court of Human Rights of November 22, 2004.

need to clean. Many inmates have skin diseases or chronic infections because of the environment in which they live.

- The inmates eat their food and see to their physiological needs in the cell itself. They are locked in their cells for some 16 hours a day, with eight hours of "recreation time" during which they are required to leave their cells; if they are being punished, they are forced to remain in their cells.

- The toilet facilities at the Provincial Penitentiary do not work. If not completely destroyed and flooded, there is no water to empty them.

- The inmates use plastic bags to defecate, which accumulate on the floor of the bathroom; they use plastic bottles as urinals and then empty them through windows onto the prison grounds or in the spaces beneath the staircases to the upper floors of the cellblocks, in order to be able to use the bottles again.<sup>64</sup>

94. In the report that the Commission presented to the Court on November 16, 2009, concerning the visit that the Inter-American Commission's Rapporteur for the Rights of Persons Deprived of Their Liberty made in April of that year to the Mendoza Provincial Penitentiary, the IACHR concluded that the insecurity and violence that prompted the request seeking provisional measures persist, so that the protection has to be kept in place. The Commission specifically warned that the seriousness of the situation -a fact that federal authorities and a number of provincial authorities acknowledged- is reflected in the numerous incidents that have occurred in the five years that the provisional measures have been in effect.<sup>65</sup>

#### **E. The death of Ricardo David Videla Fernández**

95. Ricardo David Videla Fernández, age 21 at the time, died at approximately 1:30 p.m. on June 21, 2005, while in Cell No. 17 at Cellblock 11 of the Young Adults Maximum Security Facility at the Mendoza Penitentiary. He was found hanging by his belt, which was attached to a bar on his cell window.<sup>66</sup>

96. Administrative case 7808/01/05/00105/E was opened that same day, titled, "General Security Inspection-Death of David Videla, alias "*El Perro*", in the Provincial Penitentiary," as was judicial inquiry 46824 under Investigative Prosecution Office No. 1 of the Mendoza City Prosecution Unit.<sup>67</sup>

97. In the judicial investigation, statements were taken from inmates, guards and other prison personnel in charge of the inmates, as well as the medical and cleaning staff. The record shows that Ricardo David Videla had been prescribed medication for a psychiatric condition back on June 3, 2005.<sup>68</sup> The statements also indicate that he had planned his suicide beforehand and on the day he died had told guards on several different occasions that he was going to kill himself. The statement taken from Ariel Gustavo Maccacaro Calderón reads as follows:

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<sup>64</sup> First special report filed with the Inter-American Court in the context of the provisional measures granted on behalf of the inmates in the Mendoza prisons. April 6, 2005.

<sup>65</sup> Second special report filed with the Inter-American Court in the context of the provisional measures granted on behalf of the inmates in the Mendoza prisons. November 16, 2009.

<sup>66</sup> The State's brief of June 23, 2005 and the petitioners' brief received August 3, 2009.

<sup>67</sup> By note 459, dated October 21, 2009, the State provided copies of administrative case 7808/01/05/00105/E and court case 46824/05.

<sup>68</sup> According to the informative note that Dr. Fernando Pizarro sent to the Administrative Head of the Mendoza Provincial Penitentiary, dated June 24, 2005, and presented to the Prosecutor investigating the matter.

This morning, we removed Videla Fernández Ricardo from his cell [...] that morning it was discovered that the bars on the window –the one to the side of the cell door- had been cut off, as if he was getting it ready since last night for an escape.

[...] I approached Videla's cell and saw him with his belt around his neck, standing on a kind of stool up against the wall; he was standing and held himself upright by holding onto the belt that was around his neck [...] He said to me "I'm going to hang myself today, because I can't stand it here any longer."<sup>69</sup>

98. Statements were also taken from the inmates in the adjoining cells, who were either inside or outside their cells at the time. Specifically, inmate Pedro de Jesús Zenteno Rojas said the following:

They cut the noose and instead of grabbing him they let him drop to the floor and he hit the toilet.

[...] Videla had already told officer Alvea that if he didn't let him speak with officer Fattori, he was going to hang himself [...] And Alvea replied that if he hung himself he was going to get legal measures on him" (...) <sup>70</sup>.

99. In his statement, inmate Jonathan Matías Díaz Díaz said that

"Then Videla told him [Officer Alvea Gutiérrez] to call officer Fattori.... That if Alvea didn't do it, then he [Videla] was going to hang himself. Alvea told him to go ahead and hang himself, because he wasn't going to call Fattori."<sup>71</sup>

100. Inmate Jonathan Gustavo Alfredo Moyano Sandoval said the following:

"Videla told him [officer Alvea Gutiérrez] to bring him some blankets or to bring him his belongings, because if he didn't he was going to hang himself; he told him to get officer Factory, too [...] Officer Alvea told him that if he wanted to hang himself, then go right ahead; then he let him know that he was going to handcuff him."<sup>72</sup>

101. In his statement, Officer Enrique Fernando Alvea Gutiérrez, a member of the penitentiary staff, told judicial authorities that

The inmate told me that he was going to cut himself up. I told him, 'what's the point; the doctor will be here right away and just patch you up; like always, he'll order that you be locked up for twenty-four hours.'<sup>73</sup>

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<sup>69</sup> Statement that Ariel Gustavo Macaccaro Calderón, a member of the prison staff, made at 3:50 p.m. on June 21, 2005, to the investigating Prosecutor in court case 46824/05. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>70</sup> Statement that Pedro de Jesús Zenteno Rojas, an inmate at the Mendoza Penitentiary, gave at 8:23 p.m. on June 21, 2005, in the presence of the investigating Prosecutor in court case 46824/05. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>71</sup> Statement that inmate Jonathan Matías Díaz Díaz gave at 11:30 a.m. on June 2, 2005 in the presence of the investigating Prosecutor in court case 46824/05. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>72</sup> Statement that inmate Jonathan Gustavo Alfredo Moyano Sandoval gave at 11:00 a.m. on July 4, 2005 in the presence of the investigating Prosecutor in court case 46824/05. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>73</sup> Statement that Enrique Fernando Alvea, prison staff member, gave at 9:04 p.m. on June 21, 2005, in the presence of the investigating Prosecutor in court case 46824/05. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

102. The record of the fact-finding inquiry contains a petition of *habeas corpus* written by hand and dated May 2, 2005, in which Ricardo David Videla informs the Judge of the First Circumscription on Juvenile Justice that he was being repeatedly threatened by prison staff and that they were engaging in "psychological persecution". In the petition he asked to be transferred to the San Rafael Jail.<sup>74</sup> There is nothing in the Commission's case file to suggest that any action was taken on this brief.

103. Officials from the Prison Policy Monitoring Commission visited the Mendoza Penitentiary in June 2005. On August 18, 2005, Mr. Pablo Ricardo Flores made the following statement about that visit, which is part of the court record in case 46824/05. He observed that

Inmate Videla's psychological state had markedly deteriorated [...] He was in tears. I recall that when we opened the cell, he began shielding his face from the light that came in; he was slow to get to his feet [...] He said that the hours spent locked in his cell were killing him.<sup>75</sup>

104. The report on the June 13, 2005 visit to the Mendoza Penitentiary, prepared by Dr. Claudia Cesaroni, a member of the Prison Policy Monitoring Commission of Argentina's Secretariat for Human Rights, stated the following about Ricardo David Videla Fernández: "When we saw him in the morning, he was in terrible shape; he was in Cellblock 2 for disciplinary reasons [...] That afternoon, he had already been put back in Maximum Security Section 11, where conditions are so poor that incarceration there is tantamount to another kind of punishment."<sup>76</sup> The information compiled was verbally reported to the Director of the Mendoza Penitentiary Service and to the Deputy Secretary for Justice, on the day following the visit.<sup>77</sup>

105. On June 6, 2006, the Examining Prosecutor determined that the evidence showed that "inmate Videla Fernández died by his own hand," that "no third parties were involved when the hanging occurred" and that "Ricardo Videla Fernández' death was a suicide." He also stated that "in the view of this Public Prosecutor's Office, none of the circumstances surrounding this event suggests that this was a case of criminal neglect." "[...] Therefore and inasmuch as the factors that must be present for an event to constitute criminal neglect (Article 106 of the CPP<sup>78</sup>) or any other publicly actionable crime are not present, the present proceedings are hereby closed pursuant to Article 346, as the event under investigation does not constitute a crime."<sup>79</sup>

106. On June 14, 2006, the next of kin of Ricardo Videla Fernández filed their objection to the closing of the proceedings. The judge of the Fourth Court of Guarantees was assigned to the case and on July 24, 2006, denied the petitioners' request. He ordered the case closed after concluding that "this case cannot be decided on the basis of statements made by inmates, given the

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<sup>74</sup> Petition of *habeas corpus*, undated and signed by Ricardo David Videla. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>75</sup> Statement that Pablo Ricardo Flores, teacher, gave at 9:25 a.m. on August 18, 2005, in the presence of the investigating Prosecutor in court case 46824/05. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>76</sup> Report on the visit that the Prison Policy Monitoring Commission made to the Mendoza Penitentiary in June 2005. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>77</sup> Visit to the Mendoza Penitentiary, Report prepared by Claudia Cesaroni, dated June 15, 2005. Statement that Claudia Cesaroni give on August 19, 2005, in the presence of the investigating Prosecutor. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>78</sup> Code of Criminal Procedure.

<sup>79</sup> June 6, 2006 decision to close case 46824/05. The State's brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

natural aversion they may have to the person and function of the prison staff. Thus and as already observed, the facts compiled make it impossible to attach any criminal blame to the accused prison personnel for any action that, one might claim, either came too late or constituted negligence and the like; there was certainly nothing that could qualify as a crime.”<sup>80</sup>

107. On July 31, 2006, the next of kin of the alleged victim appealed that decision, alleging that the court’s analysis of the facts was biased, that the evidence used to weigh the merits of the case was selected arbitrarily, and that the court’s finding was incorrect.<sup>81</sup> In their subsequent brief, titled “Appeal Report”, they alleged, *inter alia*, that the decision being appealed had done nothing more than legitimize the conduct of the prison personnel charged with protecting Ricardo Videla’s life, despite the fact that the prison guards were criminally liable for failing to act on their duty to provide proper assistance; Videla had warned them of the measure that he would take, which finally happened. They alleged that “sufficient elements were still present to move forward with the investigation into what transpired,” and asked that the order to close case 46824/05 be revoked.<sup>82</sup>

108. The appeal was decided by Mendoza Province’s Second Criminal Chamber, in a ruling delivered on September 25, 2006. In its decision, the court held that the court *a quo* had issued a duly reasoned decision, based on proper legal grounds, in which all the elements of the case were considered. It was, in the court’s view, a well reasoned decision in which the rules and principles governing the weighing of evidence were observed. It therefore denied the appeal filed and confirmed the lower court’s decision to order the case closed.<sup>83</sup>

109. The record for administrative case 7808/01/05/00105/E, titled “General Security Inspection-Death of David Videla, alias ‘El Perro’, in the Provincial Penitentiary,” shows that on June 21, 2005, the head of the Mendoza Penitentiary Security Center, Franco Fattori, told the deputy director of the San Felipe Complex about the events that had occurred in connection with young Videla’s death.<sup>84</sup> The record also shows that on June 23, 2005, Dr. Fernando Pizarro, Administrative Chief of the Health Division, sent a note to the Director of the Mendoza Provincial Penitentiary in which he reported that Dr. Parente, the physician in charge of maximum-security Cellblock 11, had told him that the situation in the unit was “serious”, as a number of inmates had said that they wanted to commit suicide, either by hanging or by other means.” Dr. Pizarro added that the 21-hour lockup system might be causing the inmates severe anxiety. He therefore asked the director to find an urgent solution to the problem.<sup>85</sup>

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<sup>80</sup> July 2, 2006 decision of Judge Manuel Cruz Videla, Judge of the Fourth Court of Guarantees of Mendoza. The State’s brief received on October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached, Attachment 3.

<sup>81</sup> Appeal that Dr. Fernando Gastón Peñaloza, legal representative of young Videla’s next of kin, filed on July 31, 2006. The State’s brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached

<sup>82</sup> Brief that Dr. Fernando Gastón Peñaloza, legal representative of young Videla’s next of kin, filed on September 8, 2006, with the Mendoza Province Second Criminal Chamber “Appeal Report. Objection Formula.” The State’s brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>83</sup> Appeal decision of the Mendoza Second Criminal Chamber, dated September 25, 2006. Appeal that Dr. Fernando Gastón Peñaloza, legal representative of young Videla’s next of kin, filed on July 31, 2006. The State’s brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>84</sup> Informative note “Subject: I/suicide. Inmate: Videla González Ricardo,” dated June 21, 2005, signed by the head of the Mendoza Penitentiary Security Center, Franco Fattori.

<sup>85</sup> Internal memorandum 291, dated June 23, 2005, from Dr. Fernando Pizarro, Administrative Chief of the Prison’s Health Division.

110. On June 30, 2005, the Director of General Security Inspection of the Ministry of Justice and Security ordered a summary fact-finding investigation. On November 21, deputy prefect Héctor Roberto Arango received the records in the administrative case file and ordered the pertinent evidence.

111. By a memorandum dated January 5, 2006, the Prosecutor with the Departmental Capital Prosecution Unit was asked to provide a copy of the records in 46824/05; on March 28, 2006, he was asked to report whether the judicial inquiries had implicated any members of the penitentiary staff;<sup>86</sup> the response came by way of a note dated April 5, 2006, in which it is reported that no member of the prison staff was formally charged with wrongdoing.<sup>87</sup>

112. On May 16, 2006, prison officer Fernando Enrique Alvea Gutiérrez made his statement in the preliminary fact-finding phase of case 7808-I-05, in the presence of the Office of the Inspector General for Security of Mendoza Province. His statement was the same as the statement he made in the judicial inquiry.<sup>88</sup> On May 17, 2006, the investigating authority in case 7808-I-05 requested that “the present proceedings be closed without further action, pursuant to Article 346 of the CPP (Code of Criminal Procedures), of secondary application in this case, inasmuch as the evidence compiled does not suggest that any member of the prison staff has incurred administrative culpability; closing the proceedings does not bar further review and they could be reopened if any member of the prison staff was convicted.” The investigating authority had determined that “*prima facie*, no member of the prison staff would appear to be involved, as inmate Videla had allegedly previously stated his intention to hang himself, which in the end he did [...].”<sup>89</sup>

#### **F. Lucas Matías Mendoza’s loss of sight**

113. Lucas Matías Mendoza suffered a detached retina as a result of a blow to his left eye in 1997, when he was being held in the Luis Agote juvenile detention center. That same year, and while still in the custody of the State, he was diagnosed as having toxoplasmosis in the right eye. He was subsequently examined at Hospital Durán and Hospital Santa Lucía, where they reported that the left eye was inoperable.<sup>90</sup>

114. The State did not provide any information on what medical follow-up or treatment Lucas Matías Mendoza received as a result of that diagnosis. The information available indicates that on October 31, 2005, at the request of defense counsel for Lucas Matías Mendoza, the Forensic Corps of the National Court System sent a report on his health condition to National Court for Sentence Enforcement No. 2. The report reads as follows:

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<sup>86</sup> Communications, dated January 5 and March 28, 2006, which the Office of Inspector General of Security of the Ministry of Justice and Security sent to the Prosecutor with the Mendoza Capital Prosecution Unit. Appeal that Dr. Fernando Gastón Peñaloza, legal representative of young Videla’s next of kin, filed on July 31, 2006. The State’s brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>87</sup> April 5, 2006 note signed by Dr. María Virginia Rumbo, Pro-Secretary of the Mendoza Capital Prosecution Unit. Appeal that Dr. Fernando Gastón Peñaloza, legal representative of young Videla’s next of kin, filed on July 31, 2006. The State’s brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>88</sup> Statement by prison officer Fernando Enrique Alvea Gutiérrez. Appeal that Dr. Fernando Gastón Peñaloza, legal representative of young Videla’s next of kin, filed on July 31, 2006. The State’s brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>89</sup> Findings. Case 7808-I-05. May 17, 2006. Appeal that Dr. Fernando Gastón Peñaloza, legal representative of young Videla’s next of kin, filed on July 31, 2006. The State’s brief of October 29, 2009, with a copy of the proceedings conducted into the death of Ricardo David Videla Fernández attached.

<sup>90</sup> October 28, 2005 report prepared by Dr. Roberto N. Borrone, ophthalmologist with the Forensic Medical Corps of the National Court System. The petitioners’ brief, received on November 29, 2005. Attachments.

The ocular apparatus in the left eye has a cataract; the pressure in that eye is noticeably elevated (30 mmHg)  
Ocular fundus: macular choro retinitis, likely from toxoplasmosis  
Left eye: appears to be a detached retina  
Visual acuity: loss of bilateral sight.

115. On November 14, 2005, the National Public Defender's Office asked the Ministry of Justice and Human Rights of the Nation to commute the sentence of Lucas Matías Mendoza, in consideration of his ophthalmological problem.<sup>91</sup>

116. On December 5, 2005 the Secretary for Human Rights appeared before the Sentence Enforcement Judge charged with Lucas Matías Mendoza's case, stating that he would be in favor of house arrest for the young man, given his state of health and the "severity of the disability that he is now suffering."<sup>92</sup> By a decision dated April 19, 2006, Sentence Enforcement Judge No. 2 decided not to grant the requested commutation of sentence and ordered that Lucas Matías Mendoza be transferred to Federal Penitentiary Complex No. 19, which is a medium-security facility.<sup>93</sup>

#### **G. Injuries sustained by Lucas Matías Mendoza and Claudio David Núñez**

117. On December 9, 2007, Lucas Matías Mendoza and Claudio David Núñez sustained injuries while being held in Federal Penitentiary Complex No. 1.

118. The State supplied the Commission with the disciplinary report that the Service Inspector prepared concerning Federal Penitentiary Complex No. 1, in which he states that on the night of December 9, 2007, a fight broke out between Lucas Matías Mendoza and Claudio David Núñez and two other inmates. The State asserts that prison officers reportedly intervened, separated them and, for safety reasons, temporarily housed them in Module II's temporary holdings cells. Later, the doctor on duty reportedly checked them out and put them back into their respective individual cells.<sup>94</sup>

119. Among the documents provided by the State is a report prepared by the in-house physician at Ezeiza Federal Penitentiary Complex No. 1, dated December 10, 2007. There he writes that Claudio David Núñez had bruising on the right side of his lower back, on the right kneecap, and the front of the left leg. It also states that Lucas Matías Mendoza had bruising in the lower back region, and a sutured scalp laceration.<sup>95</sup>

120. On December 12, 2007, another physician from the Medical Aid Service at Federal Penitentiary Complex No. 1 examined Claudio David Núñez and Lucas Matías Mendoza. The former presented with redness to the skin and scabbing in the naval area, two lesions with similar characteristics on the right knee, abrasions on the right iliac crest, abrasions on the left thigh and

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<sup>91</sup> The National Public Defender's Office cited Article 99 of the Constitution as the grounds for its request: "The President of the Nation shall have the following authorities: 5) To pardon or commute sentences for crimes under federal jurisdiction, following a report from the corresponding court, except in the cases of impeachment by the Chamber of Deputies." The petitioners' brief, received on November 29, 2005. Attachments.

<sup>93</sup> The State's brief, Note OEA 31 dated January 2, 2008. Attachments.

<sup>94</sup> The petitioners' brief, received on January 2, 2008. Attachment. Report prepared by the Service Inspector on December 9, 2007.

<sup>95</sup> The petitioners' brief, received on January 2, 2008. Attachment. Medical report prepared on December 10, 2007, by Dr. Esteban Blasi, Staff Physician with the Medical Aid Service at Ezeiza Federal Penitentiary Complex No. 1.

forearm, and a laceration on the right side of the scalp that was in the process of healing.<sup>96</sup> In the latter's case, the physician observed that he had a sutured laceration and bruising on the scalp, abrasions on the left scapular region that were healing, and hematoma on the soles of both feet.<sup>97</sup>

121. That same day, December 12, 2007, representatives from the Office of the Attorney for the National Prison System came to the penitentiary. Among them was a forensic physician with the National Prison System who, *in situ*, performed medical examinations on the two inmates. He found lesions on Claudio David Núñez, consisting of an irregularly shaped ecchymosis on the right scapular region, multiple abrasions on the left forearm, ecchymosis in the upper right naval region; a hematoma of irregular shape with diffuse borders on the right thigh; abrasions on the left kneecap; a hematoma of irregular shape and with diffuse edges near the fifth metatarsal bone.<sup>98</sup> As for Lucas Matías Mendoza, the physician found the following: a wound to the scalp; hematoma along the cervical column; multiple abrasions in the right scapular region; hematoma in the left scapular region; linear ecchymosis across the scapular region and hematoma on the mid soles of both feet.<sup>99</sup>

122. On December 13, 2007, a delegation from the Prisons Commission from the National Public Defender's Office visited the prison and interviewed both inmates. In his statement, Lucas Matías Mendoza asserted that a group of four prison security guards beat him as they dragged him from his cell. They took him elsewhere where they reportedly hit him with a truncheon more than 20 times on the soles of his feet. He contends that he was then taken to another place, where he was asked to stand up and walk. He was unable to do so because of the blows to his feet, whereupon the guards reportedly threw him to the floor and began beating the soles of his feet again.<sup>100</sup> In his statement, Claudio David Núñez described a similar pattern, saying that he had been struck multiple times on the soles of his feet.<sup>101</sup>

123. On December 13, 2007, both inmates were examined by a forensic physician with the National Court System, at the behest of National Sentence Enforcement Judge No. 2. In his report, the forensic physician stated that Claudio David Núñez had: a small abrasion on the right scapular region, a small abrasion in the naval area, a small abrasion on the right kneecap and a small abrasion midway up the side of the left thigh. Lucas Matías Mendoza had a sutured cut, with three stitches, on the scalp, a small abrasion on the left scapular region, an abrasion on his right knee, and hematomas on the soles of both feet. In both cases, his conclusion was that the injuries would not incapacitate them for more than a month.<sup>102</sup>

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<sup>96</sup> The State's brief, received on February 15, 2008. Attachment. Medical report on Claudio David Núñez, prepared on December 12, 2007 by Dr. Héctor Rossini, Chief of the Medical Aid Service at Ezeiza Federal Penitentiary Complex No. 1.

<sup>97</sup> The State's brief, received on February 15, 2008. Attachment. Medical report on Lucas Matías Mendoza, prepared on December 12, 2007 by Dr. Héctor Rossini, Chief of the Medical Aid Service at Ezeiza Federal Penitentiary Complex No. 1.

<sup>98</sup> The petitioners' brief, received on June 9, 2008. Attachment. Report on Claudio David Núñez, prepared on December 12, 2007 by Dr. Jorge José Tejeiro, Forensic Medical Advisor with the Office of the Attorney for the National Prison System.

<sup>99</sup> The petitioners' brief, received on June 9, 2008. Attachment. Report on Lucas Matías Mendoza, prepared on December 12, 2007 by Dr. Jorge José Tejeiro, Forensic Medical Advisor with the Office of the Attorney for the National Prison System.

<sup>100</sup> The petitioners' brief, received on January 2, 2008. Attachment. Record of the interview that the delegation from the Prisons Commission of the National Public Defender's Office had with Lucas Matías Mendoza on December 13, 2007.

<sup>101</sup> The petitioners' brief, received on January 2, 2008. Attachment. Record of the interview that the delegation from the Prisons Commission of the National Public Defender's Office had with Claudio David Núñez on December 13, 2007.

<sup>102</sup> The petitioners' brief, received on January 2, 2008. Attachment. Opinions prepared by Dr. Héctor Nicolás Papagni, Forensic Physician with the National Court System, April 13, 2007.



124. On December 17, 2007, Claudio David Núñez and Lucas Matías Mendoza made a statement to Sentence Enforcement Court No. 2. The former stated for the record that “on last December 9, he was subjected to unlawful duress. He states that he does not wish to elaborate because .he fears for his physical safety,”<sup>103</sup> Lucas Matías Mendoza made exactly the same statement.<sup>104</sup>

125. On December 27, 2007, both inmates were examined for a third time by the medical staff of Federal Penitentiary Complex No. 1. According to these medical reports, Lucas Matías Mendoza had a sutured laceration and bruising on his scalp, a scabbed abrasion in the left scapular region, and hematomas on the soles of both feet. For his part, Claudio David Núñez presented with redness and scabbing in the naval area, an abrasion on the right iliac crest, and an abrasion on the left thigh and forearm.<sup>105</sup>

126. As for the investigations instituted into the events of December 9, 2007, two criminal proceedings were pursued in Lomas de Zamora Federal Criminal and Correctional Court No. 2: case No. 615, into the force used against Lucas Matías Mendoza; and case No. 616, into the force used against Claudio David Núñez. On June 23, 2008, in case No. 615, the prosecutor requested that the case be closed since, in his view, there were no “investigative leads” to follow to prove the facts being claimed, given the victim’s alleged unwillingness or inability to identify his assailants.<sup>106</sup> Then, on July 2, 2008, the judge decided to close the case without prejudice.<sup>107</sup> On February 1, 2008, the prosecutor in case No. 616, where the allegations were essentially the same, requested that the case be closed.<sup>108</sup> The court ordered the case closed without prejudice on February 29, 2008.<sup>109</sup>

## **V. THE LAW**

127. The Inter-American Commission will examine the legal consequences of all the proven facts in the following order: i) The sentences of prison time and life imprisonment; ii) The right to appeal a judgment; iii) The right of defense; iv) The detention conditions at the Mendoza Provincial Penitentiary and the transfers; v) The death of Ricardo David Videla Fernández; vi) Lucas Matías Mendoza’s loss of vision; vii) The injuries sustained by Claudio David Núñez and Lucas Matías Mendoza; and viii) The right to humane treatment of the next of kin.

### **A. The rights of the child, the right to humane treatment, and the right to personal liberty (articles 19, 5, and 7 of the American Convention, in relation to articles 1(1)**

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<sup>103</sup> The State’s brief, Note OEA 31, of January 2, 2008. Attachment. Statement that Claudio David Núñez made before Sentence Enforcement Court No. 2, December 17, 2007.

<sup>104</sup> The State’s brief, Note OEA 31, of January 2, 2008. Attachment. Statement that Lucas Matías Mendoza made before Sentence Enforcement Court No. 2, December 17, 2007.

<sup>105</sup> The State’s brief, received on February 15, 2008. Attachment. Medical report prepared by Dr. Cristian Setevich of the Medical Aid Section, December 27, 2007.

<sup>106</sup> The petitioners’ brief, received on July 10, 2009. Attachment. Request that the Office of Federal Prosecutor No. 2 filed on June 23, 2008, asking that proceedings in case 615 be closed. Order to close case, issued by Federal Criminal and Correctional Court No. 2

<sup>107</sup> The petitioners’ brief, received on July 10, 2009. Attachment. Order to close the case, issued by Federal Criminal and Correctional Court No. 2 on July 2, 2008.

<sup>108</sup> The petitioners’ brief, received on July 10, 2009. Attachment. Request that the Office of Federal Prosecutor No. 2 filed on February 1, 2008, asking that proceedings in case 616 be closed.

<sup>109</sup> The petitioners’ brief, received on July 10, 2009. Attachment. Order to close the case, issued by Federal Criminal and Correctional Court No. 2 on February 29, 2008.

**and 2 thereof), with respect to the sentences of life imprisonment and confinement for life**

128. Article 19 of the American Convention provides that:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

129. Article 5 of the American Convention reads as follows:

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.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.

130. Article 7(3) of the Convention provides that:

No one shall be subject to arbitrary arrest or imprisonment.

131. Under Article 1(1) of the American Convention,

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.

132. Article 2 of the American Convention reads as follows:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

133. The Commission will examine the petitioners' allegations regarding enforcement of the sentences of life imprisonment and confinement for life, in the following order: i) General questions regarding the rights recognized in articles 19 and 5(6) of the American Convention; ii) international standards on juvenile criminal justice and the sentence of imprisonment for life; iii) an analysis to determine whether the criminal justice system, as applied to actual cases, had established rules and regulations for cases where the defendants were children and adolescents that were different from the rules and regulations applied in cases involving adults; iv) an examination of the principles on deprivation of liberty as a measure of "last resort" and "for as short a time as possible" given the facts of the case; v) an analysis to determine whether the possibility of release on parole, as contemplated in Argentine law, meets the periodic review requirement; vi) an analysis to determine whether the sentences imposed upon the alleged victims constituted an arbitrary deprivation of liberty and cruel and inhumane treatment; vii) examination of whether the penalties imposed on the alleged victims constituted cruel, inhuman and degrading punishment, and viii) conclusion.

1. **General questions regarding the rights recognized in articles 19 and 5(6) of the American Convention**

134. Under Article 19 of the American Convention, States have a duty to maintain an especially high standard when it comes to guaranteeing and protecting the human rights of the child. In a society that claims to practice social justice and human rights, one of the most fundamental values is respect for the rights of the child.<sup>110</sup>

135. According to the case law of the Court, Article 19 of the American Convention must be construed as an added right which the Convention establishes for those who, because of their physical and emotional development, require special protection.<sup>111</sup> Children, therefore, are the *titulaires* of the same human rights that all persons enjoy; however, they are also the *titulaires* of special rights resulting from their condition, and are entitled to the protections that are the specific duty of the family, society and the State. In other words, children are entitled to special measures of protection.<sup>112</sup>

136. In the final analysis the rights of the child must be protected because the child is a human being and because of his or her special condition as a child, which is why special measures of protection must be adopted. This added obligation of protection<sup>113</sup> and the special duties that attend it must be determined according to the particular needs of the child as a subject of law.<sup>114</sup>

137. As for the interpretation of Article 19 of the American Convention, the Inter-American Court has written that: "Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention."<sup>115</sup>

138. The Inter-American Commission, for its part, has written that:

For an interpretation of a State's obligations vis-à-vis minors, in addition to the provision of the American Convention, the Commission considers it important to refer to other international instruments that contain even more specific rules regarding the protection of children. Those instruments include the Convention on the Rights of the Child and the various United Nations declarations on the subject. This combination of the regional and universal human rights systems for purposes of interpreting the Convention is based on Article 29 of

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<sup>110</sup> IACHR, Report No. 33/04, Case 11.634, Merits, Jailton Neri Fonseca (Brazil), March 11, 2004, para. 80.

<sup>111</sup> I/A Court H.R., *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 106; *Case of Baldeón García*, Judgment of April 6, 2005. Series C No. 147, para. 244; *Case of the Mampiripán Massacre*, Judgment of September 15, 2005. Series C No. 134, para. 152; and, most especially, *Case of the "Juvenile Reeducation Institute."* Judgment of September 2, 2004. Series C No. 112, para. 147, and *Case of Servellón García et al.* Judgment of September 21, 2006, para. 113.

<sup>112</sup> Advisory Opinion OC-17/2002, para. 62:

"Adoption of special measures to protect children is a responsibility both of the State and of the family, community, and society to which they belong."

<sup>113</sup> I/A Court H.R., *Case of the "Juvenile Reeducation Institute,"* para. 160; *Case of the Gómez Paquiyauri Brothers*, paragraphs 124, 163-164, and 171; *Case of Bulacio*, paragraphs 126 and 134; and *Case of the "Street Children" (Villagrán Morales et al.)*, paragraphs 146 and 191; and *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005, para. 172. See also Advisory Opinion OC-17/02, paragraphs 56 and 60.

<sup>114</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006, para. 154.

<sup>115</sup> I/A Court H.R., *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Judgment of November 19, 1999. Series C No. 63, para. 194. I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 24; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*, Judgment of July 8, 2004. Series C No. 110, para. 166.

the American Convention and on the consistent practice of the Court and of the Commission in this sphere.<sup>116</sup>

139. The preamble to the Convention on the Rights of the Child incorporates the principle of the special needs of protection in the following terms: "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, (...)'. Article 3 of that Convention provides that in all realms in which the State intervenes, the paramount consideration shall be the best interests of the child. In the words of the Convention on the Rights of the Child, "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (...)"

140. Article 5(6) of the American Convention, a provision that has its own meaning and relevance, makes reform and social re-adaptation of the prisoner the driving principle for enforcement of sentences involving deprivation of liberty. While it does not deter States from legislating other legitimate ends that sentences of incarceration might pursue, Article 5(6) sets out the fundamental objective that such sentences are to serve so that they are compatible with the right that those deprived of liberty have to humane treatment. The fundamental goal is to prepare them to rejoin society, which means that sentences of incarceration must focus on ensuring that persons sentenced to prison are willing and able to conduct themselves as law-abiding members of society. As the Inter-American Commission observed, the priorities of the public policies that the member states of the region put into practice for citizen security should be measures to prevent violence and crime, which should include individualized measures and programs directed at persons who are serving a prison sentence.<sup>117</sup>

141. Similarly, the United Nations Standard Minimum Rules for the Treatment of Prisoners provide that:

The purpose and justification of a sentence of imprisonment or a similar measure that deprives one of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life (Rule 58).

To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners. (Rule 59).

142. For their part, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas are based on the concept that "punishments consisting of deprivation of liberty shall have as an essential aim the reform, social re-adaptation and personal rehabilitation of those convicted; their reintegration into society and family life; as well as the protection of both the victims and society."<sup>118</sup>

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<sup>116</sup> IACHR, Report No. 41/99, Case 11,491, Merits, Minors in Detention (Honduras), March 10, 1999, para. 72.

<sup>117</sup> IACHR, Report on Citizen Security and Human Rights, approved December 31, 2009, para. 155. This report goes on to observe that: "The obligations that the member states have undertaken vis-à-vis the human rights directly at stake in public policies on citizen security make it incumbent upon them to design and put into practice programs to bring their codes of criminal procedure, infrastructure, and the human and material resources assigned to the prison system to a level that guarantees that sentences delivered by courts of law are served under conditions that strictly conform to international standards in this area." (Para. 157).

<sup>118</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the IACHR at its 131st Session, March 3 to 14, 2008. Preamble.



## 2. International standards on juvenile criminal justice and the sentence of life imprisonment

143. Given that there is an international *corpus juris* on the subject of the rights of children and adolescents, some discussion is warranted of the Convention on the Rights of the Child<sup>119</sup> and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”) as they will be useful in determining what the scope and content of the State’s obligations in this case are under Article 19 of the American Convention.

144. As for the Convention on the Rights of the Child, the Commission would highlight the following provisions:

Article 37:

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) (...). The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Article 40:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

(...)

145. As for the guidelines and basic principles that must steer the exercise of criminal action in cases involving adolescents, the Inter-American Commission, following the standards established by the *corpus juris* and described earlier, has observed that there is a clear tendency in international human rights law to afford greater protection to minors than to adults and to limit the role of *jus puniendi*.<sup>120</sup> In general terms, international human rights law favors reserving those penalties that most severely restrict a minor's fundamental rights for only the severest of crimes. Hence, even in the case of criminalized offenses, laws protecting the child must advocate some form of punishment other than imprisonment or deprivation of liberty.<sup>121</sup>

146. In those cases in which adolescents have been found criminally culpable for serious crimes that carry sentences of imprisonment, the State’s exercise of the *jus puniendi* must be informed by the principle of the best interests of the child. This is the sense of Article 3 of the Convention on the Rights of the Child, cited in the previous section. A policy on crime that, in the case of juvenile offenders, is driven mainly by a retributive justice aimed at establishing culpability and that pays lip service to such basic considerations as prevention and cultivation of opportunity to prepare the youth offender to effectively rejoin society (restorative justice) would be incompatible with international standards on juvenile criminal justice.

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<sup>119</sup> Treaty ratified by Argentina on December 4, 1990.

<sup>120</sup> IACHR, Report No. 41/99, Case 11.491, Merits, Minors in Detention (Honduras), March 10, 1999, para. 113.

<sup>121</sup> IACHR, Report No. 41/99, Case 11.491, Merits, Minors in Detention (Honduras), March 10, 1999, para. 117.

147. Here the Inter-American Commission has written that particular obligations follow from Article 19 of the American Convention and Article VII of the American Declaration of the Rights and Duties of Man, which are to ensure the wellbeing of juvenile offenders and endeavor to rehabilitate them.<sup>122</sup> Similarly, the Inter-American Court has held that when the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to allow them to play a constructive and productive role in society.<sup>123</sup>

148. As for the manner in which these penalties should be applied, the Beijing Rules provide that “Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum” (Rule 17.1.b). Thus, even in the case of serious crimes that carry substantial penalties, the law must offer the judge the means to apply these penalties so that they are in the best interests of the child. In other words, “The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society” (Rule 17.1.a).

149. The premise of these standards is that in the case of children and adolescents, the State’s exercise of its punitive authority must be in strict accordance with its international obligations in the area of human rights and must have particular regard for the special condition of children and adolescents and their special needs of protection. This applies both to the determination of criminal culpability and the enforcement of the consequences that such culpability carries.

150. In previous cases, the Commission made reference to the fact that the State’s punitive response must be different when the crimes are committed by persons under the age of 18; precisely because of the particular situation of children and adolescents when they engage in such behaviors, the recriminations and the punishment imposed must be less severe than it would have been had an adult committed the same crime.<sup>124</sup>

151. The Committee on the Rights of the Child has written that:

Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.<sup>125</sup> [Emphasis added].

152. As for the nature and legal consequences of minors’ diminished culpability, the Supreme Court of Justice of Argentina wrote the following in its *Maldonado* ruling, which is particularly relevant to the analysis of the present case:

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<sup>122</sup> IACHR, Report No. 62/02, Case 12.285, Merits, Michael Domingues (United States), October 22, 2002, para. 83.

<sup>123</sup> Inter-American Court of Human Rights, *Case of the “Street Children” (Villagrán Morales et al.)*, Judgment of November 19, 1999, para. 197.

<sup>124</sup> See, *mutatis mutandis*. IACHR, Report No. 62/02, Case 12.285, Merits, Michael Domingues (United States), October 22, 2002, para. 80.

<sup>125</sup> Committee on the Rights of the Child. General Comment No. 10 (2007) *Children’s Rights in Juvenile Justice*, para. 10. The United States Supreme Court issued a recent decision in the case of *Graham v. Florida* (decision of May 17, 2010) where it held that inasmuch as juvenile offenders have diminished culpability, they ought not to receive the harshest sentences. When compared with adults, juveniles are immature and have a less developed sense of responsibility; they are more vulnerable or susceptible to negative influences and external pressures, including peer pressure. The Supreme Court also considered that the advancements in psychology and in the study of brain functions continue to produce evidence of fundamental differences between the juvenile the adult brains. For example, those parts of the brain that control behavior are still developing well into late adolescence.

Nevertheless, it is an undisputed existential fact that they [children and adolescents] do not have the same degree of emotional maturity that should be expected and demanded in an adult. This is borne out in the everyday routine experiences of family and school life, where children are corrected for conduct that would be patently pathological in adults.

All the psychology of growth and development confirms this one elementary observation. The demonstrable immaturity unquestionably necessitates that the penalty a child or adolescent must pay for his/her culpability cannot be as stiff as would be routinely demanded of an adult. From this standpoint, the child's culpability for the act is a lesser culpability than the adult's, all because of the child's immature emotional personality.

(...)

[I]n a criminal law system that is compatible with the Constitution and its concept of person, one cannot escape the fact that culpability will determine punishment; in the particular case of a child's culpability, any diminishment of culpability and therefore punishment will be because of his/her universally recognized emotional and affective immaturity (...) In such circumstances, the only solution is to recognize that the State's punitive reaction must be less than it would be, all other things being equal, if the crime had been committed by an adult.<sup>126</sup>

153. In its Advisory Opinion OC-17, the Inter-American Court wrote that the "[c]haracteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these [juvenile] courts, as well as in the nature of the measures they can adopt"<sup>127</sup> (underlining added). The Court also wrote that "the need to adopt these measures or care originates from the specific situation of children, taking into account their weakness, immaturity or inexperience."<sup>128</sup>

154. The Commission observes that international human rights law does not at the present time flatly prohibit the imposition of a life sentence on a minor under the age of 18. Under Article 37(a) of the Convention on the Rights of the Child, a sentence of life imprisonment can be given provided the possibility of release or parole exists. It is important to point out that the trend today is toward eliminating the possibility of life sentences in the case of offenses committed by juveniles, a trend that the Commission believes comports with the obligation under the American Convention, which is to provide special measures of protection for children. In its General Comment No. 10 on Children's Rights in Juvenile Justice, the Committee on the Rights of the Child recommended abolition of life imprisonment based on the fact that "life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release."<sup>129</sup>

155. As for the scope of the possibility of release, the Committee on the Rights of the Child has interpreted this provision and observed that "the possibility of release should be realistic and regularly considered."<sup>130</sup>

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<sup>126</sup> Brief from the petitioners received on July 1, 2007. Attachment 7. Supreme Court of Justice of the Argentine Nation. Maldonado, Daniel Enrique *et al.*, ruling of December 7, 2005.

<sup>127</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 137(11).

<sup>128</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 60.

<sup>129</sup> Committee on the Rights of the Child, General Comment No. 10 (2007), *Children's Rights in Juvenile Justice*, para. 77.

<sup>130</sup> Committee on the Rights of the Child. General Comment No. 10 (2007) *Children's Rights in Juvenile Justice*, para. 77.



156. As for a periodic review, the Committee on the Rights of the Child has emphasized that the child or adolescent “sentenced to this imprisonment should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child’s development and progress in order to decide on his/her possible release.”<sup>131</sup>

157. Apart from the limitation expressly stated in Article 37(a) of the Convention on the Rights of the Child, the imposition of a sentence of life imprisonment when a child or adolescent is involved must also be examined as a function of the previously mentioned general principles governing the exercise of the State’s punitive authority in the case of children and adolescents.<sup>132</sup>

158. This means that given the particularly harsh nature of a sentence of life imprisonment, such a sentence must be evaluated with special rigor to ensure not only the possibility of release but also the observance of the international standards in the area of juvenile criminal justice, as described in this section. The possibility in law of release is not in itself sufficient to make the imposition of a life sentence on a child or adolescent compatible with the international obligations requiring special protection for children and the purpose that punishment is intended to serve under the American Convention. In each case, the opportunities for a periodic review should be assessed, as should the strict observance of the principles governing the State’s exercise of its punitive authority vis-à-vis children.

159. In conclusion, the Inter-American Commission deems that articles 19 and 5(6) of the American Convention, read in combination and interpreted in light of the standards outlined in the preceding paragraphs, include: i) the States’ obligation to order the measures necessary so that the criminal justice system, as applied to children and adolescents, takes their particular circumstances and needs for protection into account and, accordingly, establishes regulations different from those that regulate the criminal justice system as applied to adults; ii) the States’ obligation to ensure that a sentence of deprivation of liberty is established as “a measure of last resort” and “for the shortest appropriate period of time”; given the severity of a penalty of life imprisonment, special care must be taken when considering these factors; and iii) the States’ obligation to ensure that the number of years a person serving a life sentence must serve in order to be eligible for parole is reasonable and proportional given the special situation of adolescents and the objective of re-socialization as the primary function that the penalty is to serve.

160. In the following sections, the Commission will examine whether the Argentine State has complied with these obligations in the instant case.

**3. An analysis to determine whether the criminal justice system, as applied to actual cases, had established rules and regulations for cases where the defendants are children and adolescents that are different from the rules and regulations applied in cases involving adults**

161. As for the obligation to order the special measures of protection necessary so that the criminal justice system applicable in the case of child and adolescent offenders gives special consideration to their particular circumstances and their needs for protection and, in so doing, establishes rules and regulations that are different from those applied in cases involving adult offenders, the Commission observes that the sentences to life imprisonment ordered in the cases of

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<sup>131</sup> Committee on the Rights of the Child. General Comment No. 10 (2007) *Children’s Rights in Juvenile Justice*, para. 77.

<sup>132</sup> In interpreting the Convention on the Rights of the Child, the Committee on the Rights of the Child has written that “In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of CRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40.” Committee on the Rights of the Child. General Committee No. 10 (2007), *Children’s Rights in Juvenile Justice*, para. 5.

César Alberto Mendoza, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal, and Ricardo David Videla Fernández; and the sentence of confinement for life ordered in the case of Claudio David Núñez, were based on Law 22,278 of August 25, 1980, as amended by Law 22,803.

162. As described in the section on proven facts, this law sets out general guidelines on the possibility of assigning criminal blame to adolescents between the ages of 16 and 18. The crimes and the sentences they carry, and any questions related to sentence enforcement, including the possibility of release on parole, are regulated under the National Penal Code. Article 4 of Law 22,278 regulates certain special sentencing authorities that judges hearing such cases have, such as the authority to refrain from imposing a sentence of imprisonment based on the result of the remedial custodial treatment; should the judge deem a sentence of imprisonment to be in order, he/she has the authority to reduce the sentence to the one imposed for an attempt to commit the crime in question. These are discretionary authorities, and hence not mandatory.

163. In other words, when it comes to sentencing and the possibility of release or parole, Law 22,278 applies the same rules that would apply in the case of an adult offender. Because of that, the alleged victims in this case were eligible to receive the maximum sentences prescribed under Article 80 of the National Penal Code, specifically life imprisonment and confinement for life. Article 13 of the Penal Code was also applicable in their case, which prescribes the number of years or portion of a sentence that one must serve before qualifying for parole and the conditions that must be met to be paroled.

164. The Commission observes that while Law 22,278 provides that juvenile offenders are to begin serving their sentence when they turn 18 years of age, the State's obligation to provide special measures under the juvenile criminal justice system is not based on the age at which the sentence will be served, but rather the age at which they became culpable under criminal law. Therefore, the State's reaction to juvenile crime must be different from its reaction in the case of adult crime and proportional to the diminished retributive justice that must be present for those who are children under international law.

165. Thus, the consequence of the lack of special sentencing guidelines for cases involving juveniles, particular sentences of imprisonment and the possibility of release or parole, was that the victims in the instant case were treated as adult offenders, which is incompatible with the rights protected under articles 19 and 5(6) of the American Convention, in relation to the obligations established in articles 1(1) and 2 thereof.

**4. An examination of the principles on deprivation of liberty as a measure of "last resort" and "for as short a time as possible" given the facts of the case**

166. As observed in the section on international standards in the matter of juvenile criminal justice, a sentence involving deprivation of liberty should be imposed only as a measure of last resort and for the shortest appropriate period of time. This higher standard of the 'last resort' principle with regard to deprivation of liberty means that court authorities charged with sentencing juveniles have to explore the alternatives to imprisonment or incarceration and do a serious examination of the particular circumstances of each case that necessitate a sentence of imprisonment rather than a less severe sentence. Obviously, the sentencing authority must strictly fulfill these obligations when a sentence of life imprisonment or confinement for life is imposed, given the severity of such a sentence.

167. In the instant case, the Commission observes that the court authorities that ordered the sentence of life imprisonment in the case of César Alberto Mendoza, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández, and of confinement for life in the case of

Claudio David Núñez, simply established criminal culpability and enforced the same sentence that an adult offender would have received for the same crimes.

168. In the respective court rulings, the judges made reference to the seriousness of the crimes of which they were convicted, but refrained from examining alternatives other than life imprisonment. Thus, for example, while generic references were made to the authority to reduce the sentence under Article 4 of Law No. 22,278, the nature of the crimes was the central factor in determining the sentence. No consideration was given to a judgment of diminished culpability for crimes when the offender was a child at the time the crimes were committed, nor was an individualized examination done of any progress made during the period of remedial custodial treatment. On this point, the court rulings again made generic references to the fact that the progress made was not sufficient; however the only factor considered in their assessment was the severity of the crime, but not the particular circumstances of the victims during the course of that treatment.

169. The Commission recognizes that the crimes attributed to César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández, are especially serious. The Commission also understands that the severity of an offense is a fundamental factor in determining the appropriate penalty. However, as the crimes were committed when the defendants were still children, the court authorities had an obligation to assess the seriousness of the crime in combination with factors such as diminished culpability, the possibilities of re-socialization, the results of remedial custodial treatment, and others considerations. By imposing the most severe penalty of imprisonment without a detailed examination of these questions and without exploring other alternatives to such a sentence, the court authorities likened the victims' situation to that of adults, and thus failed to comply with their international obligations vis-à-vis the special protection of children, which hold that imprisonment shall only be imposed as a "last resort" and "for the shortest appropriate period of time."

##### **5. An analysis to determine whether the possibility of release on parole, as contemplated in Argentine law, meets the periodic review requirements**

170. According to the proven facts, the rule determining the number of years of a sentence that must be served before becoming eligible for parole, and the conditions that must be met for parole to be granted is Article 13 of the Penal Code of the Nation. Under that article, persons sentenced to life imprisonment or confinement for life may apply for parole once they have served 20 years of their sentence. This article applies to both adults and juveniles convicted of crimes that occurred while they were under the age of 18. As previously observed, because the legal system allows this equal treatment of adults and minors, it is incompatible with the State's obligations under the American Convention.

171. Under Argentine law, court authorities<sup>133</sup> are to wait 20 years before conducting an individualized review to check for any progress made in the re-socialization process; if that review is favorable, only then can they order the release of a person convicted for events that occurred when he/she was still under 18 years of age. This is unreasonable<sup>134</sup> and contrary to the periodic review requirement.

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<sup>133</sup> According to the standards established by the IACHR in the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Resolution No. 1/08), oversight of sentence enforcement must be by a court and is the jurisdiction of the competent judges and courts (Principle VI).

<sup>134</sup> For comparison purposes, it is worth noting that the 20 years that must be served before one is eligible for parole is more than twice the average of the maximum sentences that can be given to juvenile offenders in Latin American countries. See: the State's brief, received on October 2, 2005. In this communication the State sent the Commission the texts of a bill that amended Law 22,278. Attached to that communication was a table comparing the maximum prison sentences that can be given to minors under 18 years of age, in 15 Latin American countries. According to this comparative

172. As pointed out in the section on international standards for criminal justice in the case of children and adolescents and the sentence of life imprisonment, the need for a periodic review is a function of the fact that juveniles under the age of 18 are deemed to have diminished culpability vis-à-vis adults who commit the same offenses. It is also a function of the fundamental objectives that sentences of imprisonment are to serve when the person convicted is a minor. As noted earlier, States undertake the obligation of providing education, treatment and care aimed at the child's release, reintegration into society and ability to play a constructive role therein. In the Commission's view, these obligations emanate from the fact that at the time the State assumes custody of a youth who committed crimes as a child, that child is at a critical stage in his/her personal and social development, deciding what he/she will do with his/her life and acquiring knowledge and skills that will be essential for life in society.

173. Thus, a periodic review to check these factors makes it possible to gauge the person's rehabilitation process and eventually order that person's release based on the progress made; the absence of such a review system takes a particularly heavy toll on the possibility of reform and social reintegration in the case of persons sentenced for crimes committed while they were still children, which is incompatible with the provisions of articles 5(6) and 19 of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof.

**6. An analysis to determine whether the sentences imposed upon the alleged victims constituted arbitrary deprivation of liberty and cruel and inhumane treatment**

174. The petitioners alleged that the sentence of life imprisonment violated not only articles 5 and 19 of the Convention, but also the right not to be deprived of liberty arbitrarily. On the matter of arbitrary arrest or imprisonment, the Inter-American Court has written that

In the case of the arbitrary arrest or imprisonment to which Article 7(3) of the Convention refers, the Court has previously held that no one shall be arbitrarily arrested or imprisoned for reasons and by methods that –though qualified as legal- may be deemed to be incompatible with respect for fundamental rights of the individual, due, among other things, to their unreasonable, unforeseeable, or disproportionate nature.<sup>135</sup>

175. Under certain circumstances, violations of international human rights standards committed when adopting decisions where a person's liberty is at stake can make the arrest or imprisonment resulting from such decisions arbitrary. For example, one factor considered by the United Nations Working Group on Arbitrary Detentions to determine when an arrest or imprisonment can be classified as arbitrary is described as follows:

When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.<sup>136</sup>

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table, the countries that had the highest maximum sentences in the case of minors included Argentina and the following countries: Bolivia, 16 to 21 years, ordinary law; Brazil, 3 years; Chile, 5 years; Costa Rica, 15 years; Dominican Republic, 2 years; Ecuador, 4 years; El Salvador, 7 years; Guatemala, 5 years; Honduras, 8 years; Nicaragua, 6 years; Panama, 5 years; Peru, 3 years; Uruguay, 5 years; and Venezuela, 5 years.

<sup>135</sup> I/A Court H.R., *Case of García Asto and Ramírez Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 105; *Case of Acosta Calderón*. Judgment of June 24, 2005. Series C No. 129, para. 57; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 98; and *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 83; I/A Court H.R., *Case of Usón Ramírez v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 146.

<sup>136</sup> See. Fact Sheet No. 26. Working Group on Arbitrary Detention. Publication of the Office of the United Nations High Commissioner for Human Rights.

176. Similarly, in its examination of violations of the right to a hearing by a competent and impartial judge, the Inter-American Court held that the effect of such violations could be a violation of the right to personal liberty recognized in Article 7(1) of the Convention. In the words of the Court:

this Court concluded that the tribunal that tried Mr. Usón Ramírez lacked jurisdiction and impartiality, essential prerequisites to due process. The effects of this situation are projected to all of the proceeding, rendering it defective from the beginning, and to the consequences derived from it. In that regard, any act of a tribunal that manifestly lacks competence that results in a restriction or deprivation of personal liberty, such as those that occurred in the present case to the detriment of Mr. Usón Ramírez, lead to the consequent violation of Article 7(1) of the American Convention.<sup>137</sup>

177. The Commission has thus far concluded that the proceedings that ended in the sentences of prison time and life imprisonment were flawed with a number of violations of the American Convention, in particular violations of the rights established in articles 19 and 5(6). This is the conclusion from the analysis of the facts in the light of international standards on juvenile criminal justice and the special obligations of protection implicit in those standards. In effect, the Commission concluded that: i) the sentences were imposed on the basis of a legal framework that equated the situation of juveniles with that of adults; ii) the court authorities who presided over the respective cases failed to explore the various alternatives to the sentences imposed and failed to cite the legal grounds for not exercising the authority they had under the law to reduce the sentences, which was a violation of the standard requiring that the sentence of imprisonment be used only as a last resort and then only for the shortest appropriate period of time; iii) the victims would not have the opportunity for a periodic review for 20 years, which was a disproportionately lengthy period to have to wait. Considering all these violations, the sentences of prison time and life imprisonment were imposed arbitrarily.

178. This arbitrary conduct was compounded by the limitations on the scope of the review that the courts of cassation allowed when the victims filed motions of cassation. This issue will be examined at greater length later in this report.

179. Based on the foregoing, the Commission considers that in the instant case, a number of arbitrary decisions and procedural and substantive violations occurred that rendered the victims' deprivation of liberty as an inhumane treatment and arbitrary under the terms of Articles 5(1), 5(2) and 7(3) of the American Convention, in relation to Article 1(1) thereof, to the detriment of César Alberto Mendoza, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal, Ricardo David Videla Fernández and Claudio David Núñez.

180. For the record, the Commission wishes to clarify that it is not the job of the Commission to determine whether the victims deserved a sentence of imprisonment, and if they did, for how long. Such a decision is the purview of the domestic courts. As indicated in the recommendations, it is up to the State to take the measures necessary so that the the victims' legal accountability for the conduct attributed to them is determined in accordance with the State's international obligations under the American Convention.

## **7. Conclusion**

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<sup>137</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 148.

181. Based on the observations made thus far, the Commission concludes that in failing to comply with the applicable international standards by sentencing César Alberto Mendoza, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández to life imprisonment and Claudio David Núñez to confinement for life, the Argentine State violated their rights under articles 19, 5(1), 5(2), 5(6) and 7(3) of the American Convention, in relation to the obligations set forth in articles 1(1) and 2 thereof.

**B. The right to appeal a judgment to a higher court [article 8(2)(h)] of the American Convention, in relation to articles 1(1) and 2 thereof].**

182. Article 8(2)(h) of the American Convention provides that:

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:
  - h. the right to appeal the judgment to a higher court.

183. The Commission will examine whether the Argentine State violated the guarantee contemplated in Article 8(2)(h) of the American Convention, in the following order: i) General questions on the right to appeal a judgment; ii) an examination of the cases of César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández; and iii) considerations regarding the subsequent developments vis-à-vis the right to appeal a judgment.

**1. General questions on the right to appeal a judgment**

184. The right to appeal a judgment before another or higher court is a fundamental guarantee of due process whose purpose is to avoid a miscarriage of justice from becoming *res judicata*. Under the case law of the inter-American system, the purpose of this right is “to prevent a flawed ruling, containing errors unduly prejudicial to a person’s interests, from becoming final.”<sup>138</sup> Due process of law would lack efficacy without the right of defense at trial and the opportunity to defend oneself against a sentence by means of a proper review.<sup>139</sup>

185. International human rights law does not concern itself with the label given to the existing remedy to appeal a judgment.<sup>140</sup> What matters is that the remedy meets certain standards. First, it must occur before the sentence becomes *res judicata*<sup>141</sup> and must be decided within a reasonable period, i.e., it must be *timely*. It must also be an effective remedy; in other words, it must provide results or responses to the end that it was intended to serve,<sup>142</sup> which is to prevent the consummation of an injustice. It must also be accessible, and not require the kind of formalities that would render this right illusory.<sup>143</sup>

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<sup>138</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158.

<sup>139</sup> IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella (Argentina), November 18, 1997, para. 252.

<sup>140</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 165; UN Human Rights Committee. Communication No. 701/1996, Gómez Vázquez v. Spain, Decision of August 11, 2000, para. 11.1.

<sup>141</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158. See also, Human Rights Committee of the International Covenant on Civil and Political Rights. Communication No. 1100/202, Bandajevsky v. Belarus, Decision of April 18, 2006, para. 11.13.

<sup>142</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 161.

<sup>143</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 164.

186. The Commission must underscore the point that the efficacy of a remedy is closely linked to the scope of the review. This is so because judicial authorities are fallible and can make mistakes that result in injustice. Judicial error is not confined to the application of the law, but may happen in other aspects of the process such as the determination of the facts or the weighing of evidence. Hence, the remedy of appeal will be effective in accomplishing the purpose for which it was conceived if it makes possible a review of such issues without determining *a priori* that review will only be allowed with respect to certain aspects of the court proceedings.

187. In *Abella v. Argentina*, the Inter-American Commission wrote the following:

Article 8(2)(h) refers to the minimum characteristics of a remedy that serves as a check to ensure a proper ruling in both substantive and formal terms. From the formal standpoint the right to appeal the judgment to a higher court to which the American Convention refers should, in the first place, apply to every first instance judgment with the purpose of examining the unlawful application, the lack of application, or the erroneous interpretation of rules of law based on the operative part of the judgment. The Commission also considers that to guarantee the full right of defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of those rules..  
[...]

The remedy should also allow the higher court a relatively simple means to examine the validity of the judgment appealed in general, as well as to monitor the respect for fundamental rights of the accused, especially the right of defense and the right to due process.<sup>144</sup>.

188. For its part, the ICCPR's Human Rights Committee has repeatedly held that:<sup>145</sup>

The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.<sup>146</sup>

189. The IACHR echoes the observation by the ICCPR's Human Rights Committee to the effect that the right of appeal does not necessarily mean a retrial or a new "hearing" if the court that hears the appeal is not prevented to study the facts of the case.<sup>147</sup> What the norm requires is the opportunity to point out and get an answer to possible errors of various kinds that the judge or the

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<sup>144</sup> IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, paragraphs 261-262.

<sup>145</sup> The wording of Article 14(5) of the International Covenant on Civil and Political Rights is very similar to Article 8(2)(h) of the American Convention. Therefore, the UN Human Rights Committee's interpretations of the substance and scope of Article 14(5) are useful in interpreting Article 8(2)(h) of the American Convention.

<sup>146</sup> UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, para. 48. See also: *Aliboev v. Tajikistan*, Communication No.985/2001, Decision of October 18, 2005; *Khalilov v. Tajikistan*, Communication No. 973/2001, Decision adopted on March 30, 2005; *Domukovsky et al. v. Georgia*, Communications Nos. 623-627/1995, Decision adopted on April 6, 1998, and *Saidova v. Tajikistan*, Communication No. 964/2001, decision adopted on July 8, 2004.

<sup>147</sup> UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, para. 48.

court may have made, without precluding *a priori* certain categories such as the facts and the weighing and taking of evidence. The manner and means through which the review is conducted will depend on the nature of the questions raised and the characteristics of the criminal procedural system in the State in question.

190. It should be noted that the American Convention “does not endorse any specific criminal procedural system. It gives the States the liberty to determine which one they prefer, as long as they respect the guarantees established in the Convention itself, the internal legislation, other applicable international treaties, the unwritten norms, and the imperative stipulations of international law.”<sup>148</sup>

191. It is up to the State to order the measures necessary to ensure that its criminal procedural system conforms to its international obligations in the area of human rights, especially the minimum guarantees of due process as set forth in Article 8 of the American Convention. Thus, for example, in the case of criminal procedural systems like Argentina’s, which operates mainly by the principles of the orality and immediacy of the proceedings, States are required to ensure that those principles do not involve exclusions or restrictions of the scope of the review that the court authorities have the authority to perform. Furthermore, a court’s review of a ruling ought not to pervert the principles of orality and immediacy.

192. As for the remedy’s *accessibility*, the Commission considers that, in principle, the rules requiring that a remedy meet certain minimum requirements is not incompatible with the right recognized in Article 8(2)(h) of the Convention. Those minimum requirements include, for example, the filing of the remedy, since Article 8(2)(h) does not require automatic review, or the rule stipulating a reasonable period of time within which the remedy must be filed. However, in certain circumstances, the court’s refusal to hear an appeal because the latter does not meet the formal requirements established either by statute or by judicial practice in a given region may result in a violation of the right to appeal a judgment.

193. Finally, the right to appeal a judgment is one of a set of guarantees that taken together constitute due process and that are inextricably interlinked.<sup>149</sup> Therefore, the right to appeal a judgment must be interpreted in conjunction with other procedural guarantees if the characteristics of the case so require. An example is the close relationship that exists between, the right to appeal and a duly reasoned judgment and the possibility of seeing the complete record of any oral proceedings.<sup>150</sup> The relationship between the guarantee protected under Article 8(2)(h) of the American Convention and access to an adequate defense also enshrined in Article 8(2) of the American Convention is especially relevant. The ICCPR’s Human Rights Committee has written that “[t]he right to have one’s conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.”<sup>151</sup>

194. Ascertaining whether a right has been violated when an appeal was filed requires a case-by-case analysis that evaluates the concrete facts surrounding the matter brought to the

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<sup>148</sup> I/A Court H.R., *Case of Fermín Ramírez v. Guatemala*. Judgment of June 20, 2005. Series C No. 126, para. 66.

<sup>149</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 120.

<sup>150</sup> See in this regard, UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, paragraphs 47, 48, 49 and 50.

<sup>151</sup> See in this regard, UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, para. 51.



Commission's attention, based on the general criteria outlined in the preceding paragraphs. The Commission will now examine whether the guarantee protected under Article 8(2)(h) of the American Convention was respected in each victim's case.

## **2. Analysis of the specific cases**

195. The Commission observes that the defense attorneys representing some of the victims filed cassation motions, constitutionality motions and special federal appeals to challenge the convictions. Given the framework of laws governing the various types of appeal, as described in the section on proven facts, including each one's content, the Commission observes that the debate is centered around the question of whether the cassation motion under Argentine law, complies with Article 8(2)(h) of the American Convention. Accordingly, the Commission will evaluate the State's response to the cassation motions filed on behalf of the victims, taking into special consideration the text of the articles regulating the cassation motion and the judicial practice on the subject.

196. In general terms, and as established in the section on proven facts, at paragraphs XX-XX above, the Commission notes that given the applicable laws on the subject and the long judicial tradition of a narrow interpretation of those laws,<sup>152</sup> any claim that did not fit within that narrow interpretation of what had traditionally been regarded as "reviewable" via a cassation motion had little chance of prospering.

197. Thus, it is understandable that in endeavoring to get the motions admitted and decided, the victims' defense attorneys would opt not to seek a review of question of fact or the weighing of evidence, but instead mainly argued that the law had been misapplied, that the sentence was unconstitutional or manifestly arbitrary. It is not the function of this Commission to determine what issues might have been raised in each case; however, given the legal framework and the consistently narrow interpretation of the cassation motion, the Commission deems that the analysis ought not to confine itself to determining whether the court authorities who knew of the cassation motions answered the arguments made therein; instead, the Commission must also consider that when they initiated the appeals process the victims were already saddled with a limitation in terms of the arguments they could make. This was because at the time, arguments challenging the facts or weighing of the evidence were automatically precluded; the court would not examine the importance or nature of those issues in each specific case. This exclusionary rule is incompatible with the broad scope of the remedy as contemplated in Article 8(2)(h) of the American Convention. In the *cas d'espèce*, this situation is particularly serious given the nature of the sentences imposed on the victims and their special condition at the time the acts attributed to them were committed. The limits placed on the scope of the remedy had the effect of sealing an injustice committed by virtue of the arbitrary imposition of the sentences of imprisonment and life imprisonment in the case of the victims.

198. With that understanding, the Commission will evaluate, in each case, the various ways in which this violation manifested itself when the cassation motions filed on behalf of each victim were taken up.

### **2.1 César Alberto Mendoza**

199. As established in the section on proven facts, the court-appointed public defender filed a cassation motion to challenge César Alberto Mendoza's sentence, in which she alleged that Article 4 of Law 22,278 had not been correctly applied and that the sentence was arbitrary

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<sup>152</sup> As previously observed, the Supreme Court acknowledged this practice in the "Casal judgment." See, Supreme Court of Justice of the Nation. Case No. 1681. Matías Eugenio Casal *et al.* Ruling of September 20, 2005.

inasmuch as it did provide sufficient legal justification for the imposition of the most severe sentence allowed under Argentine criminal law. She alleged that the length of the sentence was excessive.

200. When the court that determines whether a remedy will proceed to a higher court dismissed the motion, she filed a complaint motion, which the National Chamber of Criminal Cassation dismissed on the grounds that it found no basis for the defense counsel's claim that the court had failed to state the grounds for and justification of the sentence, and found no "deviation from the provisions of Article 4, paragraph 3 of Law 22,278." As for the claim that the penalty was excessive, the National Chamber of Criminal Cassation held that "the rules governing the individualization of the penalty are to be applied by the judges hearing the case and are therefore in principle not subject to review on cassation. The assessment is a function of the discretionary authorities of the trial court, except when it can be shown that a ruling is arbitrary and thus in blatant violation of constitutional guarantees."<sup>153</sup>

201. Therefore, the only way the National Chamber of Criminal Cassation would review the sentence of life imprisonment given to César Alberto Mendoza was if his defense counsel somehow managed to prove that constitutional rights had been violated or that the sentence was manifestly arbitrary. The National Chamber of Criminal Cassation confined itself to evaluating whether there were any grounds and whether there were reasons to impose the sentence. It deemed that the allegation to the effect that the sentence was arbitrary had not been proved. It therefore found that it did not have the authority to conduct the requested review. The examination done by the National Chamber of Criminal Cassation did not even consider whether the conviction and sentence were duly reasoned and substantiated, specifically the question of whether the sentence imposed was the proper one given the trial court's authority under Article 4 of Law 22,278 and the victim's particular circumstances. This argument was based on the well established premise of judicial practice at that time, which was that certain matters were the exclusive purview of the trial court or judge and hence not subject to review via a cassation motion.

202. Given the standards described above, a system in which the right of appeal is predicated on the existence of a violation of constitutional rights or a manifestly arbitrary decision is incompatible with Article 8(2)(h) of the American Convention. Irrespective of whether such violations or arbitrary decisions are present, every convicted person has a right to seek a review of different types of issues as facts and consideration of evidence, and to have their requests effectively examined by a court that, within the judicial hierarchy, has the authority to review judgments and decisions. In the instant case, because of the restrictions that the National Chamber of Criminal Cassation itself described, César Alberto Mendoza did not get a review of his conviction for correction of any possible errors the respective judge may have made; the State thus violated his right under Article 8(2)(h) of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof.

## **2.2 Claudio David Núñez and Lucas Matías Mendoza**

203. As previously recounted, three cassation motions were filed to challenge the ruling that sentenced Lucas Matías Mendoza and Claudio David Núñez to life imprisonment and confinement for life, respectively: i) the first was on behalf of Lucas Matías Mendoza and was filed by his private defense counsel; ii) the second was on behalf of Claudio David Núñez and was filed by his court-appointed public defender; and iii) the third was on behalf of both and was filed by the Juvenile Public Defender's Office.

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<sup>153</sup> Original petition filed on behalf of César Alberto Mendoza, received on June 17, 2002. Attachment 2: Court Rulings. Ruling of Section II of the National Chamber of Criminal Cassation, dated June 23, 200, Case No. 2544.

204. In the first of these motions, Lucas Matías Mendoza's private defense attorney alleged, *inter alia*, the court's misapprehension of the facts and the evidence and that certain pieces of evidence were improper. She also took issue with the legal grounds upon which the sentence was based and invoked the Convention on the Rights of the Child.

205. In the second cassation motion, Claudio David Núñez' court-appointed public defender alleged that the sentence was arbitrary because of a lack of sufficient legal grounds, and specifically pointed to the fact that Article 4 of Law 22,278, allowing the court to reduce the sentence, was not applied. She further alleged that the evidence was inadequately and arbitrarily weighed and asserted that too much weight had been given to circumstantial evidence.

206. In the third cassation motion, the Juvenile Public Defender's Office claimed that Article 4 of Law 22,278 had not been properly applied. It asserted that the judges in the case had the authority to prolong the period during which Lucas Matías Mendoza and Claudio David Núñez were under observation, thereby giving them the opportunity to demonstrate the progress they had made in their re-socialization process, a factor that would have had to be taken into account at sentencing.

207. The court that decided whether an appeal would proceed to a higher court denied all three motions. The main argument in dismissing the first two was that cassation motions cannot be used to challenge matters of fact and the weighing of evidence. In the case of the third motion, the court that decided whether an appeal would proceed to a higher court held that the substantive law had not been incorrectly applied.

208. When the three motions were denied, complaint motions were filed with and decided by the National Chamber of Criminal Cassation. The latter ruled that the first two complaint motions were admissible in part; these were the motions filed by the private defense attorney and the court-appointed public defender on behalf of Lucas Matías Mendoza and Claudio David Núñez, respectively. The part of the motion that was allowed to go forward were the challenges asserting that the law had either not been applied or had not been properly applied.

209. The other arguments made by the respective defense attorneys were declared inadmissible. The National Chamber of Criminal Cassation relied mainly on the established judicial practice at that time, which was that cassation motions could not be used to challenge matters of fact and the weighing of the evidence. By way of example, in the case of the motion filed on behalf of Lucas Matías Mendoza, the National Chamber of Criminal Cassation held that cassation motions could not be used to challenge the weighing and assessment of testimony, the identification of detainees, and other evidentiary measures taken by the court *a quo*. Similarly, in the case of the motion filed on behalf of Claudio David Núñez, the Chamber of Criminal Cassation wrote that the issues raised concerning the weighing of the evidence "are not ones that can be challenged via a cassation motion."

210. In effect, as observed in the proven facts, when deciding those claims that it had agreed to hear in the two cassation motions, the National Chamber of Criminal Cassation only addressed issues like the application of Article 4 of Law 22,278 and the question of whether the decision relied on sufficient legal grounds or was arbitrary.

211. The Commission observes that the National Chamber of Criminal Cassation precluded any review of a considerable portion of the arguments raised in the cassation motions. As previously observed, the existing standards require that any review of an adverse judgment should be broad in scope. Therefore, the Commission deems that the right to appeal the judgment was violated by the fact that the victims were unable to obtain a review of matters of fact and the weighing of the evidence.

212. As for the challenges that the National Chamber of Criminal Cassation declared admissible and the cassation motion filed by the Juvenile Public Defenders Office, the Chamber confined itself to determining whether the ruling being challenged was duly reasoned and whether the minimum requirements established in Article 4 of Law 22,278 had been satisfied. The National Chamber of Criminal Cassation did not evaluate the reasons given to justify the imposition of sentences of life imprisonment and confinement for life, respectively, considering the authorities given the court under Article 4 of Law 22,278 and the particular circumstances of both victims. Both issues were raised in the cassation motions. As happened in the case of César Alberto Mendoza, the narrow definition of reviewable issues is incompatible with the scope of review required under Article 8(2)(h) of the American Convention.

213. Based on the above considerations, the Commission concludes that the State violated, to the detriment of Lucas Matías Mendoza and Claudio David Núñez, the right recognized in Article 8(2)(h) of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof.

### **2.3 Saúl Cristián Roldán Cajal**

214. As recounted in the proven facts, the court-appointed defense attorney representing Saúl Cristián Roldán Cajal filed a cassation motion to challenge his sentence, which the Mendoza Supreme Court denied on August 5, 2002. The Commission does not have a copy of the motion filed. However, judging from the ruling delivered by the Mendoza Supreme Court, it appears that the issues raised mainly concerned the fact that the court *a quo* did not take into consideration the progress that Saúl Cristián Roldán Cajal had made during his remedial custodial treatment, with the result that the judgment did not lay out the legal grounds for its finding in this regard.

215. The Mendoza Supreme Court denied the motion on the grounds that defense counsel was actually seeking a review of matters of fact and of evidence, which were inadmissible given the limited range of issues that cassation motions could address. Specifically, the court asserted that the judgment did cite legal grounds and that “[t]he famous cassation motion actually has a very narrow sphere of application that is limited to matters of law; in other words, a cassation motion only examines whether the judgment correctly applies the law, in both formal and substantive aspects. Therefore, issues having to do with the determination of the factual circumstances and the weighing of evidence cannot be addressed by means of a cassation motion, except in cases of alleged arbitrariness.”<sup>154</sup> The Mendoza Supreme Court also asserted that the judgment was based on legal grounds.

216. Arguments like those used by the Mendoza Supreme Court limit the scope of a review by precluding allegations related to matters of fact and the weighing of the evidence. As observed in the preceding section, these restrictions are incompatible with the right to appeal a judgment.

217. As in the previous cases, when it came to the arguments regarding the legal basis for the judgment, the Mendoza Supreme Court simply transcribed certain passages of the judgment but did not evaluate them. The Commission already determined that this narrow review, limited to ascertaining whether or not the judgment had a legal basis without examining the claims asserting that the judgment’s legal arguments were incorrect, is also incompatible with the scope of Article 8(2)(h) of the American Convention.

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<sup>154</sup> Original petition filed on behalf of Saúl Cristián Roldán Cajal and received on August 15, 2003. Attachment 2. Court Rulings. Judgment of the Mendoza Supreme Court of June 25, 2003, Case No. 73.771.

218. Therefore, the Commission concludes that the Argentine State violated, to the detriment of Saúl Cristián Roldán Cajal, the right recognized in Article 8(2)(h) of the American Convention, in relation to the obligations set forth in articles 1(1) and 2 thereof.

#### **2.4 Ricardo David Videla Fernández**

219. The IACHR has established as proven fact that Ricardo David Videla Fernández' private defense attorney filed cassation motions to challenge the verdict and sentence in each of the following cases joined in the judgment: 121/02, 112/02, 109/02, 110/02, 117/02 and 116/02. The issues raised in these motions can be summarized as follows: a failure to disqualify certain pieces of evidence; misapplication of the substantive law; a lack of legal reasoning, illogical reasoning and the arbitrary nature of the sentence. All the motions were formally dismissed by the Mendoza Supreme Court in a decision dated April 24, 2003.

220. According to the proven facts, one of the main arguments used to justify dismissal of the motions was the absence of arguments showing clearly and concretely how the so-called invalid or unlawful evidence had a "decisive and essential" impact on the decision. The Mendoza Supreme Court decided to deny the cassation motion on procedural grounds and did not examine the merits of the claims. In its view, merely claiming an irregularity was not sufficient to warrant a review of the use of a certain piece of evidence. As was indicated in the section on general standards governing the right to appeal a judgment, one of the characteristics of the remedy contemplated in Article 8(2)(h) of the American Convention is that it must be accessible; in order words, formal or procedural requirements cannot be used as a means to thwart access to a review. The Commission considers that the position taken by the Mendoza Supreme Court unduly restricted the right to have a conviction reviewed and thereby prevented Ricardo David Videla Fernández from exercising the right recognized in Article 8(2)(h) of the American Convention.

221. The Mendoza Supreme Court also deemed that the cassation motions were used to raise questions that are not subject to review at this "exceptional and restrictive" stage. Specifically, the Mendoza Supreme Court observed that the motions did not accept facts that the lower court had deemed to be established, which "inevitably limited" the review function that the court of cassation could perform. In this regard, the Commission has already concluded in previous sections that positions of the kind taken by the Mendoza Supreme Court limit the scope of review by precluding claims made regarding matters of fact and the weighing of evidence, which is incompatible with the right to appeal a judgment.

222. The Commission therefore concludes that the Argentine State violated, to the detriment of Ricardo David Videla Fernández, the right recognized in Article 8(2)(h) of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof.

### **3. Observations on subsequent developments concerning the right to appeal a judgment.**

223. The Commission has concluded that the Argentine State violated the right to appeal a judgment, recognized in Article 8(2)(h) of the American Convention, to the detriment of César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández.

224. These violations were not the result of a single interpretation by one judge. Instead, they occurred in the context of a law and/or practice that precluded a review of the facts and the weighing and taking of evidence. Accordingly, the Commission concluded that the State not only violated the right recognized in Article 8(2)(h) of the American Convention, but also its obligation to

adopt such legislative or other measures as may be necessary to give effect to that right, as set forth in Article 2 of the Convention.

225. Given the more general scope of these conclusions, the Commission must not fail to mention the progress made subsequent to the rulings analyzed in the preceding paragraphs. The Commission draws particular attention to a ruling delivered by the Argentine Supreme Court on September 20, 2005, known as “the Casal judgment.”

226. As observed in the section on proven facts, in the Casal judgment the Supreme Court of the Nation examined the judicial practice of the Argentine courts -especially the Chamber of Criminal Cassation- of narrowly interpreting the rules governing the cassation motion. That narrow interpretation had meant that cassation motions seeking a review of matters of fact and the weighing of evidence were routinely denied. Taking into account the relevant provisions of international human rights law and with an express reference to Article 8(2)(h) of the American Convention and Article 14(5) of the International Covenant on Civil and Political Rights, the Argentine Supreme Court held that the narrow interpretation had to change in favor of one that was broader and not confined to matters of law; instead, the review should also address matters of fact and the weighing of evidence, with the proviso that the review would be the exclusive purview of those who had served as judges in the oral proceedings.<sup>155</sup>

227. The Commission welcomes the Casal judgment and regards it as a first step toward reconciling judicial practices with Argentina’s international obligations in the area of human rights. Of particular importance is the Supreme Court’s clarification to the effect that the distinction between matters of fact and of law ought not to be the decisive factor in determining whether a cassation motion is the proper remedy. The only limitation contemplated in the Casal judgment concerns evidence that was taken up directly by the judge present for the oral arguments, which is for most part testimony. Thus, and when compared to the events in the case *sub judice*, the Casal judgment opens up the scope of the review that cassation motions seek.

228. However, the information available suggests that the ruling has not yet triggered the kind of change necessary to solve the problems singled out in this analysis. The Commission cannot

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<sup>155</sup> Some relevant passages of the judgment follow:

Arts. 8(2)(h) of the American Convention and 14(5) of the International Covenant on Civil and Political Rights should be interpreted as requiring review of any issue not exclusively reserved for those judges on the bench for the oral proceedings. This is the only aspect that cassation judges cannot review, not just because it would negate the principle of publicity [whereby proceedings are to be open], but also because cassation judges do not have firsthand knowledge of the oral proceedings; in other words, there is a real limit on what cassation judges know. It is a concrete limitation, imposed by the nature of things and must be assessed in each case.

(...)

While it is true that this has to be established on a case-by-case basis, the fact is that, in general, the firsthand knowledge that one has by virtue of the immediacy principle does not provide that much of an advantage. As a rule, much of the evidence in a case is in writing, either in the form of documents or expert reports. Thus information one learns by virtue of the immediacy principle generally boils down to witness testimony.

(...)

Summarizing, Article 456 of the National Code of Criminal Procedure should be understood as enabling a full review of the judgment, one that is as extensive as possible, requiring that cassation judges put out the maximum review effort, according to the possibilities and records of each case and without making too much of those issues that are reserved for the judges who were present for the oral proceedings, which is inevitable because oral proceedings are now the rule and the nature of things.

That understanding is the result of [...] (b) the fact that it is impossible in practice to draw a distinction between matters of law and of fact without venturing into the realm of selective arbitrariness (...).

yet conclude that the State has corrected this problem in Argentina; the main obstacle for the State is the fact that the Casal judgment is not binding. The Commission notes that the Supreme Court of the Nation refrained from declaring unconstitutional Article 456 of the National Code of Criminal Procedure –the article that determines the causes for which a cassation motion may be filed and which is the same in Article 474 of the Mendoza Provincial Code of Criminal Procedure. While the Casal judgment might be useful for interpretation purposes, it is not binding upon judges.<sup>156</sup> Furthermore, the Commission notes that the interpretative tool that the Casal judgment offers is not obvious from its text.

229. Recently the Human Rights Committee of the International Covenant on Civil and Political Rights observed that the problems preventing a substantive review of convictions in Argentina persist. In the words of the Committee:

The Committee notes with concern the absence of procedural law and practice that would guarantee the effective implementation of the right set out in article 14, paragraph 5, of the Covenant throughout the country (article 14 of the Covenant).

The State party should take the necessary and effective measures to guarantee the right of every person who is convicted of a crime to have the conviction and sentence reviewed by a higher tribunal. In this connection, the Committee recalls its general comment No. 32 on the right to equality before courts and tribunals and to a fair trial, which emphasizes, in paragraph 48, the need to review substantively the conviction and sentence.<sup>157</sup>

230. In conclusion, the Commission finds that while the Argentine State has made progress in ensuring the right to appeal a judgment, there are still important hurdles to overcome before that right is fully and effectively guaranteed. Thus, and as the recommendations will point out, the State must pursue the process of change instituted with the Casal Judgment and order the legislative and other measures necessary to give full effect to the right recognized in Article 8(2)(h) of the American Convention.

**C. Right of defense (articles 8(2)(d) and (e) of the American Convention in relation to articles 1(1) and 2 thereof).**

231. Article 8(2), subparagraphs (d) and (e), recognizes the right of defense and provides that:

- d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law (...)

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<sup>156</sup> The “Casal” judgment states that Article 456 of the National Code of Criminal Procedure lends itself to a narrow and broad interpretation. As the Supreme Court wrote:

“(...) it is clear that nothing in subparagraph 2 of Article 456 of the National Code of Criminal Procedure suggests another interpretation is not possible. The narrow interpretation of the scope of the cassation motion is solely the product of this institution’s legislative tradition and history, dating back to its original version. The text itself lends itself to both narrow and broad or liberal interpretation: a liberal interpretation would neither alter nor stretch the rather labored language of the text (...)”.

<sup>157</sup> Human Rights Committee. Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations by the Human Rights Committee. Argentina. CCPR/C/ARG/CO/4. March 31, 2010, para. 19.

232. The Inter-American Court has held that “the legal assistance provided by the State must be effective and, to this end, the State must adopt all appropriate measures.”<sup>158</sup> The Commission considers that the failure to personally notify the defendant of a decision rendered in a criminal proceeding and omissions on the part of a court-appointed defense counsel, can adversely affect a person’s right of self defense at various stages in the proceedings. Argentina’s own Supreme Court has acknowledged the close nexus between personal notification and the right to defend oneself against a court ruling that will make one’s conviction final.<sup>159</sup>

233. The Commission observes that the petitioners alleged that César Alberto Mendoza was prevented from filing a complaint motion with the Supreme Court of Justice of the Nation when he was not personally notified that the special federal appeal filed on his behalf had been denied; his court-appointed attorney had failed to so inform him and had unilaterally decided not to pursue any further challenges. According to the petitioners, the victim did not learn of the decision until months later.

234. As noted in the section on proven facts, the State did not submit arguments to rebut these allegations and provided no document to show that César Alberto Mendoza had in fact been personally notified of the decision that denied the special federal appeal filed on his behalf. Nor did it attempt to show that the court-appointed attorney in the case had advised him of the decision.<sup>160</sup>

235. Based on the information available, the Commission deems that in the case of César Alberto Mendoza, both these factors worked to prevent him from defending himself by exhausting every possible avenue allowed under the law. The Commission therefore concludes that the State violated his right of defense, recognized in article 8(2), subparagraphs (d) and (e) of the American Convention, in relation to the obligations established in Article 1(1) thereof.

236. In the cases of Claudio David Núñez and Lucas Matías Mendoza, the petitioners alleged that it was months before they learned of the decisions that denied the complaint motions filed on their behalf, owing to the fact that they were not personally notified of those decisions and their respective defense counsels did not bring the decisions to their attention. As previously observed, the failure to deliver personal notification can be prejudicial to the person’s right of self

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<sup>158</sup> I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 159. Citing. *Cf. ECHR, Case of Artico v. Italy*, Judgment of 13 May 1980, Application No. 6694/74, paragraphs 31-37.

<sup>159</sup> See, “Dubra” Judgment, 327:3802; C. 605, L.XXXIX, Judgment of December 23, 2004, where the Supreme Court held that “the person on trial must be personally notified of any decision that would make that person’s conviction final, since it is up to the convicted defendant to decide whether to seek a new ruling; defense counsel does not have that power.” See also P.2456.XL. “Peralta, Josefa Elba/ complaint motion” where the court held that the “jurisprudence of this Supreme Court is that every defendant convicted of a crime must be personally notified of the conviction so that criminal convictions do not become *res judicata* merely because defense counsel wills it so.”

<sup>160</sup> Here the Commission recalls the Court’s case law on the burden of proof lies when it is alleged that the State failed to afford certain Convention-protected guarantees. Specifically, the Court wrote the following on the guarantees provided under Article 7 of the Convention:

In the instant case, the victim has no available means of proving this fact. His allegation is of a negative nature, and indicates the inexistence of a fact. The State declares that the information about the reasons for the arrest was provided. This is an allegation of a positive nature and, thus, susceptible of proof. Moreover, if it is recalled that, on other occasions, the Court has established that “in proceedings on human rights violations, the defense of the State cannot be based on the impossibility of the plaintiff to provide evidence that, in many cases, cannot be obtained without the cooperation of the State,” this leads to the conclusion that the burden of proof on this point corresponds to the State.

See, I/A Court H.R. *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 73.

By analogy the same reasoning applies in the case of a failure to observe the guarantees recognized in Article 8(2) of the American Convention.



defense. However, unlike what happened in the case of César Alberto Mendoza, the Commission observes that the decision of which Claudio David Núñez and Lucas Matías Mendoza were not personally notified was the final decision that cannot be appealed. The Commission thus does not have sufficient information to conclude that a violation of the right of self defense occurred that was prejudicial to them.

237. Finally, the petitioners alleged that Saúl Cristián Roldán Cajal was denied the opportunity to file additional appeals to challenge the Mendoza Supreme Court's decision that denied the cassation motion because he was not personally notified of the decision and his court-appointed defense counsel did not bring it to his attention. According to the petitioners, it was a few months later that the victim learned of the Supreme Court's ruling. The Commission does not have any documentation indicating that Saúl Cristián Roldán Cajal was personally notified or learned of the ruling. Consistent with its analysis of the case of César Alberto Mendoza, the Commission deems that the Argentine State failed to shoulder its burden of proof. Because other appeals and motions remained to be exhausted, the Commission deems that the failure to personally notify Saúl Cristián Roldán Cajal and the failure of his court-appointed defense counsel to advise him of the decision constituted violations of his right of defense, in violation of Article 8(2), subparagraphs (d) and (e) of the American Convention, in relation to the obligations undertaken in Article 1(1) of that instrument.

**D. Right to have one's personal integrity respected and to humane treatment (articles 5(1) and 5(2) of the American Convention in relation to Article 1(1) thereof) and the conditions of detention at the Mendoza penitentiary and the transfers from one institution to another**

238. The Commission recalls that by virtue of the State's special position as guarantor, all persons deprived of liberty are to be treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees, and strictly in accordance with international human rights instruments.<sup>161</sup>

239. The conditions at the Mendoza Provincial Penitentiary were described earlier at paragraphs 90-94. The Commission has established that the atmosphere of constant tension and violence caused by the absence of proper mechanisms to control and care for the inmates at that facility posed a danger to the inmates. On several different occasions the Commission got a firsthand look at the subhuman and inhumane conditions in which the prisoners were incarcerated, which are described in the section on proven facts. These were the conditions at the Mendoza Penitentiary at the time that Ricardo David Videla Fernández and Saúl Cristián Roldán Cajal were incarcerated there.

240. The petitioners asserted that one of the decisive factors in the death of Ricardo David Videla Fernández were the inhumane and subhuman conditions in which he was being held, which is examined above at xx-xx. They state that during Saúl Cristián Roldán Cajal's incarceration at that facility he sustained severe injuries at the hands of the guards and other inmates.<sup>162</sup> While the Commission does not have specific details<sup>163</sup> about what happened to Saúl Cristián Roldán Cajal,

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<sup>161</sup> IACHR, Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Principle 1.

<sup>162</sup> The petitioners contend that during his incarceration in the Mendoza prisons, Saúl Cristián Roldán Cajal sustained severe injuries. During a prison riot in March, members of the prison staff and Infantry Guard Corps (CGI) fractured his upper jaw and broke his teeth. He also sustained a foot injury caused by a "Tramontine" knife. In November 2007, another inmate stabbed him in the back. He never received any medical attention for that injury. Finally, on March 21, 2007, he was assaulted by another inmate and sustained a fracture to the nasal septum.

<sup>163</sup> The Commission only has the petitioners' version of these allegations. No record of a filed complaint or other evidence was provided, nor were problems obtaining such evidence alleged.

the State did not submit any information or specific arguments suggesting that the victims were somehow spared the terrible conditions at the Mendoza Provincial Penitentiary.

241. The Commission therefore concludes that the Argentine State was derelict in its duty to provide the minimum detention conditions befitting human dignity, to the detriment of Ricardo David Videla Fernández and Saúl Cristián Roldán Cajal, in violation of articles 5(1) and 5(2) of the American Convention, in relation to Article 1(1) thereof.

242. The petitioners also mentioned the fact that the victims were transferred from one detention facility to another, which had consequences for their schooling and the development of their affective relationships. On this point the State reported that many of the transfers were done at the request of the defense attorneys who asked that the inmates be held in facilities near the Autonomous City of Buenos Aires to facilitate the preparation and activities associated with their defense. As for the alleged victims' access to education, the State informed the IACHR that Claudio David Núñez and César Alberto Mendoza, both of whom were at the Santa Rosa Penal Colony, La Pampa Province (Unit No. 4 of the Federal Penitentiary Service), were taking courses –each one in different tracks within the educational system-, while Lucas Matías Mendoza had classes in an office adjacent to his place of confinement, taught by various professors, thus enabling him to pursue his regular studies.

243. Under the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, transfers shall not be carried out for the purpose of punishing, repressing or discriminating against persons deprived of liberty, their families or representatives.<sup>164</sup> Those principles also provide that persons deprived liberty have the right to education, which shall be accessible to all, without discrimination. The Commission considers that the practice of repeatedly transferring inmates could adversely affect their access to education and employment and thus affect their re-socialization process.

244. The foregoing notwithstanding, given the information supplied by both parties, the Commission does not have sufficient cause to conclude that the victims' transfers constituted a violation of the American Convention.

**E. Rights to humane treatment, to life, to judicial guarantees and to judicial protection (articles 4(1), 5(1), 8(1) and 25(1) of the American Convention in relation to Article 1(1) thereof) in the death of Ricardo David Videla Fernández**

245. The pertinent part of Article 4(1) of the Convention provides that:

Every person has the right to have his life respected. (...) No one shall be arbitrarily deprived of his life."

246. The pertinent paragraphs of Article 5 of the American Convention read as follows:  
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.

247. Article 8(1) of the American Convention reads as follows:

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

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<sup>164</sup> IACHR, Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Principle IX.4.

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.

248. For its part, Article 25(1) of the American Convention provides that:

1. 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.

249. The petitioners contend that the Argentine State failed to fulfill its duty to take measures to protect the life of Ricardo David Videla Fernández, who was 21 at the time of his death. They allege that the prison authorities knew beforehand that young Videla intended to take his own life, inside his cell at the Mendoza Penitentiary. The State answered the allegations by arguing that suicide threats are a common occurrence among inmates and that when Ricardo David Videla committed suicide, in other words, when the prison authorities learned that he was hanging from the bars on his cell window, they took immediate steps to save him.

250. The Commission's finding on these allegations is based on the Argentine State's obligations under articles 4, 5, 8(1) and 25(1) of the American Convention. While a possible violation of Article 4 of the Convention was not alleged during the admissibility phase of the proceedings on this case, the Commission received more information during the merits phase, including the court record supplied by the State in connection with the internal investigations into the death of Ricardo David Videla Fernández. For the record, the State had an opportunity to refute the petitioners' allegations regarding the failure to protect the victim prior to his death and its failure to conduct a serious investigation of his death.

251. The Commission will now examine the parties' arguments regarding the death of Ricardo David Videla Fernández and the investigations instituted on the occasion of his death, in the following order: i) General observations on the right to life, the right to humane treatment and the State's obligations vis-à-vis persons in its custody; ii) analysis of Ricardo David Videla Fernández' situation prior to his death and the circumstances surrounding his death; and iii) analysis of whether the investigations constituted an effective recourse.

**1. General observations on the right to life, the right to humane treatment and the State's obligations vis-à-vis persons in its custody**

252. The Commission has observed the following with respect to Article 5 of the American Convention:

Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms it protects are derived from the attributes of their human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect. Accordingly, Article 5(1) guarantees to each person the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty. In the Commission's view, consideration of respect for the inherent dignity and value of individuals is especially crucial in determining whether a person should be deprived of

his or her life.<sup>165</sup>

253. The Inter-American Court, for its part, has held that “[t]he State has the duty to provide detainees with [...] [medical] care and adequate treatment whenever necessary.”<sup>166</sup> Therefore, persons deprived of their liberty are under the control of State authorities and are especially human beings.<sup>167</sup>

254. The Inter-American Court has also written that injuries, hardships, health problems or other harm that a person suffers while deprived of his/her liberty may amount to a form of cruel punishment if his/her physical, mental and moral state deteriorates because of the detention conditions that are strictly prohibited under Article 5(2) of the Convention.<sup>168</sup>

255. The Commission has written that the States’ obligation to respect the physical integrity of persons deprived of liberty, to refrain from using cruel and inhuman treatment and to respect the dignity of the human person, means that persons deprived of liberty must be guaranteed access to proper medical attention.<sup>169</sup>

256. As for the right to life, time and time again the Inter-American Court has held that the right to life is fundamental human right and that full enjoyment of that right is a prerequisite for the enjoyment of all other human rights.<sup>170</sup> The Inter-American Court has held that this implies that States have both the obligation to guarantee the creation of the necessary conditions to ensure that violations of this inalienable right do not occur, as well as the duty to prevent the infringement of that right by its officials or private individuals.<sup>171</sup> As the Court wrote, the object and purpose of the Convention, as an instrument for the protection of the human being, requires that the right to life be interpreted and enforced so that its guarantees are truly practical and effective (*effet utile*).<sup>172</sup>

257. The *jurisprudence constante* of the Court is that “compliance with the duties imposed by Article 4 of the American Convention, in conjunction with Article 1(1) thereof, not only presupposes that no person can be arbitrarily deprived of his life (negative duty) but also requires, pursuant to its obligation to guarantee the full and free exercise of human rights, that the States

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<sup>165</sup> IACHR, Report No. 38/00 of April 13, 2000, Case 11.743, Baptiste (Grenada), para. 89.

<sup>166</sup> I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, paragraphs 102 and 103; *Case of De la Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 132; and *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 157.

<sup>167</sup> See also, U.N. Doc. HRI/GEN/1/Rev.7 at 176 (1992), Human Rights Committee, General Comment 21, para. 3; European Court of Human Rights, *Case of Dzieciak v. Poland*, Application no. 77766/01, Judgment of December 9, 2008; European Court of Human Rights, *Case of Slimani v. France*, Application no. 57671/00, Judgment of 27 July, 2004, para. 28.

<sup>168</sup> I/A Court H.R., *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 101.

<sup>169</sup> IACHR. Application filed with the Inter-American Court of Human Rights. Case 11.535. Pedro Miguel Vera Vera. Ecuador. February 24, 2010, para. 42.

<sup>170</sup> I/A Court H.R. *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 78; I/A Court H.R., *Case of the “Street Children” (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 144.

<sup>171</sup> I/A Court H.R., *Case of the “Street Children” (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 144.

<sup>172</sup> I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 79; I/A Court H.R., *Case of Baldeón García*. Judgment of April 6, 2006. Series C No. 147, para. 83.

adopt any and all necessary measures to protect and preserve the right to life (positive duty) of the individuals under their jurisdiction."<sup>173</sup> Hence, as the Court wrote,

States must adopt all necessary measures to create a legal framework that deters any possible threat to the right to life; establish an effective legal system to investigate, punish, and redress deprivation of life by State officials or private individuals; and guarantee the right to unimpeded access to conditions for a dignified life.<sup>174</sup>

258. The jurisprudence of the organs of the inter-American system holds that the obligation to guarantee the conditions to ensure that violations of right to life do not occur also includes such as aspects as prevention, protection and investigation. When these requirements are not satisfied, the State may be held internationally responsible for violation of the right to life.

259. Specifically, the Commission has held that a State's failure to fulfill its duty to protect an individual when protection has been requested means that the State has left that person defenseless and facilitated violations of that person's human rights, in blatant disregard of the duty to prevent.<sup>175</sup>

260. The Court has recently reiterated the factors that must be taken into account when evaluating a State's compliance with the duty to prevent and protect as a means of guaranteeing a right. The Court wrote the following:

according to the Court's jurisprudence, it is evident that a State cannot be held responsible for any human rights violation committed between private individuals within its jurisdiction. Indeed, a State's obligation of guarantee under the Convention does not imply its unlimited responsibility for any act or deed of private individuals, because its obligation to adopt measures of prevention and protection for private individuals in their relations with each other is conditional on its awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger. In other words, even though the juridical consequence of an act or omission of a private individual is the violation of certain human rights of another private individual, this cannot be attributed automatically to the State, because the specific circumstances of the case and the discharge of such obligation to guarantee must be taken into account.<sup>176</sup>

261. The Court has also held that as guarantors of the rights recognized in the Convention, States are responsible for observing the Convention-protected rights of all persons in their custody.<sup>177</sup> As guarantor of the right to life, the State is required to prevent any situations that might lead, by action or omission, to a violation of that right. In effect, in its role as guarantor, the State does in fact have the responsibility to guarantee the rights of individuals in its custody and to supply information and evidence pertaining to the

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<sup>173</sup> I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 80; I/A Court H.R., *Case of the "Street Children" (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 144.

<sup>174</sup> I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 81; I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, para. 66.

<sup>175</sup> IACHR. Report 24/98. Joao Canuto de Oliveira. Brazil. April 7, 1998, para. 53.

<sup>176</sup> I/A Court H.R., *Case of González et al. "Cotton Field."* Judgment of November 16, 2009, para. 280; I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 123. *See also*, ECHR, *Case of Kiliç v. Turkey*, Judgment of 28 March 2000, paragraphs 62 and 63, and ECHR, *Case of Osman v. the United Kingdom*, Judgment of 28 October 1998, paragraphs 115 and 116.

<sup>177</sup> I/A Court H.R., *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, paragraphs 104–106.

detainee's fate.<sup>178</sup> Furthermore, the Court has written that because of its role as guarantor, the State has the obligation to provide a satisfactory and convincing explanation of what happened and to disprove accusations regarding its responsibility, through valid evidence.<sup>179</sup>

## **2. Analysis of Ricardo David Videla Fernández' situation prior to his death and the circumstances surrounding his death**

262. It has been established that Ricardo David Videla Fernández' mental health required medical treatment. At the time of his death, he had been prescribed medication for a psychiatric condition. The Commission has also established that the prison personnel in whose custody he was at the time of his death were aware of his mental health condition and of the deterioration of that condition in the days leading up to his death. Furthermore, the version of events given by the prison staff was corroborated by the other inmates, who also reported that Ricardo David Videla Fernández had announced his intention to take his life, and had said a number of times that one of the reasons he wanted to end his life was that he could no longer endure the prison conditions to which he was subjected.

263. Given the State's obligations where humane treatment is concerned and its special condition as guarantor, it was the State's responsibility to provide all means necessary to ensure that the victim's detention conditions were ones befitting his human dignity and, most especially, to properly treat his mental health problems.

264. In the instant case, it has been established that the conditions that Ricardo David Videla Fernández endured were incompatible with his personal integrity. The only information the Commission has regarding his mental health condition is the fact that the victim was being provided with medication for a psychiatric condition. The Commission has no details about whether Ricardo David Videla Fernández was receiving any type of special therapy or was being constantly monitored for his mental health problem.

265. The Commission established that Ricardo David Videla Fernández filed a petition of *habeas corpus* in May 2005 describing his condition and expressly stating that he was being subjected to psychiatric mistreatment by his guards. Although it was said that a court authority visited the victim, there is no specific indication that any follow-up was done of his claims of mistreatment. Quite the contrary, as a result of the report issued by the Prison Policy Monitoring Commission of Argentina's Secretariat of Human Rights, days before his death Ricardo David Videla Fernández had been placed in a punishment cell, where the Commission found him to be "in terrible shape."

266. From the information reported in the preceding paragraphs one can infer that Ricardo David Videla Fernández did not receive proper medical attention for his mental health problems. The suggestion that he might have had some form of psychiatric treatment or medication for a psychiatric condition, without any indication of what the State was doing to provide him with adequate care and to properly monitor his mental condition, is not sufficient for the Commission to conclude that Argentina fulfilled its obligation to guarantee the victim's mental and moral integrity while he was alive. This finding is reinforced by the fact that the petition of *habeas corpus* the victim filed in May 2005 and the June 2005 report prepared by the Secretariat for Human Rights' Prison Policy Monitoring Commission indicating that the victim was in very bad condition drew virtually no reaction from the prison authorities or even the court authorities.

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<sup>178</sup> I/A Court H.R., *Case of Bulacio*. Merits, Reparations and Costs. Judgment of September 30, 2003. Series C No. 100, para. 138. See also, I/A Court H.R., *Case of the Urso Branco Prison*, Provisional Measures, Order of April 22, 2004, *consideranda* 6.

<sup>179</sup> I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 111.

267. Summarizing, the present case involves a combination of circumstances for which the State offers no explanation, thus allowing one to infer that these factors had a direct bearing on the death of Ricardo David Videla Fernández. These factors are as follows: the subhuman and inhumane detention conditions that he endured at the Mendoza Penitentiaries and the failure to monitor and provide proper medical care for the victim's mental health problem. According to what the victim himself said prior to his death, his mental health problem and his desire to take his own life were exacerbated by the ever-present inhuman prison conditions he endured.

268. Apart from the failures and omissions on the part of prison personnel in the days and weeks leading up to Ricardo David Videla Fernández' death, the failure to protect the victim was blatantly apparent even on the day he died. Because the victim had announced his intention to commit suicide, his guards should have spared no effort to protect the life and personal integrity of Ricardo David Videla. But the opposite happened: prison authorities did not keep a close eye on the victim, did not make an emergency call for medical or psychiatric personnel to intervene, and did not take the proper steps to guard him.

269. On the day of his death, Ricardo David Videla Fernández repeated his previous threats of suicide and said that he planned to hang himself. As one of the guards stated, "*El Fajinero* approached, hit the window and said 'Videla tells me that he's about to hang himself.'" My boss ordered me to see what was happening; I entered sector 11A, approached Videla's cell and saw that his belt was around his neck and attached to a high window; Videla said to me 'I'm going to hang myself because I can't stand it here any longer.' I ran off to alert my boss, who was in the guard station. I told him that Videla was about to hang himself. My boss brought the key ring and entered the cellblock with me (...) when we looked through window, we saw that he had already hung himself (...) we entered the cell (...) checked for a pulse or other sign of life, and found that he was dead."

270. In his second statement, the very same guard said that when he went to check on Ricardo David Videla to confirm what the inmate had said about Videla being on the verge of committing suicide, "he didn't have the key to Videla's cell; the practice in that cellblock, which was a maximum-security facility, was that one entered with the key to the cell that one was going to open. At that moment, it was not Videla's recreation time or time to open his cell. As for the procedure followed when an inmate threatened to hurt himself, a threat that was a common occurrence in that cellblock, the procedure was to see whether it was true that the inmate was about to hurt himself, and then advise the superior for directives as to what measures one was to take."

271. The Commission deems that these measures were not a proper response to an emergency situation and to the threat that the situation posed to the victim's life and personal integrity. Summarizing, by failing to adopt measures to improve the subhuman, inhumane detention conditions, by not providing medical treatment suitable to the victim's condition, and by not reacting properly to his suicide threats on the day of his death, the Argentine State was guilty of a series of omissions that caused Ricardo David Videla Fernández' health to deteriorate and ultimately caused his death. The Commission therefore concludes that the Argentine State violated Ricardo David Videla Fernández' right to humane treatment and his right to life, protected under articles 5(1), 5(2) and 4(1) of the American Convention, in relation to Article 1(1) thereof. The Commission will now turn its attention to the omissions and irregularities that were the basis for the Commission's finding that the State had disregarded its duty to ensure a proper investigation into the events that transpired.

## **2. Analysis of whether the investigations constituted an effective recourse.**

272. The Court has observed that “as a result of the protection granted by Articles 8 and 25 of the Convention, the States are obliged to provide effective judicial recourses to the victims of human rights violations that must be substantiated according to the rules of due process of law.”<sup>180</sup> The Court has also written that:

From Article 8 of the Convention it is evident that the victims of human rights violations, or their next of kin should have substantial possibilities to be heard and to act in the respective proceedings, both to clarify the facts and punish those responsible, and to seek due reparation.<sup>181</sup>

273. The Court has also held that the victims and their next of kin have the right to expect, and the States the obligation to ensure, that the events that transpired will be effectively investigated by State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the damages and injuries that the next of kin have suffered will be redressed.<sup>182</sup> Therefore, once state authorities learn of a human rights violation, especially a violation of the rights to life, humane treatment and personal liberty,<sup>183</sup> they have a duty to initiate, *ex officio* and without delay, a serious, impartial and effective investigation,<sup>184</sup> which must be conducted within a reasonable period of time.<sup>185</sup>

274. As to the meaning of the duty to investigate “with due diligence,” the Inter-American Court has written that due diligence implies that the investigations are to be conducted by all legal means available and should be geared to establish the truth.<sup>186</sup> The Court has also written that the State has a duty to ensure that everything necessary is done to ascertain the truth of what happened and to punish anyone responsible,<sup>187</sup> and involving every State institution.<sup>188</sup>

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<sup>180</sup> I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 124; I/A Court H.R., *Case of the Rochela Massacre*. Judgment of May 11, 2007. Series C. No. 163, para. 145; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 381; and I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*. Judgment of November 24, 2006. Series C No. 158, para. 106.

<sup>181</sup> I/A Court H.R., *Case of García Prieto et al.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 102; I/A Court H.R., *Case of the “Street Children” (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 227; and I/A Court H.R., *Case of the Serrano Cruz Sisters*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, para. 63.

<sup>182</sup> I/A Court H.R., *Case of García Prieto et al.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 103; I/A Court H.R., *Case of Bulacio*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 114; and I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 382.

<sup>183</sup> I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 100.

<sup>184</sup> I/A Court H.R., *Case of García Prieto et al.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 146; and I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz*, Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 130.

<sup>185</sup> I/A Court H.R., *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 114; I/A Court H.R., *Case of the Rochela Massacre*. Judgment of May 11, 2007. Series C. No. 163, para. 146; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 382.

<sup>186</sup> I/A Court H.R., *Case of García Prieto et al.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101.

<sup>187</sup> I/A Court H.R., *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 114; I/A Court H.R., *Case of the Rochela Massacre*. Judgment of May 11, 2007. Series C. No. 163, para. 146; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 382.

<sup>188</sup> I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 130; I/A Court H.R., *Case of the Pueblo Bello Massacre*.



275. For its part, the Inter-American Commission has written the following with regard to the States' obligation to conduct a serious investigation:

[T]he fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts does not constitute a failure to fulfill the obligation to investigate. However, in order to establish in a convincing and credible manner that this result was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth, the State must show that it carried out an immediate, exhaustive and impartial investigation.<sup>189</sup>

276. The Court has written that the duty to investigate is one of means and is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective<sup>190</sup> or as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof.<sup>191</sup>

277. The facts that the IACHR has established show that the State launched two investigations as a result of the death of Ricardo David Videla Fernández: one criminal investigation and one disciplinary inquiry.

278. In the case of the criminal investigation, the Commission observes that a number of measures were taken, which included statements taken from inmates and prison staff. As a result of those statements, the Prosecutor's Office in charge of the case was able to corroborate that Ricardo David Videla Fernández was on psychiatric medication, that he had broken a bar in the cell in which he had been previously held and that he had conveyed to more one than one prison guard that he intended to take his life. Based on that information, the Prosecutor's Office ordered the investigations closed as he believed he had proof that the victim had died by his own hand and that the moment he was found hanging, the authorities had done everything they could to save him.

279. The foregoing suggests that the investigation was aimed at determining whether Ricardo David Videla Fernández had committed suicide and whether the prison authorities had reacted appropriately on the day of his death, as soon as they learned of what had happened. The investigation did not look into any possible blame for the omissions described in the preceding section given the inhumane conditions under which the victim was being held and the obvious deterioration in his health. Nor were any inquiries conducted to ascertain why the prison authorities failed to react to the victim's announcement that he would take his own life.

280. The Commission believes these were logical lines of investigation<sup>192</sup> that might reasonably have been pursued to establish any possible blame in the death of someone who was in the custody of the State. This became even more apparent when the statements taken by the

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Judgment of January 31, 2006. Series C No. 140, para. 120; and I/A Court H.R., *Case of Huilca Tecse*. Judgment of March 3, 2005. Series C No. 121, para. 66.

<sup>189</sup> IACHR, Report No. 33/04, Case 11.634, Merits, Jailton Neri Fonseca, Brazil, March 11, 2004, para. 97.

<sup>190</sup> I/A Court H.R., *Case of Velásquez Rodríguez*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 131; and I/A Court H.R., *Case of Zambrano Vélez et al.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

<sup>191</sup> I/A Court H.R., *Case of Velásquez Rodríguez*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court H.R., *Case of Zambrano Vélez et al.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

<sup>192</sup> See also: I/A Court H.R. *Case of Escué Zapata v. Colombia*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 106: "It is vital that the complexity of the matter, the context and the circumstances in which it occurred and the patterns that explain its commission must be taken into account when carrying out due diligence in the investigative procedures."

Prosecutor's Office uncovered serious evidence that Ricardo David Videla's death might have been avoided if authorities had reacted to his cries for help and to the complaints of the Secretariat for Human Rights' Prison Policy Monitoring Commission.

281. The Commission notes also that the preceding observations apply with equal force to the disciplinary inquiry, which was ultimately closed when no official was charged in the criminal investigation.

282. Given the foregoing considerations, the Commission concludes that the State did not provide Ricardo David Videla Fernandez' next of kin<sup>193</sup> with an effective recourse to have the events clarified and those responsible identified, all in violation of rights recognized in articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof.

**F. The right to humane treatment and the child's right to special protection (articles 5(1), 5(2) and 19 of the American Convention, in relation to Article 1(1) thereof) as they pertain to Lucas Matías Mendoza's loss of sight.**

283. In the preceding section, the Commission underscored the State's obligations under articles 5(1) and 5(2) of the American Convention vis-à-vis persons in its custody. Specifically, the Commission addressed the State's obligation to provide proper medical attention and treatment when a detainee so requires. In the case of Lucas Matías Mendoza, the Commission observes that he was hit in the eye in 1997 and sustained a detached retina when he was still a child and while being held in detention in a facility for juveniles under the age of 18.

284. The Inter-American Court has held that "when the person the State deprives of his or her liberty is a child, (...) it has the same obligations it has with regard to any person, yet compounded by the added obligation established in Article 19 of the American Convention. On the one hand, it must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principle of the best interests of the child."<sup>194</sup>

285. The Commission does not have sufficient information indicating that the State was to blame for the blow that Lucas Matías Mendoza sustained in 1997. However, from the information available it appears that in that very same year the victim was diagnosed as having a detached retina in the left eye. The record also shows that Lucas Matías Mendoza suffered from a congenital problem that caused toxoplasmosis in his right eye. According to the information brought to the Commission's attention, it was not until 2005 that a medical examination was done at the request of the victim's defense counsel. The medical examination revealed that he had lost his bilateral vision.

286. In earlier sections, the Commission pointed out that as guarantor of persons deprived of liberty, it is up to the State to give a convincing and satisfactory explanation of what happened to persons in its custody. The Argentine State provided no information at all regarding the medical attention that Lucas Matías Mendoza received between 1997, when he was diagnosed as having a detached retina and toxoplasmosis, and 2005, when the medical examinations concluded that he had already lost his bilateral vision. Because the State failed to shoulder its burden of proof in this regard, the Commission deems that Argentina did not provide a convincing and satisfactory explanation of

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<sup>193</sup> The names of the next of kin who, according to the petitioners, were adversely affected by what happened to Ricardo David Videla Fernández, appear at paragraph 13(l) of this report.

<sup>194</sup> I/A Court H.R., *Case of the "Juvenile Reeducation Institute."* Judgment of September 2, 2004. Series C No. 112, para. 160; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers.* Judgment of July 8, 2004. Series C No. 110, paragraphs 124, 163-164; and I/A Court H.R., *Case of Bulacio.* Judgment of September 18, 2003. Series C No. 100, paragraphs 126 and 134.

the victim's vision loss, nor did the State authorities act with the special due diligence that Lucas Matías Mendoza's need for medical attention required.

287. The Commission therefore concludes that the Argentine State violated, to the detriment of Lucas Matías Mendoza, the right to humane treatment recognized in articles 5(1) and 5(2) of the American Convention, in relation to the obligations undertaken in Article 1(1) thereof.

**G. Rights to humane treatment, judicial guarantees and judicial protection (articles 5(1), 5(2), 8(1) and 25(1) of the American Convention in relation to Article 1(1) thereof) and the obligation to prevent and punish torture (articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture) as they pertain to the treatment of Claudio David Núñez and Lucas Matías Mendoza**

288. Articles 5(1), 5(2), 8(1) and 25(1) were cited in previous sections. For purposes of the present analysis, the Commission recalls the provisions of Article 1 of the Inter-American Convention to Prevent and Punish Torture, which provides that:

The States Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

289. Article 6 of that Convention reads as follows:

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

290. Article 8 of the Torture Convention provides that:

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, 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 process.

291. According to the petitioners, on December 9, 2007, Claudio David Núñez and Lucas Matías Mendoza were allegedly severely beaten by guards at Ezeiza Federal Penitentiary Complex No. 1. They allege that both were beaten on various parts of the body, but the heaviest blows were to the soles of their feet. The petitioners alleged that these beatings constitute a form of torture known as *falanga*. The State, for its part, alleged that what happened that day was a fight among inmates and that the guards had intervened to break up the fight.

292. The Commission will examine the parties' allegations in the following order: i) General standards on torture and cruel, inhuman or degrading treatment; ii) an analysis of these standards in light of the treatment of Claudio David Núñez and Lucas Matías Mendoza; and iii) an analysis of the investigations conducted.

**1. General standards on torture and cruel, inhuman or degrading treatment**

293. Time and time again the Commission has held that “International Human Rights Law strictly prohibits torture and cruel, inhuman, or degrading punishment or treatment. The absolute prohibition of torture, both physical and psychological, is currently part of the domain of the international *jus cogens*. Said prohibition remains valid even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and other crimes, state of siege, or a state of emergency, civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability or other public emergencies or catastrophes.”<sup>195</sup>

294. The Court, for its part, has written that various universal and regional instruments set forth said prohibition and enshrine the right of all human beings not to be tortured. Similarly, various international instruments recognize this right and reaffirm that prohibition, including international humanitarian law.<sup>196</sup>

295. The Inter-American Convention to Prevent and Punish Torture, which entered into force for Argentina on February 28, 1987, is part of the inter-American *corpus juris* which the Commission is to use as a tool with which to interpret the meaning and scope of the general provision contained in Article 5(2) of the American Convention.<sup>197</sup> Specifically, Article 2 of the Inter-American Convention to Prevent and Punish Torture defines torture as:

[...] any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

296. The Commission is again compelled to underscore the standards described earlier in this report on the State’s special condition as guarantor of the rights of all persons deprived of liberty.

### **3. Analysis of these standards in light of the treatment of Claudio David Núñez and Lucas Matías Mendoza**

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<sup>195</sup> I/A Court H.R., *Case of Bueno Alves*. Judgment of May 11, 2007. Series C. No. 164, para. 76; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 271; and I/A Court H.R., *Case of Baldeón García*. Judgment of April 6, 2006. Series C No. 147, para. 117.

<sup>196</sup> I/A Court H.R., *Case of Bueno Alves*. Judgment of May 11, 2007. Series C. No. 164, para. 77. Citing: the International Covenant on Civil and Political Rights, Article 7; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2; the Convention on the Rights of the Child, Article 37, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 10; the Inter-American Convention to Prevent and Punish Torture, Article 2; the African Charter on Human and Peoples’ Rights, Article 5; the African Charter on the Rights and Welfare of the Child, Article 16; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (*Convention of Belém do Pará*), Article 4, and the European Convention on Human Rights and Fundamental Freedoms, Article 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, Article 5; UN 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, Article 6; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 17(3); Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Article 4, and European Committee of Ministers, Guidelines on Human Rights and the Fight against Terrorism, Guideline IV; Article 3 common to the four Geneva Conventions; Third Geneva Convention relative to the treatment of prisoners of war (Convention III), Articles 49, 52, 87, 89, and 97; Fourth Geneva Convention relative to the protection of civilian persons in time of war (Convention IV), Articles 40, 51, 95, 96, 100 and 119; Additional Protocol to the Geneva Conventions of August 12, 1949, on protection of victims in international armed conflict (Protocol I), Article 75(2)(ii), and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 4(2)(a).

<sup>197</sup> *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 145.

297. As was established in the section on proven facts, at the urging of a number of officials, including the National Sentence Enforcement Judge and the Office of the Attorney for the National Prison System, between December 10 and 27, 2007, Lucas Matías Mendoza and Claudio David Núñez underwent numerous medical evaluations. On the whole, these examinations were consistent in reporting that both young men had slight abrasions and bruising on various parts of the body. However, it was also established that the last four medical examinations done on Lucas Matías Mendoza found hematomas on the soles of both feet.

298. Here the Commission must again point out that the State, being responsible for detention centers, is the guarantor of the rights of detainees, which involves, *inter alia*, the obligation to provide a satisfactory explanation when someone in its custody sustains some injury.<sup>198</sup> In other words, absent that explanation, and inasmuch as the persons in question are incarcerated in State-run detention centers or prisons, the presumption must be that the State is responsible for what happens to persons in its custody.<sup>199</sup>

299. The Commission observes that it has been duly established that Lucas Matías Mendoza had hematomas on the soles of his feet, and that Claudio David Núñez also had abrasions and the like on various parts of the body, as confirmed in medical reports prepared by physicians in the employ of the State. Two of these medical reports were prepared by doctors on the staff of the Medical Aid Service at Federal Penitentiary Complex No. 1.

300. The versions of events given by Claudio David Núñez and Lucas Matías Mendoza are consistent with each other and with the medical reports. Based on the information available, the Commission deems that there were serious indicia that the injuries both young men sustained, particularly those of Lucas Matías Mendoza, were not the result of a fight among inmates. His injuries were consistent with a form of torture described in the Istanbul Protocol as follows: "*Falanga* is the most common term for repeated application of blunt trauma to the feet (or more rarely to the hands or hips), usually applied with a truncheon, a length of pipe or similar weapon."<sup>200</sup> The injuries that Lucas Matías Mendoza sustained are all the more serious because he was suffering from progressive blindness and by that time had lost almost all vision, which made him particularly vulnerable.

301. These findings are compounded by the conclusions listed below regarding the State's failure to duly investigate the victims' claims, especially in light of the results of the medical examinations they underwent. This means that the State failed to provide a satisfactory explanation of what happened to the victims and thus failed to disprove the presumption regarding its responsibility for what happens to persons in its custody.

302. In view of the foregoing, the Commission concludes that as a result of the use of methods demeaning to human dignity and calculated to inflict physical pain and suffering, Claudio David Núñez and Lucas Matías Mendoza were subjected to torture by agents of the State; as a consequence, the Argentine State violated their right to humane treatment recognized in Article 5 of the American Convention, and failed to comply with its obligation to prevent torture, an obligation undertaken in articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture.

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<sup>198</sup> I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para. 126.

<sup>199</sup> I/A Court H.R., *Case of the Urso Branco Prison*. Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2002. *Consideranda* 8. I/A Court H.R., *Case of Neira Alegría et al. v. Peru*. Judgment of January 19, 1995. Series C No. 20, para. 65.

<sup>200</sup> Istanbul Protocol. *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Office of the United Nations High Commissioner for Human Rights. Professional Training Series No. 8,t paragraph 203.

#### 4. Analysis of the investigations conducted.

303. As it has in previous cases, the Commission observes that the State has an international obligation to investigate, clarify and redress any violation of human rights denounced and to punish those responsible, all in accordance with articles 1(1), 8 and 25 of the American Convention.<sup>201</sup> In this particular case, the State had an obligation to identify those responsible for the violations of the right to humane treatment denounced by the petitioners. Furthermore, and by virtue of the principle of *jura novit curia*, the Commission believes that articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, transcribed above, are also relevant in the present case.

304. As for the duty to investigate any situation in which an act of torture may have been committed, the Inter-American Court has held that:

in the light of the general obligation of the State Parties to respect and guarantee the rights of all persons subject to its jurisdiction, contained in Article 1(1) of the American Convention, the State has the obligation to commence immediately an effective investigation that may allow the identification, the trial and the punishment of those responsible, whenever there is an accusation or well-grounded reason to believe that an act of torture has been committed in violation of Article 5 of the American Convention. Furthermore, this action is specifically regulated in Articles 1, 6 and 8 of the Inter-American Convention against Torture, which Articles bind the State Parties to take all steps that may be effective to prevent and punish all acts of torture within the scope of their jurisdiction [...] <sup>202</sup>.

305. Following this same line of reasoning, in the case of *Bueno Alves v. Argentina*, the Court held that:

As regards the obligation to guarantee the right enshrined in Article 5(1) of the Convention, the Court has pointed out that this obligation implies the duty of the State to conduct an adequate investigation into the possible acts of torture and other cruel, inhuman or degrading treatment. As regards the effective investigation and the documentation, the following principles are applicable: independence, impartiality, competence, diligence, and promptness, which must be adopted by any judicial system and applied to all investigations involving alleged tortures. <sup>203</sup>

306. As for the criminal investigation into the events in which Lucas Matías Mendoza and Claudio David Núñez sustained injuries, the petitioners reported that Lomas de Zamora Federal Criminal and Correctional Court No. 2 had received the respective complaint on December 26, 2007. <sup>204</sup> Later, in a communication dated July 10, 2009, the petitioners alleged that “rather than conduct an in-depth investigation to determine whether the prison guards bore any criminal blame [...] the judge in charge of the investigations decided to close them.” The State, for its part, offered no specific arguments in connection with these allegations.

307. As for the criminal cases prosecuted in connection with the injuries that Lucas Matías Mendoza and Claudio David Núñez sustained, cases Nos. 615 and 616, the Acting Federal

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<sup>201</sup> IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, para. 392.

<sup>202</sup> I/A Court H.R., *Case of Gutiérrez Soler V. Colombia*. Judgment of September 12, 2005. Series C No. 132, para. 54; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 159; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*. Judgment of July 8, 2004. Series C No. 110, para. 114.

<sup>203</sup> I/A Court H.R., *Case of Bueno Alves*. Judgment of May 11, 2007. Series C. No. 164, para. 108.

<sup>204</sup> These complaints were brought by Dr. Juan Facundo Hernández, attorney with the Cooperative for the Rights of Children and Adolescents.

Prosecutor in charge of the Lomas de Zamora Public Prosecutor's Office No. 2, who was in charge of the investigations, requested that they be closed on June 23 and February 1, 2008, respectively. Having examined both requests that the Prosecution filed seeking to have the investigations closed, it appears that the only consideration cited by the examining prosecutor is the victims' reticence about naming those alleged to have mistreated them. This despite the fact that both stated that their assailants were members of the prison security service.

308. In his request asking that case No. 616 be closed the prosecutor asserted the following: "the prosecution is not prepared to deny the complaint made; nevertheless, the victim has done little to cooperate by providing details on how the events transpired and who the eventual perpetrators were, which makes it impossible to continue the inquiry."<sup>205</sup> Furthermore, both applications filed with the court seeking to have the investigations closed made reference to the forensic medical reports' findings that the injuries that Claudio David Núñez sustained were not serious. The applications described the report as follows: "[...] the medical report duly requested from the Forensic Medical Cops of the National Justice System, the original of which should be attached [...], concludes that Claudio David Núñez has no external injuries [...]" and "[...] that the injuries that Lucas Mendoza reportedly sustained are mild, and should take less than a month to heal ... during which time he will be unable to work."<sup>206</sup>

309. Subsequently, in court orders handed down on July 2 and February 29, the judge presiding over the cases decided to close the investigations into cases Nos. 615 and 616, based on the prosecution's observations; the judge did not order any additional evidence in the case.

310. The Inter-American Commission observes that the investigating prosecutor and the judge presiding over the case did little to actively go after and get at the real causes of the events denounced. Both appeared to have believed that the case could not go forward unless the victims identified their assailants; they failed to produce any evidence to show that the injuries sustained were the result of a fight. The Commission therefore considers that the means the State used to investigate the facts of these two cases could not be deemed to be serious, diligent and effective. Furthermore, given the fact that at the time they made their statements Lucas Matías Mendoza and Claudio David Núñez were inmates in the prisons in the Federal Penitentiary System, it would have been reasonable to assume that they would be afraid to finger any of the guards who were their custodians at the time.

311. In the Commission's view, the State cannot justify its failure to comply with its duty to investigate allegations of torture on the grounds that the victims did not identify their assailants by name. The Argentine authorities were derelict in their duty to spare no effort to investigate these facts. And there is no information to suggest that measures were taken to ensure that the victims could make their statements in safety. It was the duty of the investigating authorities to exhaust every possible avenue to determine what transpired, including the fact that the victims were unwilling to supply the requested information because they were afraid. Had this been done, the State might have been able to order the measures necessary to eliminate any danger to which the victims might expose themselves as a result of their complaints and, in short, clear away any obstacles to continuing the investigation.

312. In the *Abella case*, which also involved the Argentine State, the Commission pointed out that the obligation to investigate and punish those responsible for human rights violations is one

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<sup>205</sup> The petitioners' brief, received on July 10, 2009. Attachment. Request filed on February 1, 2008, in which Federal Prosecutor's Office No. 2 requests that proceedings in case No. 616 be closed.

<sup>206</sup> The petitioners' brief, received on July 10, 2009. Attachment. Request filed on February 1, 2008, in which Federal Prosecutor's Office No. 2 requests that proceedings in case No. 616 be closed.

of means and not ends: "in cases such as the present, in which individuals are deprived of their freedom, confined in an enclosed space and controlled exclusively by agents of the State, any defense alleging the difficulty or impossibility of establishing the identity of those responsible should be strictly and rigorously scrutinized. Even though this obligation is a means, in such cases it is the State which has control over all the probative means to clarify the facts."<sup>207</sup>

313. The Commission finds that the inference of the observations made by the prosecutor, which the judge in the case then relied upon, is that they did not investigate the facts either diligently or effectively. The Commission therefore concludes that the State violated, to the detriment of Claudio David Núñez and Lucas Matías Mendoza, articles 8(1) and 25(1) of the American Convention, in relation to the obligations set forth in Article 1(1) thereof. The Commission also finds that the State violated articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish torture to the detriment of the very same persons.

#### **H. Right to personal integrity (Article 5(1) of the American Convention in relation to Article 1(1) thereof) regarding the victims' next of kin**

314. Finally, the Commission recalls that the jurisprudence of the Inter-American Court is that "the next of kin of the victims of human rights violations may, in turn, be victims."<sup>208</sup> Paragraph 13, subparagraph l) of this report, lists the names of the persons who, in the petitioners' view, were affected by the events in this case.

315. The Commission considers that the nature of the facts described thus far, including the improper treatment -incompatible with international laws on the subject- of the victims when they were sentenced to life in prison and confinement for life, respectively, the absence of a periodic review with a view to the possibility of release or parole, and the consequences that their sentences had, allow one to reasonably infer that the mental and moral integrity of the victims' next of kin were also affected.

316. The consequences were all the more serious in the case of the next of kin of Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández, given the inhumane detention conditions that they endured while incarcerated in the Mendoza Penitentiaries. Particularly striking in the case of Ricardo David Videla Fernández was the lack of proper treatment and, when he died while in the custody of the State, the failure to conduct an effective investigation to determine what had happened. Similarly, the next of kin of Claudio David Núñez and Lucas Matías Mendoza were affected by the treatment they received; the latter's loss of sight, and the failure to properly investigate any of these facts.

317. The Commission therefore concludes that the Argentine State violated the right to have one's mental and moral integrity respected, protected under Article 5(1) of the American Convention in relation to Article 1(1) thereof, to the detriment of the next of kin of César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández.

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<sup>207</sup> IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, para. 393.

<sup>208</sup> I/A Court H.R.. *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 101; I/A Court H.R.. *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 160; I/A Court H.R.. *Case of Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 105; I/A Court H.R.. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 175; and I/A Court H.R.. *Case of Castillo Páez v. Peru*. Reparations and Costs. (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 59.



## **VI. CONCLUSIONS**

318. Based on the observations set forth in this report, the Inter-American Commission on Human Rights concludes that the Argentine State violated:

a. The rights protected under articles 5(6), 7(3) and 19 of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof, to the detriment of César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández.

b. The right protected under Article 8(2)(h) of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof, to the detriment of César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza, Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández.

c. The rights protected under articles 8(2)(d) and (e) of the American Convention, in relation to the obligations undertaken in Article 1(1) thereof and to the detriment of César Alberto Mendoza and Saúl Cristián Roldán Cajal.

d. The rights protected under articles 5(1) and 5(2) of the American Convention, in relation to the obligations undertaken in Article 1(1) thereof and to the detriment of Saúl Cristián Roldán Cajal and Ricardo David Videla Fernández.

e. The rights protected under articles 4(1) and 5(1) of the American Convention, to the detriment of Ricardo David Videla Fernández, and articles 8(1) and 25(1) of the American Convention, to the detriment of his next of kin, all in relation to the obligations undertaken in Article 1(1) thereof.

f. The rights protected under articles 5(1), 5(2) and 19 of the American Convention, in relation to the obligations undertaken in Article 1(1) thereof, to the detriment of Lucas Matías Mendoza.

g. The rights protected in articles 5(1), 5(2), 8(1) and 25(1) of the American Convention, in relation to the obligations undertaken in Article 1(1) thereof, to the detriment of Lucas Matías Mendoza and Claudio David Núñez. Also, the obligations contained in articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

h. The right protected in Article 5(1) of the American Convention, to the detriment of the victims' next of kin.

## **VII. RECOMMENDATIONS**

319. Based on the conclusions reached in this report on the merits,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE ARGENTINE STATE:**

1. Order the measures necessary to enable César Alberto Mendoza, Claudio David Núñez, Lucas Matías Mendoza and Saúl Cristián Roldán Cajal to file a remedy to get a full review of their convictions, in accordance with Article 8(2)(h) of the American Convention.

2. Take measures to ensure that the international standards in the area of juvenile criminal justice, as set forth in this report, are observed in that review and that the victims' legal situation is determined in accordance with those standards.

3. Ensure that so long as they are deprived of their liberty, they receive any and all medical treatment they may require.

4. Order the legislative and other measures necessary so that the criminal justice system applied in the case of juvenile offenders under the age of 18 is compatible with the State's international obligations with respect to the special measures of protection that children require and the purpose of punishment, according to the parameters set forth in the present report.

5. Order the legislative and other measures to ensure effective compliance with the right recognized in Article 8(2)(h) of the American Convention, in accordance with the standards described in the present report.

6. Conduct a thorough, impartial and effective investigation, within a reasonable period of time, to clarify the death of Ricardo David Videla Fernández and, if appropriate, impose any penalties that may be in order. This investigation should include possible blame for any omissions or dereliction of the duty to prevent on the part of prison personnel while the victim was in their custody.

7. Conduct a thorough, impartial and effective investigation, within a reasonable period of time, to clarify the facts surrounding the torture that Lucas Matías Mendoza and Claudio David Núñez suffered and, if called for, impose the penalties that the law prescribes.

8. Order measures of non-repetition that include training programs for prison personnel on international human rights standards, particularly the right of persons deprived of liberty to decent treatment and the prohibition of torture and other cruel, inhuman or degrading treatment.

9. Order the measures necessary to ensure that the detention conditions at the Mendoza Provincial Penitentiary are in compliance with inter-American standards on the matter.

10. Make adequate compensation for the human rights violations found in the present report for both pecuniary and non-pecuniary damages.