

**REPORT No. 74/11**  
CASE 12.653  
MERITS  
CARLOS AND PABLO CARLOS MEMOLI  
ARGENTINA  
July 20, 2011

**I. SUMMARY**

1. On February 12, 1998, Mr. Carlos Memoli and his son Pablo Carlos Memoli (hereinafter, "the petitioners" or "the alleged victims") lodged a petition on their own behalf before the Inter-American Commission on Human Rights (hereinafter, "the Commission," "the Inter-American Commission" or "the IACHR") for the alleged violation of their right to a fair trial and to freedom of thought and expression, enshrined respectively in Articles 8 and 13 of the American Convention on Human Rights (hereinafter, "the Convention" or "the American Convention"), against the Republic of Argentina (hereinafter, "the State," "the State of Argentina" or "Argentina"). The petitioners and alleged victims claimed that they were found criminally responsible for denouncing the executive officers of a mutual benefit association of the city of San Andres de Giles for allegedly engaging in the irregular sale of burial vaults in the local cemetery. They also contend that the criminal case culminating in their conviction was tried without regard to due process.

2. The State argues that the alleged victims did not adequately exhaust domestic remedies and that the petition lodged with the IACHR does nothing more than call into question the outcome of a legal dispute over private matters between the Memolis and the plaintiffs. Additionally, it claims that the alleged victims had access to all judicial remedies provided for by Argentinean law and that the criminal sanction imposed on them abides by the provisions of Article 13.2 of the American Convention, inasmuch as the sanction is expressly and previously established by law and meets the requirements for the subsequent imposition of liability in order to protect the right to honor and reputation of the plaintiffs.

3. On July 23, 2008, the IACHR approved Report N° 39/08, finding the petition admissible pertaining to Article 13 (right to freedom of thought and expression) and Article 8 (right to a fair trial), in connection with Article 1.1 and 2 of the American Convention.

4. The Commission finds that the State has violated Article 8 and 13 of the American Convention, in connection with Article 1.1 and 2 of said treaty, to the detriment of Carlos and Pablo Carlos Memoli.

**II. PROCEEDINGS BEFORE THE IACHR SUBSEQUENT TO ADMISSIBILITY REPORT No. 39/08**

5. Upon approving Admissibility Report No. 39/08, the Commission assigned the number 12.653 to the case. On August 5, 2008, the Commission served notice to both parties of approval of the admissibility report, offered its assistance to help to reach a friendly settlement on the matter, and set a period of two months for the petitioners to make submissions on the merits.

6. On August 29, 2008, the petitioners submitted their arguments on the merits and requested a "conciliation hearing." These arguments were forwarded to the State on October 16, 2008, requesting its reply within two months. On October 24, 2008, the petitioners expressed their interest in reaching a friendly settlement in the case.

7. In a brief dated October 20, 2008 received on January 23, 2009, the State informed the Commission that it had decided to not enter into the friendly settlement procedure in the case. On February 2, 2009, the Commission forwarded this brief to the petitioners.

8. On January 15, 2009, the petitioners submitted additional arguments on the merits, which were forwarded to the State on March 4, 2009.

9. On March 11, 2009, after granting an extension to the State, the Commission received a communication from it reiterating its prior arguments on the merits and requesting the IACHR to "reject the arguments on the merits put forth by the petitioner." On July 6, 2009, these arguments were forwarded to the petitioners.

10. On May 13, 2009, July 27, 2009 and September 4, 2009, the Commission received additional arguments on the merits from the petitioners, which were forwarded to the State on July 6, 2009, August 11, 2009, and September 17, 2009, respectively.

11. On August 11, 2009 and September 18, 2009, the State submitted additional briefs, reiterating its arguments on the merits from earlier briefs. These communications were forwarded to the petitioners on August 24, 2009 and November 23, 2009, respectively.

12. The IACHR received additional arguments from the petitioners on February 1, 2010, April 28, 2010 and April 28, 2011, requesting a ruling on the merits of the case and providing copies of parts of the record of the proceedings in the civil case.

### **III. POSITION OF THE PARTIES**

#### **A. Petitioners**

13. The petitioners contend that the Executive Officers of the Italian Mutual Benefit Society engaged in the irregular sale of burial vaults in the cemetery of the Municipality of San Andres de Giles over a five year period, promising official title to the vaults, which were never provided. They charge that the Municipal Government gave land to the Italian Mutual Benefit Society for a period of 40 years at the symbolic price of one peso in order to create an "Italian pantheon" at the cemetery, through sales carried out by a public notary, a Justice of the Peace, a mayor and 12 city council members. The petitioners argue that the members who bought vaults from the Italian Mutual Benefit Society paid 20 pesos per month over 36 months without receiving "any property at all." They claim that Mr. Carlos Memoli filed a criminal complaint about these acts and that the Judge overseeing the case investigation found the burial vaults in the municipal cemetery negotiated by the Italian Society to be an "impossible subject of a contract and naturally invalid."

14. The petitioners note that the daily newspaper "La Libertad," of which Mr. Pablo Memoli was managing editor, published articles denouncing the alleged irregularity in the sale of the burial vaults at the municipal cemetery, as well as alleged mismanagement of the Italian Mutual Benefit Society. They further contend that on two occasions they participated in broadcasts on "Radio Vall" during which they denounced the same acts. They allege that based on the aforementioned denunciations, Messrs. Antonio Guarracino, Humberto Romanello and Juan B. Piriz, respectively president, secretary and treasurer of the Italian Mutual Benefit Society, filed a private criminal action (*querrela*) against the alleged victims for the crimes of calumny (*calumnia*) and slander (*injuria*), as provided for in Articles 109 and 110 of the Criminal Code of Argentina.

15. On December 29, 1994, the alleged victims were convicted under a judgment issued by Judge No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes. Said

decision was upheld on appeal in a judgment issued by the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes on December 28, 1995. The petitioners indicated that they presented a series of remedies challenging this decision, the final one being a motion for reconsideration of an interlocutory decision (*recurso de reposición*) denied by the Supreme Court of Justice of the Nation on December 16, 1997.

16. The petitioners state that on December 30, 1997 a civil suit was brought against them for the same offenses that were the subject of the private criminal action (*querrela*) for damages, eight years after they took place. They note that pursuant to Article 4037 of the Civil Code of Argentina, the period of time established to pursue claims of a civil nature lapses after two years and yet, as of August 6, 2002, the judge hearing the civil suit for damages had not yet ruled on the statute of limitations.

17. The alleged victims reiterate in several additional briefs, the latest one dated April 28, 2011, that the civil suit for damages brought against them has still not been settled. However, they state that under an out-of-court settlement agreement entered into between Messrs. Humberto Romanello, Antonio Guarracino and the Memolis, these two plaintiffs dropped their civil suit against them leaving, nonetheless, Mr. Juan Piriz as the sole plaintiff in said action.

18. They further claim that, as part of the private criminal action for damages lodged against them, a "general restraining order on the sale of their assets" (*inhibición general de bienes*) was issued, based on a motion filed by the plaintiffs. This motion led to the granting of an injunction on behalf of the plaintiffs in order to ensure their potential right to receive payment for damages as well as ensure payment of attorney's fees. The injunctive measure was ordered in March of 1996 and then, following an appeal filed by the petitioners, it was upheld on April 18 of that same year. The petitioners note that at the end of 1996 they paid the plaintiffs' attorney's fees. They contend that, even though they did so, the injunction on their assets has been reinstated several times since then in the context of the civil case against them and, as of the date of their arguments on the merits of April 30, 2009, they are still "restrained under court injunction from selling [their] assets."

19. The petitioners contend that the judicial officials who decided the private criminal action for damages did not take into account the evidence on the veracity of the statements printed in "La Libertad" newspaper and that during the appeals proceeding several irregularities were committed which infringed on their right to a defense. They allege that the Second Appellate Chamber for Criminal and Correction Matters of the Judicial Department of Mercedes convened a surprise hearing and held it without their presence. Specifically, they claim that after the hearing of November 28, 1995, another hearing was granted for the plaintiffs to have the opportunity to reply to the arguments of defendants. They state that said hearing was a second opportunity for the plaintiffs to put forth their arguments by reading a document. They allege that these acts were in violation of the rules in effect at the time under Article 423, section 6 of the Code of Criminal Procedure of the Province of Buenos Aires. The petitioners note that these alleged violations of their right to a defense were recognized by the Supreme Court of the Province of Buenos Aires and the Supreme Court of Justice of the Nation.

20. They argue that Mr. Carlos Memoli was sentenced to a suspended term of one month in prison because his attorney used the word "unscrupulous" in an administrative proceeding, in referring to the members of the Executive Committee of the Italian Mutual Benefit Society. They assert that pursuant to the Criminal Code of Argentina, making slanderous statements in a court proceeding file is not subject to punishment. They note that Mr. Pablo Memoli was sentenced to a suspended term of five months of prison for publishing newspaper articles denouncing the alleged irregularity in the management of the Italian Mutual Benefit Society of the city of San Andres de Giles. The petitioners allege that they made the statements for which they were convicted as part

of the private criminal action for damages in response to statements made by the plaintiffs. They claim that they made their statements based on the "present public interest", inasmuch as "the mayor [of the city] submitted a bill to the 12 [municipal] council members for them to approve a 40 year leasing ordinance for the institution [the Italian Mutual Benefit Society]" and that this argument was "proven and ignored by the triers of fact."

21. Lastly, the petitioners allege that in April of 2005, they were notified by Federal Court to make a deposit to the order of the Supreme Court of Justice of the Nation, under court order to comply, of the sum of 2000 Argentine pesos as a result of the denial of the extraordinary appeal to this court on October 5, 1997.

22. The petitioners contend that they endured "a series of irregularities and acts of negligence" during the criminal case as a consequence of an alleged violation of their right to a defense. They assert that the criminal appeals court "violates the law with impunity when the Chamber affords an unusual privilege to the accusing party in allowing them, 7 days later, an extension of the already completed hearing so they can respond to our arguments" and that "they were denied, of course, the chance to respond," inasmuch as the accused "were not even present." The petitioners contend that "[the] most serious part was that the appellate judges took those final statements of the plaintiffs and used them in their judgment to convict us." They note that they appealed to the Supreme Court of the Province of Buenos Aires to set aside the judgment and find it unconstitutional and then filed an extraordinary appeal to the Supreme Court of Justice of the Nation, as well as a petition in error with the National Court, and all of them were denied. The petitioners are claiming that the alleged violation of the right to a defense "violates their right to equal protection under the law."

23. The petitioners also assert that three of the civil court judges who heard the civil case against them were sanctioned for "delays and irregularities" and that they "violated the Chamber's appeals procedure" in the case. The petitioners state that "of the 10 sitting judges in this jurisdiction, 3 were sanctioned" and the others "are joined together in an 'Association of Judges of Mercedes,'" and therefore the petitioners believe that the judges of the Department of Mercedes could apply a "personal punishment" to them for denouncing the three sanctioned judges. The petitioners argue that they have been "unreasonably punished" in view of the "slowness of justice" in their case.

24. Lastly, the petitioners affirm that they have been deprived of the right to purchase and sell property since March 1996 and still face the "possibility of being convicted in the coming years" in violation of their right to due process. They allege that their precarious situation is a result of "malfeasance in office," "irregularities," "abuse of authority" and "denial and delay of justice" on the part of the judges who heard their case. Therefore, the petitioners state that "it is very difficult for this party, to achieve the minimal impartiality that any citizen can require" and that "this proves the rigid position that we have endured over the past 20 years, both in the criminal and the civil cases by judges of the city of Mercedes, and for the simple crime of slander."

25. In their arguments on the merits, the petitioners state that the facts at issue constitute violations of Article 8, 13, 24 and 25 of the American Convention to the detriment of Carlos Memoli and Pablo Memoli. Consequently, they request that the State vacate the sentences for the offenses, stay the proceedings against Carlos Memoli and Pablo Memoli and lift the injunction on their assets.

## B. Position of the State

26. The State of Argentina claims that it was notified of the petition four years after it was received by the Office of the Executive Secretariat of the Inter-American Commission. It notes that the excessive delay in the "pre-admissibility" stage should be grounds for the Commission to refrain from entertaining the petition, inasmuch as it affects the rights and expectations of the respondent State, makes it difficult to take any preliminary steps to attempt to settle the controversy in a domestic forum or to reach a friendly settlement.

27. It contends that the petition before the Commission involves a private dispute stemming from personal conflicts between Mr. Carlos Memoli and Messrs. Antonio Guarracino, Humberto Romanello and Juan Bautista Ricardo Piriz. It maintains that the private criminal action for damages brought by these last three gentlemen stems from a belligerent relationship involving an Italian language course offered by the Italian Mutual Benefit Society. It further claims that the confrontation grew to greater proportions as a result of the criminal complaint for alleged fraud lodged by Mr. Carlos Memoli; the high public profile of the matter raised by articles published in the "La Libertad" newspaper and the two radio interviews given by the alleged victims.

28. The State argues that the alleged victims were tried and convicted, at both the trial and appeals level, with the assistance of an attorney and the opportunity to introduce evidence, all with full respect for fair trial rights. It asserts that Messrs. Carlos and Pablo Memoli were convicted on only some of the counts in the complaint and that the civil action brought by the plaintiffs in the context of the criminal proceeding was dismissed.

29. As for the argument of the petitioners regarding the surprise scheduling of a hearing by the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, the State claims that the court deemed it necessary to hold an additional hearing in order to put the parties on an equal footing in their ability to defend themselves. It notes that at the first hearing the defendants took the floor to speak on two occasions, while the plaintiffs did so only once, which prompted the scheduling of an additional hearing in order to strike a procedural balance and hear arguments on the facts of the case.

30. The State asserts that both the plaintiffs and the defendants were served notice of this hearing. It affirms that the defense attorney for the alleged victims participated in this proceeding and, therefore, their absence does not amount to a violation of due process rights. It further contends that both parties appealed the trial court judgment and it was proper to supplement the first hearing by providing an opportunity to the plaintiffs to argue on the points about which they had not submitted any pleadings, which were part of the appeal, and about which the defendants and their attorneys had extensively argued during the first hearing convened by the appellate court.

31. The State claims that the alleged victims enjoyed all due process rights at both the trial and appellate levels. It argues that after the appeals decision was handed down, the alleged victims improperly sought extraordinary remedies in both the provincial and the federal sphere. It notes that they attempted to file an appeal to the Supreme Court of Justice of the Province of Buenos Aires, pleading grounds for a Writ of inapplicability of the law, which is why the appeal was denied by the high court. The State asserts that the alleged victims filed a federal appeal against this decision, which was also denied. It claims that, in light of this, the defendants filed a Motion for Reconsideration of an Interlocutory Order (*Recurso de Revocatoria*), which was denied because it was evident that the challenged ruling is not subject to reconsideration.

32. As to the argument of the petitioner that Mr. Carlos Memoli was convicted because his attorney had used a particular expression in an administrative proceeding, the State contends

that this assertion is not part of the consideration and decision of the courts, which heard the case. It notes that Mr. Carlos Memoli was convicted for a number of acts of slander expressed through different ways, and not for the aforementioned expression in an administrative proceeding.

33. The State argues that the alleged victims misused the appeals procedure and, therefore, have not adequately exhausted domestic remedies. It notes that the petitioners' claim does nothing more than call into question the judgment issued by the Argentinean courts in the suit. In this regard, it contends that the Commission cannot review judgments of domestic courts that act within the sphere of their competence and apply due process guarantees.

34. The State contends that it has not violated the freedom of expression of the alleged victims, inasmuch as the criminal sanction imposed on them is expressly and previously established by law, and meets the requirements for the subsequent imposition of liability in order to protect the right to honor and reputation of the plaintiffs. It asserts that these elements conform to the requirements set forth in Article 13.2 of the American Convention.

35. With regard to the civil action for damages against the petitioners, the State did not express a position during the merits stage. However, during the admissibility stage the State argued that because this process is still ongoing, the petitioner's allegations should be considered in the domestic proceedings and not before the IACHR.

36. Finally, the State notes that two judges for civil matters of the Judicial Department of Mercedes were sanctioned with a "warning" for "delays in ruling." It further states that Dr. Etchegaray, Judge of Court No. 10 for Civil and Commercial Matters, was sanctioned for delaying a ruling on an objection to disqualification of license in the Memoli's case and Dr. Cuestas, Judge of Court No. 1 for Civil and Commercial Matters, was sanctioned for recusing herself from the Memoli case twice. The State alleges that the two judges were not sanctioned for acting against the daily newspaper "La Libertad," but rather "confronted with the tasks inherent to them, [the Court] found that it affected proper functioning of the service of justice." Lastly, the State notes that the aforementioned judges were only sanctioned with "warnings" and not with a harsher sanction, because of "the lack of seriousness of the offense and the absence of a history of disciplinary actions of both judges."

#### IV. PROVEN FACTS

37. In April 1989 Mr. Carlos Memoli became a Vice Secretary of the Executive Board of the Italian Mutual Benefit Society of San Andres de Giles, which among other activities, organized Italian language courses for the local community.<sup>1</sup> In late 1989, the Executive Board of the Italian Society refused admission of Mr. Carlos Memoli's spouse, Mrs. Daisy Sulich de Memoli, as a language course teacher's assistant.<sup>2</sup> On November 23, 1989, the Executive Board decided to suspend the Memolis from the association for 24 months. On April 6, 1990, Mr. Carlos Memoli sent out certified letters to the Board, alleging failure to publish the quarterly balance statements on

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<sup>1</sup> Annex 1. Brief of October 8, 1996, from the petitioners, addressed to the Supreme Court of Justice of the Province of La Plata, in re. Federal Appeal to Supreme Court, pg. 2. Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>2</sup> Annex 2. Appellate Court Judgment issued on December 28, 1995, Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Ca. 55964, case titled "Salabery, Alberto et al, vs. Memoli, Carlos et al in re Complaint for wrongful accusation of a crime and slander," pg. 18. Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

the Society's activities and accusing its members of irregular conduct pertaining to promises of sale/purchase of burial vaults in the municipal cemetery.<sup>3</sup>

38. The decision of the Executive Board to suspend the Memolis for 24 months was ratified at the Regular Meeting of the General Assembly of the Italian Society on May 11, 1990.<sup>4</sup> During said Regular Assembly Meeting, the Mutual Benefit Society decided to include on the order of business of the following year's Regular Meeting of the General Assembly deliberations on the expulsion of Carlos Memoli and his wife Daisy Sulich de Memoli. After being notified of said decision, the two of them resigned from their membership. The executive officers of the Italian Society accepted the resignation of the couple and informed them that they would be prohibited from rejoining the association.<sup>5</sup>

39. On June 27, 1990, Mr. Carlos Memoli filed a complaint with the National Institute of Mutual Benefit Associations (INAM) [the federal government regulatory agency of associations], under the number 160/90, alleging failure of the treasurer of the Italian Mutual Benefit Society, Mr. Juan Bautista Piriz, to release periodical balance statements.<sup>6</sup>

40. At the initiative of one of the members of the Executive Board of the Italian Mutual Benefit Society, Mr. Antonio Guarracino, the concession of a parcel of land in the Municipal Cemetery (*Cementerio Norte*) was obtained from the Municipal Government of San Andres de Giles, making the association responsible for the construction of burial vaults, in order to offer them to its members in exchange for dues payments.<sup>7</sup>

41. As a result of the business dealings with these burial vaults in the municipal cemetery, Mr. Carlos Memoli lodged a criminal complaint for alleged fraud with the Sectional Office of the Police of San Andres de Giles against Messrs. Antonio Guarracino, Humberto Romanello and Juan Bautista Ricardo Piriz, because according to Mr. Carlos Memoli, the sale of the burial vaults was allegedly being carried out with the promise of handing over the notarized title to the purchaser; and he claims, however, that this was never done. This complaint gave rise to Case No. 73679 before what was at the time the First Court for Criminal Matters of the Judicial Department of Mercedes.<sup>8</sup> In a ruling on June 6, 1990, said court found that the crime charged in the complaint had not been committed and ordered the dismissal without prejudice.<sup>9</sup> The judge found that the

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<sup>3</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes. Case No. 71.114, pg. 40. Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>4</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 40.

<sup>5</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 40.

<sup>6</sup> Annex 2. Appellate court judgment issued on December 29, 1995, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 19.

<sup>7</sup> Annex 2. Appellate court judgment issued on December 28, 1995, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 18-19.

<sup>8</sup> Annex 4. Judgment issued on June 6, 1990. Court No. 1 for Criminal Matters of the Judicial Department of Mercedes, Case No. 73.679, pg. 2. Annex to the communication of the petitioners of August 29, 2008 (received on September 9, 2008).

<sup>9</sup> Annex 1. Brief of October 8, 1996 from the petitioners addressed to the Supreme Court of Justice of the Province of La Plata, in re Federal Appeal to Supreme Court, pg. 41. Judgment issued on June 6, 1990, Court No. 1 for Criminal and Correctional Matters of the Judicial Department of Mercedes, pg. 3.

conduct did not constitute the crime of fraud, noting that there was an error committed by the defendants, but no intentional deception was involved.<sup>10</sup>

42. Messrs. Antonio Guarracino, Humberto Romanello and Juan Bautista R. Piriz brought a private criminal action for damages (*querrela penal*) for calumny (*calumnia*) and slander (*injuria*) against Carlos Memoli and his son, Pablo Memoli. The basis for said legal action is the content of newspaper articles published in the newspaper *La Libertad*, of which Pablo Memoli was the managing editor, and the content of the statements made by the defendants on the radio program *Radio Vall*, on two separate occasions, as well as language used by the Memolis at the Argentine Institute of Mutual Benefit Associations (INAM) in the context of an administrative complaint regarding the same acts which were the subject of their criminal charges.<sup>11</sup>

43. The newspaper articles and the radio statements basically were about the alleged mismanagement of the administration of the Italian Mutual Benefit Society and the alleged fraud stemming from the irregular sale of the burial vaults to members of this society.<sup>12</sup>

44. As a consequence of the legal action, on December 29, 1994, Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes convicted Carlos Memoli to a suspended one-month prison term for committing the crime of slander and Pablo Memoli to a five-month suspended prison term for committing the same crime, imposing court costs on both of them.<sup>13</sup>

45. The judgment of Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes was based on statements deemed slanderous against the honor of the plaintiffs. Statements made by Carlos Memoli included the following: a) on the radio program May 10, 1990 he said that the plaintiffs acted: "... maligning and lying, sowing terror in some, threatening others, it is of no use..."<sup>14</sup>; this was in relation to irregularities in the sale of the burial vaults; and b) in the context of the administrative procedure before INAM, the plaintiffs were labeled as "three unscrupulous men;"<sup>15</sup> "with the intention to 'whitewash' six years of abuse and corrupt scheming,"<sup>16</sup> "with clear intentions of taking over and managing in a fascist and arbitrary way endorsed by members of the executive board,"<sup>17</sup> among other statements made by him.

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<sup>10</sup> Annex 1. Brief of October 8, 1996 from the petitioners addressed to the Supreme Court of Justice of the Province of La Plata, in re Federal Appeal to Supreme Court, pg. 5; *cf.* Annex 4. Judgment issued on June 6, 1990. Court No. 1 for Criminal Matters of the Judicial Department of Mercedes pgs. 2-3.

<sup>11</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pgs. 4-5, 43-45, 53-55, 61-65, 67-70, 71, 74, 84.

<sup>12</sup> *Cfr.* Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pgs. 2-24.

<sup>13</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pgs. 84-85.

<sup>14</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 67, II).

<sup>15</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 65 letter c).

<sup>16</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 72 letter b).

<sup>17</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 65 letter c).



46. Statements made by Mr. Pablo Memoli included: a) on the radio program May 4, 1990, referring to the plaintiffs, he stated that: "these men act with mendacity, ruses and with a lot of trickery;"<sup>18</sup> "we want to put an end to some of the corrupt ones...here we have to extirpate two or three people;"<sup>19</sup> "who we believe are corrupt;"<sup>20</sup> "you open the newspaper and the corrupt ones are out the next day;"<sup>21</sup> b) on the radio program May 10, 1990, Pablo Memoli, in the same context as these events, stated that: "...these [guys] made that bill of sale knowing, maybe that it was wrong, that's why we explained it clearly in our newspaper regarding the fraudulent intent ...b);"<sup>22</sup> "... we were sure, ... we do not need to lie, not even play a little trick in anything, at all, ..., and they do, and they do and they are doing so."<sup>23</sup> Other statements put forth in different newspaper articles labeled the plaintiffs as "possible criminals,"<sup>24</sup> among other statements.

47. The decision of Court No. 7 for Criminal and Correctional Matters of the Judicial Department of Mercedes was appealed and upheld by the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, on December 28, 1995.<sup>25</sup> The alleged victims filed a motion for clarification of judgment with the same court, which was denied in a decision on March 26, 1996.<sup>26</sup> Additionally, they filed an appeal to set aside judgment (based on procedural flaws) and for reversal of judgment (based on inapplicability of the law). On April 18, 1996, the Second Appellate Chamber for Criminal and Correctional Matters of Mercedes granted leave to appeal to the Supreme Court on the basis of unconstitutionality and forwarded the appeal to the Supreme Court of Justice of the Province of Buenos Aires, while dismissing the appeal for finding of inapplicability of the law.<sup>27</sup> On September 10, 1996, the Supreme Court of the Province determined that the appeal did not meet the requirements set forth in Article 349 section 1 of the Criminal Code of Procedure (CPP), and found it inadmissible.<sup>28</sup>

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<sup>18</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 59 letter e).

<sup>19</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 61, letter h).

<sup>20</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 61 letter i).

<sup>21</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 62 letter j).

<sup>22</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 65 letter c).

<sup>23</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pg. 65 letter d).

<sup>24</sup> Annex 3. Trial court judgment issued on December 29, 1994, Court for Criminal and Correctional Matters No. 7 of the Judicial Department of Mercedes, pgs. 47-57, point 8).

<sup>25</sup> Annex 2. Appellate court judgment handed down on December 28, 1995, Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, pgs. 53-61.

<sup>26</sup> Annex 5. Judgment of April 25, 1996, Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Case No. 57.311 bis "Motion for Clarification of Judgment." Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>27</sup> Annex 6. Judgment of April 18, 1996, Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, Case No. 57.311 bis case heading "Motion for general injunction of assets in case 78.673," Certificate of notification. Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>28</sup> According to the petitioners, the decision on this appeal was based on the following opinions: "The appeal to the Supreme Court on pgs. 1079-1088, does not fulfill the requirements set forth in Article 349 of the CPP [Criminal Procedure Code], inasmuch as although it charges a violation of Article 168 of the Constitution of the Province, it has no legal basis in the normative content of said precepts, but rather an attempt is made to bring before this Tribunal for examination alleged errors in trying the case such as violation of the right to defense at trial, alleged procedural flaws prior to sentencing, arbitrariness therein and breaking specific procedural rules, as well as the way in which the issue has been resolved, [which

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48. The alleged victims filed an Appeal for Reversal of Judgment of the same court before the high court of the province, which denied it on September 23, 1996. On October 8, 1996 they lodged an Extraordinary Appeal to the Federal Jurisdiction before the Provincial Supreme Court,<sup>29</sup> alleging arbitrariness in the prior judgments and invalidity of the second hearing convened by the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes. On November 26, 1996, the Supreme Court of the Province of Buenos Aires denied the federal appeal.<sup>30</sup>

49. On December 11, 1996, the alleged victims filed an Appeal for Reversal of Judgment with the court *a quo*, which was denied in a ruling on December 27, 1996. On December 11, 1996, they also filed a petition in error for denial of appeal before the Supreme Court of Justice of the Nation, which denied it on October 3, 1997, on the following grounds: "the [original] appeal [to the Supreme Court of the Nation], the denial of which [prompted the petition in error for denial of appeal] is inadmissible (Article 280 of the Civil and Commercial Procedural Code of the Nation)."<sup>31</sup> Said decision was served on the alleged victims on October 7, 1997. On October 9, 1997 the alleged victims filed a motion for reconsideration of an interlocutory decision (*recurso de reposición*), which was denied by the Supreme Court of Justice of the Nation in a decision served on the appellant on December 16, 1997.<sup>32</sup>

50. On March 1, 1996, in the context of the criminal damage proceedings against Carlos and Pablo Memoli, plaintiffs Antonio Guarracino, Humberto Romanello and Juan Bautista R. Piriz requested a "general injunction for the sale or encumbrance of assets" against the Memolis. The plaintiffs claim to have obtained, at that time, "two favorable rulings," and that "if the result persisted, once the Supreme Court ruled, the right to collect for damages, as well as professional fees of the attorneys involved, will arise."<sup>33</sup> On March 8, 1996, the general injunction on assets

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are] topics outside of the appeal itself though they are indeed appropriate for a motion of inapplicability of the law (Article 350 of the above-cited Code, *cfr.* Decisions and judgments 92-I-209; Ac. 2,030...)". Annex 1. Brief of the petitioners of October 8, 1996, addressed to the Supreme Court of Justice of the Province of La Plata, in re/ Federal Appeal to Supreme Court, pg. 25.

<sup>29</sup> *Cfr.* Annex 1. Brief of the petitioners of October 8, 1996, addressed to the Supreme Court of Justice of the Province of La Plata, in re/ Federal Appeal to Supreme Court.

<sup>30</sup> The Provincial Supreme Court provided the following basis in law for its decision: "That decisions declared on admissibility of appeals filed before local Courts do not justify, as a rule, the granting of the petition of Article 14 of Law 48, especially in cases such as this one in which the lower court errors expressed on the subject, only suggest personal differences of the appellant with the interpretation made by the court handing down judgment, and therefore they are not suitable for such purposes taking into account that the flaw of arbitrariness with respect to rulings of that nature is especially restrictive." Legal Basis 6 (*Visto* 6). Judgment issued on November 26, 1996, Supreme Court of Justice of the Province of Buenos Aires, Ac. 63.249, case titled "Alberto Salaberry and Osvaldo O. Lossino on behalf of Antonio Guarracino, Humberto Romanello and Juan B.R. Piriz bringing suit for wrongful accusation of a crime and slander against Carlos and Pablo Memoli." Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>31</sup> Annex 7. Judgment issued on October 3, 1997, Supreme Court of Justice of the Nation, Case No. 55.964 case titled *Salaberry, Alberto et al v. Memoli, Carlos and Memoli, Pablo in re complaint for wrongful accusation of crime and slander*, S. 1662. XXXII. Appeal on facts. Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>32</sup> Annex 8. Judgment issued on December 10, 1997, Supreme Court of Justice of the Nation, Case No. 55.964 case titled *Salaberry, Alberto et al v. Memoli, Carlos and Memoli, Pablo in re complaint for wrongful accusation of crime and slander*, S. 1662. XXXII. Appeal on facts. Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>33</sup> Annex 9. Brief of Alberto Salaberry of March 1, 1996 addressed to Court No. 1 for Criminal and Correctional Matters, Motion for General Injunction of Assets, "Salaberry, Alberto et al on behalf of Mr. Antonio Guarracino et al v. Memoli, Pablo et al in re complaint for wrongful accusation of crime and slander" (page 5). Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

requested by the plaintiffs was granted by a Judge for Criminal and Correctional Matters of the Province of Buenos Aires.<sup>34</sup> On March 14, 1996, Carlos and Pablo Memoli filed an appeal against the general injunction of assets.<sup>35</sup> On April 18, 1996, the Chamber for Criminal and Correctional Matters of the Department—Appellate Panel II, upheld the general injunction of assets, finding it, “in conformity with the law.”<sup>36</sup> Carlos and Pablo Memoli filed a motion for clarification of this decision; the Chamber denied the motion on April 25, 1996.<sup>37</sup>

51. Based on the exhibits in possession of the IACHR, it is a fact that the general injunction of assets, issued against Carlos and Pablo Memoli, was vacated by the court of the Province of Buenos Aires on September 18, 2001.<sup>38</sup> The record also reflects that the measure was issued again on October 31, 2001 by Judge Roberto P. Sanchez, in the context of civil case “Romanello Humberto et al versus Memoli Carlos et al, in re Damages.”<sup>39</sup> The general injunction of assets was also reinstated on October 3, 2006,<sup>40</sup> on May 24, 2007,<sup>41</sup> and October 15, 2008.<sup>42</sup> According to the information provided by the petitioners and undisputed by the State, the general injunction of assets was still in effect at the time of approval of this report.<sup>43</sup>

52. Based on the facts that gave rise to the criminal proceeding against Carlos and Pablo Memoli, and once the criminal conviction was upheld by the Supreme Court of Justice of the Nation, a civil proceeding was brought as well. On December 29, 1997, Messrs. Humberto Romanello, Antonio Guarracino and Juan Piriz filed suit for damages against Carlos and Pablo

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<sup>34</sup> Annex 10. Judgment issued on March 8, 1996, Pedro Francisco Fernandez, Judge of Court No. 1 for Criminal and Correctional Matters of Mercedes, ordering “precautionary measure requested on pg. 5 by the plaintiff,” in reference to the request for general injunction of assets sought by the plaintiffs in the case of “Mr. Antonio Guarracino et al v. Memoli, Pablo et al in re complaint for wrongful accusation of crime and slander” (page 6). Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>35</sup> Annex 11. Brief of Carlos Memoli and Pablo Memoli of March 14, 1996, addressed to the Appellate Chamber for Criminal and Correctional Matters of the Department, Province of Buenos Aires, Appeal of general injunction of assets, “Mr. Antonio Guarracino et al v. Memoli, Pablo et al in re complaint for wrongful accusation of crime and slander” (Pages 10-15). Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>36</sup> Annex 12. Judgment issued April 18, 1996. Second Appellate Panel of the Chamber of Criminal and Correctional Matters of the Department, Province of Buenos Aires, C.57.311 bis, titled “Inc. de inhibición Gral. de Bienes en Causa 78.673” (page 17). Annex to the original petition of the petitioners of January 28, 1998 (received February 12, 1998).

<sup>37</sup> Annex 13. Brief of petitioners of April 1996 addressed to the Appeals Chamber for Criminal Matters of Mercedes, Motion for Clarification of Judgment (page 18). Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998). Annex 14. Judgment issued on April 25, 1996, Appellate Chamber for Criminal Matters of Mercedes, C. 57.311 bis Motion for Clarification. Annex to the original petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>38</sup> Annex 14. Order issued on September 18, 2001, Case No. 62.821 Memoli Pablo, Motion Gen. Injunct. Assets. Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>39</sup> See Annex 15. Communication of Judge Roberto P. Sanchez of November 5, 2001, addressed to the Director of the Register of Property and Real Property, Civil Court No. 5, Dept. of Mercedes (page 498). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>40</sup> Annex 16. Official Letter issued on October 19, 2006, Judge Martha Rosa Cuesta, with reference to the order of October 3, 2006 Court No. 1 for Civil and Commercial Matters, precautionary measure no. 1497892/4 “Romanello, Humberto et al v. Memoli, Carlos et al in re damages” (page 506). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>41</sup> Annex 17. Brief of June 4, 2007 of Alberto C. Salaberry, in reference to the order issued on May 24, 2007, Justice of the Peace Attorney of San Andres de Giles (page 556). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>42</sup> Annex 18. Order issued on October 15, 2008, Hector Ruben Echave, Federal Judge, Case File No. 53.189 Sec. 1 (page 186). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>43</sup> See communications of the petitioners dated October 27, 2008, January 15, 2009, April 30, 2009 (received on May 13, 2009), July 20, 2009 (received on July 27, 2008), and April 28, 2010.

Memoli for the sum of 90,000 Argentine Pesos, based on the criminal conviction of the petitioners for the crime of slander.<sup>44</sup> On February 10, 1998, Carlos and Pablo Memoli raised an objection on the grounds of *res judicata* and lapsing of the statute of limitations,<sup>45</sup> and on March 2, 1998 provided their answer to the complaint and moved for it to be dismissed.<sup>46</sup> On March 28, 1998, the plaintiffs to the civil suit filed an addition to the complaint,<sup>47</sup> to which the petitioners provided an answer.<sup>48</sup> On September 11, 2001, Carlos and Pablo Memoli reached an out-of-court settlement with plaintiffs Antonio Guarracino and Humberto Romanello, with Juan Piriz remaining as the only plaintiff in the suit.<sup>49</sup> The case file before the IACHR includes records of the proceedings in the civil case up to November 2009 and, as of that date, the case had not been resolved at the trial level.<sup>50</sup> Based on the information provided by the petitioners and undisputed by the State of Argentina, as of the date of the adoption of this report, the decision of the trial court is still pending.<sup>51</sup>

53. As a result of the judicial delay in the civil case, the Supreme Court of Justice of the Province of Buenos Aires sanctioned two judges and put forth a recommendation to another one. On March 12, 2008, Pablo Memoli filed a complaint against the presiding judges of Courts No. 1, 5 and 10 for Civil and Commercial Matters of the Department of Mercedes, respectively,<sup>52</sup> alleging the crimes of malfeasance in office, denial and delay of justice, abuse of authority and, 'all in all, ongoing violation of the law for the purpose of favoring the plaintiffs'" as a result of the performance of these judges in the civil case for damages.<sup>53</sup> During this suit, the court noted that "most of the questioning, reflects disagreements with rulings that were issued, a subject matter [falling] outside [of the scope] of this court [procedure]."<sup>54</sup> Nonetheless, it noted on the record that Dr. Martha Rosa Cuesta, the judge presiding over Court No. 1 for Civil and Commercial Matters "[was delayed] in ruling on the request for declaring the end to the evidentiary period," which "caused considerable delay" and that Dr. Tomas Etchegaray, the judge presiding over Court No. 10 for Civil and Commercial Matters, caused a delay of several months from the time of recusing

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<sup>44</sup> Annex 19. Brief of Alberto Salaberry of December 29, 1997, Civil Complaint, "Mr. Antonio Guarracino et al v. Memoli, Pablo et al in re criminal complaint for wrongful accusation of a crime and slander" (page 4). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>45</sup> Annex 20. Brief of the petitioners of February 10, 1998, addressed to Judge Tomas Martin Etchegaray, Court for Civil and Commercial Matters, "Romanello et al v Memoli Carlos et al in re damages", (page 19). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>46</sup> Annex 21. Brief of the petitioners of March 2, 1998 addressed to Judge Tomas Martin Etchegaray, Court for Civil and Commercial Matters, "Romanello et al v Memoli Carlos et al in re damages", (page 68). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>47</sup> Annex 22. Brief of Alberto Salaberry of May 28, 1998 (page 81). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>48</sup> Annex 23. Brief of the petitioners of March 28, 1998, addressed to Judge Tomas Martin Etchegaray, Court for Civil and Commercial Matters (page 165). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>49</sup> Annex 24. Brief of Antonio Guarracino, Humberto Romanello and Pablo Memoli of September 11, 2001 (page 208). Annex to the communication of the petitioners of January 15, 2009 (received on January 23, 2009).

<sup>50</sup> See communication of the petitioners of January 14, 2010 (received on February 1, 2010), Annexes.

<sup>51</sup> See communications of the petitioners dated October 27, 2008, January 15, 2009, April 30, 2009 (received on May 13, 2009), July 20, 2009 (received on July 27, 2008), and April 28, 2010.

<sup>52</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, Case File 2001-535/07, pg. 1. Annex to the communication of the petitioners of April 25, 2008 (received on May 6, 2008).

<sup>53</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pg. 1.

<sup>54</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pg. 2.

himself until the time judgment was handed down.<sup>55</sup> Consequently, the court declared “that the behavior of Dr. Etchegaray and Dr. Cuesta conspires against the prestige and efficacy of the Judiciary and therefore it is appropriate to apply disciplinary corrective action, taking into consideration—as a mitigating factor—the absence of any history of disciplinary action against either of them” and imposed on them the disciplinary sanction of “a warning.”<sup>56</sup> The record also shows judicial delay caused by Dr. Roberto Sanchez, the judge presiding over Court No. 5 for Civil and Commercial Matters, but the court noted that “the recognized error did not bring any harm to processing the motion.”<sup>57</sup> Therefore, the court found that “application of a corrective disciplinary action was not warranted, even though a recommendation to the judge was,” and it was recommended to him that “henceforth, he should arbitrate the relevant body of documentary evidence so that incidents like this one do not repeat themselves.”<sup>58</sup>

54. Finally, with regard to the allegation that the Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes convened a second hearing and held it without the presence of the defendants, this court rejected the objections of the petitioners in its judgment on the appeal, arguing that the hearing was necessary to resolve “a situation of inequality” to the detriment of the plaintiffs.<sup>59</sup> Additionally, the Supreme Court of Justice of the Province of Buenos Aires denied the appeal to vacate the decision and find the law inapplicable, as filed by the petitioners who alleged said hearing was improperly held, in noting that the “alleged errors in trying the case as the violation of the right to a defense in trial” are “subjects outside of the appeal itself.”<sup>60</sup> The petitioners also raised the subject of the Petition in Error for Denial of Appeal filed before the Supreme Court of Justice of the Nation on December 11, 1996,<sup>61</sup> which was declared inadmissible by said Court on October 3, 1997.<sup>62</sup> In this regard, the Commission notes that records in the case file show that on November 30, 1995, the attorney of Carlos and Pablo Memoli was properly served notice of the second hearing before the Appellate Chamber for Criminal and Correctional Matters—Panel II, and that both the attorney of the Memolis and the attorney of the plaintiffs appeared at said hearing on December 5, 1995.<sup>63</sup>

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<sup>55</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pgs. 2-4.

<sup>56</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pg. 5.

<sup>57</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pg. 4-5.

<sup>58</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pg. 4-5.

<sup>59</sup> Annex 26. Appellate judgment issued on December 5, 1995, Second Appellate Chamber for Criminal and Correctional Matters, Case 55.964, pg. 17. Annex to the petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>60</sup> Annex 27. Judgment issued on September 10, 1996, Supreme Court of Justice of the Province of Buenos Aires, Action 63.249 case titled “Alberto Salaberry and Osvaldo O. Lossino on behalf of Antonio Guarracino, Humberto Romanello and Juan B.R. Piriz. They are filing suit for wrongful accusation of crime and slander against Carlos and Pablo Memoli”, pg. 1. Annex to the petition of the petitioners of January 28, 1998 (received on February 12, 1998). Also see Annex 28. Order issued on September 23, 1996, Supreme Court of Justice of the Province of Buenos Aires on September 23, 1996. Annex to the petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>61</sup> Annex 29. Brief of the petitioners of December 11, 1996, addressed to the Supreme Court of Justice of the Nation. Annex to the petition of the petitioners of January 28, 1998 (received on February 12, 1998).

<sup>62</sup> Annex 7. Judgment issued on October 3, 1997, Supreme Court of Justice of the Nation.

<sup>63</sup> *Cfr.* Annex 30. Certificate of Service of Notice issued on November 30, 1995, Appellate Chamber for Criminal and Correctional Matters of Mercedes (page 997). Annex to the petition of the petitioners of January 28, 1998 (received on February 12, 1998); Annex 26. Appellate judgment issued on December 5, 1995, Second Appellate Chamber for Criminal and Correctional Matters, pg. 1.

## V. ANALYSIS OF THE LAW

55. The Commission shall examine whether there has been a violation in the instant case of Article 8 (Right to a Fair Trial) and Article 13 (Right to Freedom of Thought and Expression) of the American Convention, in connection with Article 1.1 (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of said treaty.

### A. Freedom of thought and expression (Article 13 in connection with Article 1(1) and 2 of the American Convention)

56. Article 13 of the American Convention establishes that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of controls over newsprint, radio broadcasting, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

57. The Inter-American Court has held that freedom of expression has an individual dimension and a social dimension. In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or write, as it also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.<sup>64</sup> Regarding the second dimension of the right to freedom of expression, the social element, the Court has established that freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try to communicate one's point of view to others, but it also implies everyone's right to receive other people's opinions, information and news.<sup>65</sup>

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<sup>64</sup> Cfr. IA Ct of HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, par. 31, available in Spanish at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_05\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_05_esp.pdf) and in English at: [http://www1.umn.edu/humanrts/iachr/b\\_11\\_4e.htm](http://www1.umn.edu/humanrts/iachr/b_11_4e.htm)

<sup>65</sup> Cfr. IA Court of HR, *Case of Herrera Ulloa Vs. Costa Rica*. Preliminary Objections, Merits, Reparation and Costs. Judgment July 2, 2004. Series C No. 107, par. 110, available at: [http://www.corteidh.or.cr/docs/judgments/j10704.htm](#)

58. The social dimension of freedom of expression, that is, the right of the public to hear relevant information and opinions both to define their own life project and for participation in the political process, constitutes an institutional guarantee that is necessary for the existence of a true democracy.<sup>66</sup> Specifically, the Inter-American system has consistently recognized that the right of the public to have access to as many opinions or as much information as possible on matters of general interest is essential for individuals to be able to exert control over the administration of government, participate actively in decision-making that affects them and, particularly, exercise their political rights.<sup>67</sup> For these same reasons it has been asserted that States must create a legal framework that encourages, as opposed to inhibits or hampers a vigorous, plural and uninhibited discussion of all public affairs, even when it clashes with, is offensive or disruptive to authorities or a sector of society. As the Court has stated, these are the requirements of pluralism inherent in a democratic society.<sup>68</sup>

59. Notwithstanding its enormous importance, freedom of expression is not an absolute right. Article 13.2 of the Convention, which prohibits prior censorship, also provides for the possibility of establishing restrictions on freedom of expression in response to abusive exercises of this right. These restrictions are of an exceptional nature and should not limit, beyond what is strictly necessary, the full exercise of freedom of expression, nor become a direct or indirect method of censorship.<sup>69</sup> As opposed

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[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_esp.pdf); IA Ct. of HR, *Case of Ricardo Canese Vs. Paraguay*. Merits, Reparation and Costs. Judgment August 31, 2004. Series C No. 111, par. 79, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf); IA Ct. of HR, *Case of "The Last Temptation of Christ" (Olmedo Bustos et al) Vs. Chile*. Merits, Reparations and Costs. Judgment February 5, 2001. Series C No. 73, par. 66, available at: [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_73\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_73_esp.pdf).

<sup>66</sup> Cfr. Annual Report of the Inter-American Commission on Human Rights, 2009 Annual Report of the Special Rapporteurship for Freedom of Expression, pg. 239, par. 13, available at: <http://www.cidh.org/pdf%20files/RELEAnual%202009.pdf>.

<sup>67</sup> IA Ct. of HR. *Case of Ríos et al Vs. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment January 28, 2009. Series C No. 194, par. 105, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_194\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_194_esp.pdf); IA Ct. of HR, *Case of Perozo et al Vs. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment January 28, 2009. Series C No. 195, par. 116, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_195\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_195_esp.pdf). Also see IA Ct. of HR, *Case of Ricardo Canese Vs. Paraguay*. Merits, Reparations and Costs. Judgment August 31, 2004. Series C No. 111, par. 90, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf). Also see Annual Report of the Inter-American Commission on Human Rights, 2009 Annual Report of the Special Rapporteurship for Freedom of Expression, pgs. 236-238, pars 6-10, available at: <http://www.cidh.oas.org/annualrep/2009sp/RELE%20ESP%202009.pdf>.

<sup>68</sup> IA Ct. of HR, *Case of Ivcher Bronstein Vs. Peru*. Merits, Reparations and Costs. Judgment Corte IDH, *Case Ivcher Bronstein Vs. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, pars. 151-52, available at: [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_74\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_74_esp.pdf); IA Ct. of HR, *Case of Kimel Vs. Argentina*. Merits, Reparations and Costs. Judgment May 2, 2008. Series C No. 177, par. 87, [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_74\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_74_esp.pdf); IA Ct. of HR, *Case of Ricardo Canese Vs. Paraguay*. Merits, Reparations and Costs. Judgment August 31, 2004. Series C No. 111, par. 83, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf). Also see Annual Report of the Inter-American Commission on Human Rights, 2009 Annual Report of the Special Rapporteurship for Freedom of Expression, pgs. 236-238, pars 6-10, available at: <http://www.cidh.oas.org/annualrep/2009sp/RELE%20ESP%202009.pdf>.

<sup>69</sup> Cfr. IA Court of HR, *Case of Herrera Ulloa Vs. Costa Rica*. Preliminary Objections, Merits, Reparation and Costs. Judgment July 2, 2004. Series C No. 107, par. 120, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_esp.pdf); IA Ct. of HR, *Case of Ricardo Canese Vs. Paraguay*. Merits, Reparations and Costs. Judgment August 31, 2004. Series C No. 111, par. 95, and IA Ct. of HR, *Case of Palamara Iribarne Vs. Chile*. Merits, Reparations and Costs. Judgment November 22, 2005, Series C No. 135, par. 79, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_135\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_esp.pdf); IA Ct. of HR, *Case of Kimel Vs. Argentina*. Merits, Reparations and Costs. Judgment May 2, 2008. Series C No. 177, par. 54. Also see Annual Report of the Inter-American Commission on Human Rights, 2009 Annual Report of the Special Rapporteurship for Freedom of Expression, pg. 258, pars. 68 and 69, available at: <http://www.cidh.oas.org/annualrep/2009sp/RELE%20ESP%202009.pdf>

to other rights enshrined in the Convention, the right to freedom of expression regulates in detail its possible limitations.

60. In this regard, both the Commission and the Inter-American Court have consistently held that any measure restricting freedom of expression must fulfill three requirements, as set forth in Article 13.2, in order to be consistent with the American Convention, to wit: (1) the limitation must be established formally and materially by law; (2) the limitation must be aimed at fulfillment of objectives authorized by the Convention; and (3) the limitation must be suitable to achieve the intended objective, necessary in a democratic society for the achievement of the purposes sought by it, and strictly proportional to the aim pursued.<sup>70</sup>

61. In the instant case, the parties agree that the criminal conviction for the crime of slander imposed on Carlos and Pablo Memoli entailed a restriction on their right to freedom of expression. They disagree, however, as to whether this restriction was consistent with the American Convention. As indicated in its Admissibility Report in the instant case,<sup>71</sup> the Commission's task in this case is not to act as an appeals court reviewing the domestic decisions that declared the petitioners guilty, but to assess whether the criminal conviction of Carlos and Pablo Memoli represented a subsequent imposition of liability in accordance with Article 13.2 of the Convention, or whether on the contrary it violated the terms of that provision. In order to examine this question, the IACHR shall refer to the criteria set forth in the preceding paragraph.

62. The first part of the test requires that limitations on freedom of expression be previously and expressly, specifically, precisely and clearly established in a law,<sup>72</sup> both in the formal and material senses of the word.<sup>73</sup> When laws establish limitations on freedom of expression that may lead to a person's deprivation of liberty, the Inter-American Court has held that the requirements of the principle of legality must be strictly adhered to: "if such restriction or limitations are under criminal law, it is important to observe the strict requirements characteristic of the criminal

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<sup>70</sup> Cfr. IA Ct. of HR, *Case of Uson Ramirez Vs. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment November 20, 2009. Series C No. 207, par. 49, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_207\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_esp.pdf); IA Ct. of HR, *Case of Kimel Vs. Argentina*. Merits, Reparations and Costs. Judgment May 2, 2008. Series C No. 177, par. 56 and IA Ct. of HR, *Case of Tristan Donoso Vs. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment January 27, 2009. Series C No. 193, par. 56, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_193\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_esp.pdf). Also see Annual Report of the Inter-American Commission on Human Rights, 2009 Annual Report of the Special Rapporteurship for Freedom of Expression, pg. 258, pars. 68 and 69, available at: <http://www.cidh.oas.org/annualrep/2009sp/RELE%20ESP%202009.pdf>.

<sup>71</sup> IACHR. Report No. 39/08, Petition 56-98. Admissibility, Carlos and Pablo Mémoli, Argentina, July 23, 2008, para. 55, available at: <http://www.cidh.oas.org/annualrep/2008sp/Argentina56-98.sp.htm>.

<sup>72</sup> IA Ct of HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, pars. 39-40; IA Ct. of HR, *Case of Palamara Iribarne Vs. Chile*. Judgment November 22, 2005. Series C No. 135, par. 79; IA Court of HR, *Case of Herrera Ulloa Vs. Costa Rica*. Preliminary Objections, Merits, Reparation and Costs. Judgment July 2, 2004. Series C No. 107, par. 120; IA Ct. of HR, *Case of Tristan Donoso Vs. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment January 27, 2009. Series C No. 193, par. 117; IACHR. 1994 Annual Report, Chapter V: Report on Compatibility between Contempt of Court Laws and the American Convention on Human Rights. Title IV. OAS/Ser. L/V/II.88. doc. 9 rev. February 17, 1995, available at: <http://www.cidh.oas.org/annualrep/94span/cap.V.htm>; IACHR. Report No. 11/96, Case No. 11.230. Merits, Francisco Martorell, Chile. May 3, 1996, par. 55, available at: <http://www.cidh.oas.org/annualrep/96eng/Chile11230.htm>; IACHR. Arguments before the Inter-American Court in the case of *Ricardo Canese Vs. Paraguay*. Transcripts at: IA Ct. of HR, case of *Ricardo Canese Vs. Paraguay*. Judgment August 31, 2004. Series C No. 111, par. 72. a), available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf).

<sup>73</sup> In this regard, the Inter-American Court definition in Advisory Opinion OC-6/86 is applicable, according to which the expression "laws" does not mean any legal norm, but rather general normative acts approved by the constitutionally established and democratically elected legislative body, pursuant to the procedures set forth in the Constitution.



codification to satisfy the principle of legality,<sup>74</sup> inasmuch as “ambiguity in the formulation of criminal definitions generates doubts and opens the door to the discretion of the authorities, particularly undesirable where the criminal liability of a person is to be determined and punished with sentences which severely affect fundamental rights, such as life or freedom.”<sup>75</sup> This derives in the need to “use strict and unequivocal terms, clearly restricting any punishable behaviors,”<sup>76</sup> which entails a “clear definition of the incriminatory behavior, setting its elements, and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures.”<sup>77</sup> It is relevant to recall as well that the Commission has established that when expression involves matters of public interest, subsequent imposition of liability must be through civil and not criminal law.<sup>78</sup>

63. The Commission notes that the basis for the conviction of Carlos and Pablo Memoli in the instant case was the crime of slander, which at the time was defined by law as a criminal offense under Article 110 of the Criminal Code of Argentina as follows: “He who dishonors or discredits another person, shall be punished with a fine of one thousand five hundred to ninety thousand pesos or a prison term of one month to one year.” In the case of *Kimel Vs. Argentina*, the Inter-American Court had the opportunity to examine this provision, and found that the definition of the criminal offense was “inadequate” and therefore violatory of both Article 13 and Article 9 of the Convention, in connection with Article 1.1 and 2 of the treaty.<sup>79</sup> In order to come to that conclusion, the Court took into account the State of Argentina’s own recognition of this, in stating that “the lack of sufficient accuracy in the criminal legislation punishing defamation and preventing the infringement of the right to freedom of thought and expression entails the State’s failure to comply with the obligation to adopt domestic measures as provided for in Article 2 of the American Convention.”<sup>80</sup> The IACHR notes as well that the State of Argentina subsequently amended the definitions of the offenses of calumny and slander in its Criminal Code in response to the judgment of the Court in the *Kimel* case,<sup>81</sup> making the definition of these offenses more precise, eliminating prison terms as punishment for them, and establishing that expressions referring to matters of public interest cannot constitute the offenses of calumny or slander.<sup>82</sup> Consequently, the Inter-American Court found that

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<sup>74</sup> IA Ct. of HR, *Case of Uson Ramirez Vs. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, par. 55.

<sup>75</sup> IA Ct. of HR, *Case of Kimel Vs. Argentina*. Merits, Reparations and Costs. Judgment May 2, 2008. Series C No. 177, par. 63.

<sup>76</sup> IA Ct. of HR, *Case of Uson Ramirez Vs. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, par. 55.

<sup>77</sup> IA Ct. of HR, *Case of Uson Ramirez Vs. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, par. 55.

<sup>78</sup> IACHR, Inter-American Declaration of Principles on Freedom of Expression, Principle 10, available at: <http://www.cidh.oas.org/basicos/basicos13.htm>.

<sup>79</sup> IA Ct. of HR, *Case of Kimel Vs. Argentina*. Merits, Reparations and Costs. Judgment May 2, 2008. Series C No. 177, par. 67.

<sup>80</sup> IA Ct. of HR, *Case of Kimel Vs. Argentina*. Merits, Reparations and Costs. Judgment May 2, 2008. Series C No. 177, par. 66.

<sup>81</sup> Annual Report of the Inter-American Commission on Human Rights, 2009 Annual Report of the Special Rapporteurship for Freedom of Expression, pgs. 387-88, pars 30-32, available at: <http://www.cidh.oas.org/annualrep/2009sp/RELE%20ESP%202009.pdf>

<sup>82</sup> *Cfr.* Law 26.551, enacted on November 26, 2009, available at: <http://infoleg.gov.ar/infolegInternet/anexos/160000-164999/160774/norma.htm>. Based on this amendment, the respective articles of the Argentinean Criminal Code establish:

**Article 109:** Calumny or falsely accusing an individual of committing a specific and detailed criminal offense which gives rise to a public action, will be punished with a fine of three thousand pesos (\$3,000)

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Argentina had fulfilled its obligation to adapt its domestic law in the area of freedom of expression, as ordered by the Court in its judgment in the *Kimel* case.<sup>83</sup>

64. In short, the Inter-American Court has found that the provision criminalizing slander in existence at the time of the criminal conviction of Carlos and Pablo Memoli was inconsistent with the Convention. In strict application of this legal precedent, the Commission finds that the criminal sanction imposed on Carlos and Pablo Memoli violated their right to freedom of expression, in violation of Article 13 of the Convention in connection with Article 1.1 and 2 of the this treaty.

**B. Fair trial rights (Article 8) in relation with freedom of thought and expression (Article 13) and Article 1(1) of the American Convention**

65. Article 8.1 of the American Convention recognizes the right of every individual to be heard before a competent judge or court within a reasonable period of time:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

66. The Inter-American Court has held forth that the right of access to justice means that controversies are disposed of within a reasonable period of time,<sup>84</sup> inasmuch as a protracted delay can, in and of itself, constitute a violation of due process guarantees.<sup>85</sup>

67. Historically, the Court has held that it is necessary to take three elements into account to determine whether or not a period of time is reasonable: a) the complexity of the matter, b) the procedural activity of the interested party, and c) the conduct of judicial authorities.<sup>86</sup> In

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to thirty thousand pesos (\$30,000). In no instance shall expressions referring to matters of public interest or those that are not affirmative constitute the offence of calumny.

**Article 110:** He who intentionally dishonors or discredits a particular individual shall be punished with a fine of one thousand five hundred pesos (\$1,500) to twenty thousand pesos (\$20,000). In no instance shall expressions referring to matters of public interests or those that are not affirmative constitute the offense of slander. Nor shall words harmful to honor constitute the offense of slander when they are relevant to a matter of public interest.

<sup>83</sup> Cfr. IA Ct. of HR, *Case of Kimel Vs. Argentina*. Monitoring of Judgment Compliance. Decision of the Inter-American Court of Human Rights May 18, 2010, pars. 30-35, available at: [www.corteidh.or.cr/docs/supervisiones/kimel\\_18\\_05\\_10.pdf](http://www.corteidh.or.cr/docs/supervisiones/kimel_18_05_10.pdf).

<sup>84</sup> Cfr. IA Ct. of HR, *Case of Suarez Rosero Vs. Ecuador*. Merits. Judgment November 12, 1997. Series C No. 35, par. 73, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_35\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_35_esp.pdf); IA Ct. of HR, *Case of Heliodoro Portugal Vs. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment August 12, 2008. Series C No. 186, par. 148, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_186\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_esp.pdf), and *Case of Salvador Chiriboga Vs. Ecuador*. Preliminary Objections and Merits. Judgment May 6, 2008. Series C No. 179, par. 59, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_179\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_179_esp.pdf).

<sup>85</sup> Cfr. IA Court of HR, *Case of Hilaire, Constantine and Benjamin et al Vs. Trinidad and Tobago*. Merits, Reparation and Costs. Judgment June 21, 2002. Series C No. 94, par. 145, available at: [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_94\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_94_esp.pdf); IA Ct. of HR, *Case of Heliodoro Portugal Vs. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment August 12, 2008. Series C No. 186, par. 148, and IA Court of HR, *Case of Salvador Chiriboga Vs. Ecuador*. Preliminary Objections and Merits. Judgment May 6, 2008. Series C No. 179, par. 59.

<sup>86</sup> Cfr. IA Court of HR, *Case of Genie Lacayo Vs. Nicaragua*. Merits, Reparation and Costs. Judgment January 29, 1997. Series C No. 30, par. 77, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_30\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_30_esp.pdf); IA Court of HR. *Case of Bayarri Vs. Argentina*. Preliminary Objections, Merits, Reparation and Costs. Judgment October 30, 2008. Series C No. 187, par. 107, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_187\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_187_esp.pdf), and IA Ct. of

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recent years the Court has deemed it appropriate to specify, additionally, that in said examination of reasonableness, the effect caused by the duration of the proceedings on the juridical situation of the person involved therein must be taken into account, bearing in mind, among other elements, the matter in dispute. If the passage of time has a significant bearing on the juridical situation of the individual, the proceedings should be carried out more diligently so that the case is decided as soon as possible.<sup>87</sup>

68. In the instant case, the petitioners repeatedly denounced that the civil case stemming from their criminal conviction continues on the docket of the trial court even though it was initiated in December 1997. According to assertions of the petitioners, this delay has had severe consequences on their juridical situation, taking into account particularly that since March of 1996, the Argentinean courts have issued on several occasions a “general injunction [against sale and encumbrance] of assets” of Carlos and Pablo Memoli, in order to ensure their capacity to pay an eventual damages award in the context of the civil case. According to the petitioners, this general injunction of assets has allegedly caused their “civil death,” in light of the fact that it leaves them unable “to sell [their] property or [...] freely acquire or dispose of it,” nor “be entitled to hold a radio frequency [...] because one must have assets to be able to gain access to one according to the radio broadcasting law.”<sup>88</sup>

69. Pursuant to the scope of the admissibility report in this case, the Commission must limit itself to deciding whether in this process the right to a fair trial that is enshrined in Article 8.1 of the Convention has been respected, particularly whether the process has been resolved within a reasonable period of time based on the criteria set forth above. According to that report, the Commission must also determine whether particular characteristics of the civil proceedings, such as the period of time it has been pending, and the attachment on assets in effect for 15 years, have had a disproportionate effect on the right to freedom of expression of the petitioners.

70. The Commission notes that the civil proceeding against Carlos and Pablo Memoli was filed on December 29, 1997, and as of the present date, has not been resolved in the first instance. It further notes that the matter in question is not particularly complex, inasmuch as there are no significant disputes on the facts between the parties, and the evidence is for the most part readily accessible. With regard to the procedural activity of the parties and the conduct of the judicial authorities, the Commission has not been able to engage in an exhaustive examination on these topics due to the fact that it has not had access to the complete case file. Some conclusions can be drawn, however. The Commission notes that by March 2001, both parties to the case had submitted a number of briefs setting forth their claims on the facts and the law. Subsequently, references are made in the proceedings to pleadings of the petitioners, which allegedly caused delay in the case; in 2008, for example, the Supreme Court of Justice of the Province of Buenos Aires established as fact that “the continual [filing of] motions and appeals by [the petitioners], caused

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HR, *Case of Heliodoro Portugal Vs. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment August 12, 2008. Series C No. 186, par. 149.

<sup>87</sup> IA Court of HR. *Case of Valle Jaramillo et al Vs. Colombia*. Merits, Reparation and Costs. Judgment November 27, 2008. Series C No. 192, par. 155, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_192\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_192_esp.pdf). Also see IA Court of HR. *Case of Anzualdo Castro Vs. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment September 22, 2009. Series C No. 202, par. 156, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_202\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_202_esp.pdf); IA Court of HR. *Case of Kawas Fernandez Vs. Honduras*. Merits, Reparation and Costs. Judgment April 3, 2009 Series C No. 196, par. 112, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_196\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_196_esp.pdf).

<sup>88</sup> Communication of the petitioners January 15, 2009 (received January 23, 2009).

significant delays in the trying of the case,<sup>89</sup> and in 2009 Judge for Civil Matters Oscar Hector Mendez found the defendant in the civil case “negligent in producing evidence.”<sup>90</sup> On the other hand, the Supreme Court of Justice of the Province of Buenos Aires imposed a disciplinary sanction on two of the judges involved in the case, on the grounds of “significant delays” therein.<sup>91</sup> The records in the case file show, therefore, that even though the long delay in disposing of the case is partly attributable to the pleadings of the petitioners, the conduct of the judicial authorities has also contributed to this situation.

71. The fact that the civil case has remained at the trial level for more than 13 years after it was first brought must be considered in light of the general injunction issued against the assets of the petitioners. Unquestionably, the almost uninterrupted application of said injunction over more than 15 years (two years as a result the injunction issued in the criminal proceeding, and 13 years of injunctive effect stemming from the civil proceeding which is still ongoing) represents a severe interference with the juridical situation of Carlos and Pablo Memoli. Moreover, based on assertions of the petitioners, which have not been disputed by the State, as a consequence of this injunction, they have been totally precluded from purchasing and selling assets or from exercising other related rights.<sup>92</sup> In view of the jurisprudence of the Inter-American Court on the effect of the passage of time on the juridical situation of persons, the IACHR finds that this substantive and ongoing infringement should have given rise to particular diligence on the part of judicial officials, in order to complete the case as soon as possible. Nonetheless, the civil proceeding has dragged on for more than 13 years, a time period that is not reasonable in light of the circumstances set forth above. The Commission finds, therefore, that the State has violated Article 8.1 of the Convention in relation to Article 1.1, because it violated the principle of reasonable time in the civil case against Carlos and Pablo Memoli.

72. With regard to the civil case brought on the basis of the statements made by Carlos and Pablo Memoli, the Commission recalls that its Declaration of Principles on Freedom of Expression recognizes that civil sanctions can be a valid tool for protecting individuals’ reputations.<sup>93</sup> However, the Inter-American Court has established that civil proceedings in the area of freedom of expression should be strictly proportionate so as not to have a chilling effect on speech. This rule is particularly important in matters relating to issues of public interest, since “the fear of civil sanction [...]any way it is viewed can be as or more intimidating or chilling for the exercise of the freedom of expression than a criminal sanction can be, inasmuch as it has the

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<sup>89</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of the Province of Buenos Aires, Case File 3001-535/07, pg. 2. Annexes to the communication of the petitioners April 25, 2008 (received on May 6, 2008).

<sup>90</sup> Annex 31. Order issued on October 30, 2009, Judge for Civil and Commercial Matters Oscar Hector Mendez, Case File.82341 case titled “Romanello Humberto et al Vs. Memoli Carlos et al in re damages.” Annex to the communication of the petitioners January 14, 2010 (Received on February 1, 2010).

<sup>91</sup> *Cfr.* Annex 25. Judgment issued on March 12, 2008, Supreme Court of the Province of Buenos Aires, pgs. 5-6.

<sup>92</sup> The petitioners indicate, for example, that they cannot take part in the awarding of licenses to provide audiovisual communications services, a business in which they have had an interest for many years. The Commission notes with regard to this issue that Article 24 of Audiovisual Communication Services Law 26.522, enacted on October 10, 2009 establishes that:

Natural persons, as radiobroadcast licenses holders, natural persons as partners of for-profit corporate entities, at the time of entering the process of bidding/awarding of licenses, must meet the following requirements, and continue to meet them while the license is valid: [...] f) not be incapacitated or disqualified, civilly or criminally, from engaging in or doing business, nor have been convicted of an offense with intentional deceit or malice from either a public or private action.

<sup>93</sup> *Cfr.* IACHR, Declaration of Principles on Freedom of Expression, Principle 10, available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=26&IID=2>.

potential to endanger personal and family life.”<sup>94</sup> At the same time, the burden imposed by the legal proceedings themselves should not be disproportionate to that which should be accepted as a consequence of pertaining to a society governed by the rule of law.<sup>95</sup>

73. In the case at hand, the Commission notes that the civil suit against Carlos and Pablo Memoli for the sum of 90,000 Argentine pesos, together with the general injunction of assets that has been in effect for more than 15 years, has not only generated fear of possible civil sanction, but also effectively compromised the personal lives and life projects of the petitioners. In fact, Carlos and Pablo Memoli have been precluded from fully realizing themselves as citizens during a very protracted period of time as a consequence of the particular circumstances, including the freezing of their assets for more than 15 years, of a civil suit that was brought in response to the alleged damage caused by their statements.

74. In the case of *Ricardo Canese vs. Paraguay*, the Inter-American Court found that there was a disproportionate infringement of the right to freedom of expression of the victim stemming from a criminal proceeding for defamation and slander, even though the sentences imposed at the trial and appeals levels were never executed and the victim was acquitted in the end at the highest level of appeal.<sup>96</sup> In order to arrive at this conclusion, the Court took into account, *inter alia*, that for eight years the criminal suit gave rise to a precautionary measure that restricted Mr. Canese from leaving the country.<sup>97</sup> In other words, no punishment imposed as a result of a court order was ever applied to the victim, but the criminal proceeding itself had effects which, in the view of the Court, were tantamount to an “unnecessary and excessive punishment because of the statements that [he] made,” which disproportionately restricted his freedom of expression.<sup>98</sup> Following the same logic, the Commission finds that in the case *sub examine*, the application of a general injunction on assets in the context of a civil suit that has not been adjudicated within a reasonable period of time has lost its precautionary nature and taken on the nature of a sanction.

75. Because of the foregoing reasons, the Commission finds that the violation of the principle of reasonable time in the civil suit that is ongoing in domestic courts in the instant case has given rise to an additional violation of the right to freedom of expression of the petitioners. The circumstances of said civil suit—including the threat of a civil sanction pending over a long period of time and, especially, the general injunction against sale of the assets of the defendants in effect for 15 years—have most certainly had the effect of punishing the exercise of freedom of expression by Carlos and Pablo Memoli. Far from being grounded in a careful balancing of the legal interests at stake, this sanction is the direct consequence of the unreasonable delay in resolving the suit, as a result of which the civil suit in and of itself, and the general injunction of assets that accompanies it, have had a serious impact on the life projects of the petitioners. For the preceding reasons, the Commission finds that the infringement of the principle of reasonable time in the instant case has violated Article 13 as well as Article 8.1 of the American Convention.

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<sup>94</sup> IA Ct. of HR, *Case of Tristan Donoso Vs. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment January 27, 2009. Series C No. 193, par. 129, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_193\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_esp.pdf).

<sup>95</sup> Cfr. IACHR. Application to the Inter-American Court of Human Rights in the case of *Jorge Fernando Grande (11.498) against Argentina*, May 4, 2010, para. 91, disponible en: <http://www.cidh.oas.org/demandas/11.498SP.pdf>.

<sup>96</sup> IA Ct. of HR, *Case of Ricardo Canese Vs. Paraguay*. Merits, Reparations and Costs. Judgment August 31, 2004. Series C No. 111, pars. 69, 49, 106, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf).

<sup>97</sup> IA Ct. of HR, *Case of Ricardo Canese Vs. Paraguay*. Merits, Reparations and Costs. Judgment August 31, 2004. Series C No. 111, par 106.

<sup>98</sup> IA Ct. of HR, *Case of Ricardo Canese Vs. Paraguay*. Merits, Reparations and Costs. Judgment August 31, 2004. Series C No. 111, par 106.

76. Finally, the IACHR must decide on the arguments of the petitioners regarding the violation of Article 8 of the Convention in relation to several alleged irregularities in the criminal proceeding and in the civil suit against them. As to the criminal suit, the arguments of the petitioners revolve around the convening and holding of a second hearing by the appellate court judge, allegedly without their presence, and in violation of the provisions of the Code of Criminal Procedure of the Province of Buenos Aires. The Commission notes in this regard that the fair trial rights provided for by Article 8 of the Convention include the “right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing.”<sup>99</sup> The jurisprudence of the Inter-American Court also establishes the confrontation of witness and evidence as a fundamental due process guarantee.<sup>100</sup> In the case *sub examine*, the case proceedings show that on November 30, 1995, the attorney of Pablo and Carlos Memoli was duly served notice of the second hearing before the Appellate Chamber for Criminal and Correctional Matters—Panel II, and that both she and the attorney of the plaintiffs appeared at said hearing on December 5, 1995.<sup>101</sup> According to an assertion of the Appellate Chamber in its judgment, this second hearing was necessary in order to ensure procedural balance between the parties.<sup>102</sup> The IACHR notes as well that the alleged impropriety of this hearing was raised by the petitioners before the Second Panel of the Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, the Supreme Court of Justice of the Province of Buenos Aires, and the Supreme Court of Justice of the Nation, and none of these three courts found the argument admissible. Based on the aforementioned considerations, the Commission finds that the petitioners have not proven the violation of Article 8 of the Convention in relation to the alleged irregularities in the criminal proceeding in the instant case.

77. Moreover, in the context of the civil suit, as has been mentioned earlier, the petitioners lodged a complaint in domestic courts for “malfeasance in office, denial and delay of justice, abuse of authority and ‘all in all, ongoing violation of the law for the purpose of favoring the plaintiffs.’”<sup>103</sup> In ruling on these complaints, the Supreme Court of Justice of the Province of Buenos Aires found grounds only for the allegation of delay of justice, noting that “most of the questioning reflects disagreements with decisions issued.”<sup>104</sup> In the case before the Commission, although the petitioners have repeatedly alleged a lack of independence and impartiality of the judges involved, they have not introduced any evidence to allow the IACHR to come to a conclusion distinct from that of the Supreme Court of Justice of the Province of Buenos Aires. The Commission does not find that the violation of Article 8 alleged by the petitioners in relation to the supposed irregularities in the civil suit has been proven.

## VI. FINDINGS

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<sup>99</sup> American Convention on Human Rights, Article 8.2.d.

<sup>100</sup> *Cfr.* IA Court of HR. *Case of the Massacre of la Rochela Vs. Colombia*. Merits, Reparation and Costs. Judgment May 11, 2007. Series C No. 163, par. 193, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_163\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_163_esp.pdf).

<sup>101</sup> *Cfr.* Annex 30. Certificate of Service issued on November 30, 1995, Appellate Chamber for Criminal and Correctional Matters of Mercedes (page 997); Annex 26. Judgment of appeal issued on December 5, 1995, Second Appellate Chamber for Criminal and Correctional Matters, pg. 1.

<sup>102</sup> Annex 2. Judgment of appeal issued on December 28, 1995, Second Appellate Chamber for Criminal and Correctional Matters of the Judicial Department of Mercedes, pg. 17.

<sup>103</sup> *Cfr.* Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pg. 1.

<sup>104</sup> Annex 25. Judgment issued on March 12, 2008, Supreme Court of Justice of the Province of Buenos Aires, pg. 2.

78. Based on the considerations of fact and law set forth in this report, the IACHR finds the State of Argentina internationally responsible for violating Articles 8.1 and 13 of the American Convention, in conjunction with the general obligations provided for in Article 1.1 and 2 of said treaty, to the detriment of Carlos and Pablo Memoli.

## **VII. RECOMMENDATIONS**

79. Based on the analysis and the findings in this report,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE STATE OF ARGENTINA:**

1. To vacate the criminal convictions against Carlos Memoli and Pablo Carlos Memoli as well as all of the consequences stemming from them;
2. Immediately lift the general injunction of assets against Messrs. Carlos Memoli and Pablo Carlos Memoli;
3. Take all measures necessary to resolve the civil case against Messrs. Carlos Memoli and Pablo Carlos Memoli expeditiously and impartially, safeguarding the rights enshrined in the American Convention;
4. Provide full compensation for all pecuniary and non-pecuniary losses suffered by Carlos and Pablo Carlos Memoli as a result of the violations established herein; and
5. Adopt all necessary measures to prevent the repetition of similar situations with regard to the disproportionate duration of civil processes and injunctive measures under the conditions noted herein.