Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Eduardo Kimel v. Argentina
Doc. Type:	Judgement (Merits, Reparations and Costs)
Decided by:	President: Cecilia Medina-Quiroga; Vice President: Diego Garcia-Sayan; Judges: Sergio Garcia-Ramirez; Manuel E. Ventura-Robles; Margarette May Macaulay; Rhadys Abreu-Blondet On May 7, 2007, Judge Leonardo A. Franco, an Argentine national, informed the Court that he would be unable to be present at the deliberation of the instant case, which was accepted by the President on that same day, in consultation with the other members of the Court. As a result of the foregoing, on May 7, 2007, the State was notified that, within the term of 30 days, it could designate a judge ad hoc to take part in the deliberation and determination of this case. Said term expired without the State having made such designation.
Dated:	2 May 2008
Citation:	Kimel v. Argentina, Judgement (IACtHR, 2 May 2008)
Represented by:	APPLICANTS: Gaston Chillier, Andrea Pochak, Santiago Felgueras, Alberto Bovino and Liliana Tojo
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In the Case of Kimel,

the Inter-American Court of Human Rights (hereinafter, "the Inter-American Court," or "the Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, "the Convention" or "the American Convention") and Articles 29, 31, 53(2), 55, 56, and 58 of the Rules of Procedure of the Court (hereinafter, "the Rules of Procedure"), delivers the following judgment.

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE APPLICATION

1. On April 19, 2007, pursuant to the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter, "the Commission" or "the Inter-American Commission") filed before the Court an application against the Argentine Republic (hereinafter, "the State" or "Argentina"), originating in the petition filed on December 6, 2000, by the Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS) and by the Center for Justice and International Law (Centro por la Justicia y el Derecho Internacional, CEJIL). On February 24, 2004, the Commission approved Report No. 5/04, whereby it found the petition filed by Mr. Kimel to be admissible. Subsequently, on October 26,

2006 the Commission approved Report on the Merits No. 111/06, under the terms of Article 50 of the Convention, which contained recommendations for the State. Said report was served on the State on November 10, 2006. After considering the information furnished by the parties following the adoption of the report on the merits, and in view of the "lack of substantial progress in the effective compliance with [its recommendations]," the Commission decided to submit the instant case to the jurisdiction of the Court. [FN1]

[FN1] The Commission appointed Florentín Meléndez, Commissioner, Santiago A. Canton, Executive Secretary, and Ignacio J. Álvarez, Special Rapporteur on Freedom of Expression, as delegates, and attorneys Elizabeth Abi-Mershed, Juan Pablo Albán-Alencastro, and Alejandra Gonza as legal counsels.

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2. In its application, the Commission stated that Eduardo Kimel is a "well-known journalist, writer, and investigative historian," who has published several books on the political history of Argentina, among them "La Masacre de San Patricio" (the San Patricio Massacre), wherein he described the findings of his research into the murder of five clergymen. In the book the author criticized the handling of the case by the authorities responsible for carrying out the investigation into the massacre, among them a judge. According to the facts described by the Commission, on October 28, 1991, the judge mentioned by Mr. Kimel started criminal proceedings against him for libel, pointing out that "though the defamation of a judge with regard to his actions in the performance of his public duties would amount to contempt of public authority under the terms of Art[icle] 244 of the Criminal Code -which has been repealed-, the specific imputation of a crime that is publicly actionable always constitutes defamation." Upon the conclusion of the criminal proceedings, Mr. Kimel was sentenced by the Fourth Court of the National Appeals Chamber for Criminal Matters for the crime of libel to one-year imprisonment and payment of $ 20,000.00 (twenty thousand Argentine pesos) as damages.

3. The Commission requested the Court to determine that the State has failed to fulfill its international obligations as a result of the violation of Articles 8 (Right to a Fair Trial) and 13 (Freedom of Thought and Expression) of the American Convention in relation to the general duty to respect and ensure human rights and the obligation to bring domestic law into conformity as set forth in Articles 1(1) and 2 of the American Convention. It further requested that the State be required to adopt reparation measures.

4. On June 23, 2007, Gastón Chillier, Andrea Pochak, Santiago Felgueras, and Alberto Bovino from the CELS, and Liliana Tojo from CEJIL, as representatives of the alleged victim (hereinafter, "the representatives"), filed their brief containing requests, arguments, and evidence (hereinafter, "brief of requests and arguments"), under the terms of Article 23 of the Rules of Procedure. The representatives alleged that the State "has violated the right of individuals to express their ideas through the press and to debate public issues," as a result of the use of certain criminal descriptions as a means to punish such acts. They added that the judicial guarantees of due process of law and judicial effective protection were not respected. Therefore, they requested that the State be declared responsible for the violation of the rights enshrined in Articles 13, 8(1), 8(2)(h), and 25 of the Convention, all of them in relation to Articles 1(1) and 2 thereof.

5. On August 24, 2007, the State filed its brief containing the answer to the application and its observations on the brief of requests and arguments (hereinafter, the "answer to the application"), [FN2] wherein it "acknowl[edged its] international responsibility" for the violation of Articles 8(1) and 13 of the Convention and made some observations regarding the violation of Article 8(2)(h) of said treaty and the violation of the right to a hearing by an independent and impartial court.

[FN2] On May 28, 2007, the State appointed Jorge Cardozo as Agent and Javier Salgado as Deputy Agent.

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6. On September 4 and 11, 2007, the Commission and the representatives filed, respectively, their observations on the acknowledgement of responsibility made by the State (supra para. 5).

II. PROCEEDING BEFORE THE COURT

7. The application filed by the Commission was served on the State on April 26, 2007, and on the representatives on April 27, 2007. During its proceeding before the Court, in addition to the main pleadings submitted by the parties (supra paras. 1, 4, and 5), the President of the Court [FN3] (hereinafter, "the President") ordered that the statements rendered in due time by the representatives, regarding which the parties had the opportunity to file their observations, be admitted as testimony by means of affidavits. Furthermore, taking into consideration the specific circumstances of the case, the President summoned the Commission, the representatives, and the State to a public hearing to hear the testimony of the alleged victim, of a witness, and of an expert witness, as well as the oral closing arguments of the parties on the merits and possible reparations and legal costs.

[FN3] Order of the President of the Court of September 18, 2007.

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8. On October 9, 2007, the representatives informed that they had started a friendly settlement procedure with the State in order to reach an agreement which would be "signed prior to the hearing convened" and that, consequently, they "waiv[ed] their claim" for the alleged violation of the rights enshrined in Articles 8(2)(h) and 25 of the Convention and of the right to a hearing by an independent and impartial court as set forth in Article 8(1) thereof. Therefore, the representatives expressed their waiver to the testimony of the expert witness and of the witness who had been summoned to the public hearing (supra para. 7).

9. The public hearing was held in the city of Bogota, Colombia, [FN4] on October 18, 2007, during the XXXI Regular Period of Sessions of the Court. At this hearing, the representatives, the Commission, and the State submitted a "memorandum of agreement" wherein the State

ratified its acknowledgment of international responsibility (supra para. 5) and the representatives ratified their waiver of some of their claims (supra para. 8).

[FN4] At this hearing there appeared: a) for the Inter-American Commission: Juan Pablo Albán-Alencastro, Lilly Ching Soto, and Alejandra Gonza; counsels, b) for the representatives of the alleged victims: Andrea Pochak, and c) for the State: Jorge Cardozo, Agent; Javier Salgado, Deputy Agent; Andrea Gualde; Julia Loreto; Josefina Comune; and Natalia Luterstein; counsels.

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10. On November 8, 2007, the Court requested the State and the representatives to submit, together with their written closing arguments, evidence to facilitate the adjudication of the case. [FN5]

[FN5] The evidence requested consisted of information and documents related to: a) the binding force of judicial decisions in Argentina, particularly of those adopted by the Supreme Court of Justice of the Nation; b) a copy of the judicial decisions concerning the freedom of thought and expression supporting the arguments submitted by the parties in relation to the adoption of international standards on human rights by the domestic courts, and c) the official exchange rates of the Argentine peso against the US dollar as relevant to the instant case.

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11. On November 27, 2007, the Commission and the State forwarded their respective briefs of closing arguments. On November 29, 2007, [FN6] the representatives submitted their brief of closing arguments, together with documentary evidence. Both the representatives and the State submitted evidence to facilitate the adjudication of the case as requested by the Court (supra para. 10).

[FN6] On November 27, 2007, the representatives requested a three-day extension to submit their written closing arguments. On December 4, 2007, the representatives pointed out that they had requested an extension "as they understood that the communication sent by [the] Court on […] November 8, 2007 [(supra para. 10)] modified [O]rder of the […] President […] of September 18, [2007 (supra para. 7)]," which set November 27, 2007, as the non-renewable deadline to submit the brief of closing arguments. On December 5, 2007, the Court informed the representatives that, in accordance with the twelfth operative paragraph of Order of the President of September 18, 2007, the term granted to the parties to submit their briefs of closing arguments would not be renewed, and that note of November 8, 2007, requesting evidence to facilitate the adjudication of the case provided that the representatives should include the information and documents requested "in their written closing arguments." Therefore, said note did not modify the Order of the President in any manner whatsoever.

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12. As to the two-day delay incurred by the representatives in submitting their brief of closing arguments, the Court bears in mind that, according to its prior decisions in similar cases,

"the formalities inherent to certain branches of domestic law do not apply under International Human Rights Law, the main purpose of which is the due and adequate protection of such rights." [FN7] Hence, it considers that such delay does not amount to an excessive term which may be the grounds for rejecting said brief, taking into consideration that the access of individuals to the Inter-American System for the Protection of Human Rights is particularly relevant for the elucidation of the facts [FN8] and the determination of possible reparation measures.

[FN7] Cf. Case of Castillo-Petruzzi et al. v. Peru. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 77, and Case of Acevedo-Jaramillo et at v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 7, 2006. Series C No. 144, para. 137.

[FN8] Cf. Case of Escué-Zapata v. Colombia. Order of December 20, 2006, Considering paragraph No. 10.

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13. On July 2, 2007; October 12, 2007; and December 28, 2007, the Court admitted, respectively, amici curiai briefs submitted by the Human Rights Clinic of the Master's Degree in Fundamental Rights of Universidad Carlos III of Madrid, by the World Press Freedom Committee [Comité Mundial para la Libertad de Prensa], and by the Civil Rights Association [Asociación por los Derechos Civiles, ADC].

14. On January 21, 2008, the State submitted a brief containing observations on the brief of closing arguments filed by the representatives, wherein it pointed out that the latter brief contained a paragraph which, according to the representatives, was part of the agreement reached by the parties in the instant case (supra para. 9), when, as a matter of fact, it was not a part thereof. Furthermore, the State challenged the amicus curiae filed by the Civil Rights Association (supra para. 13), claiming, inter alia, that it was time-barred, as […] all the procedures established in the [R]ules of Procedures of [the] Court regarding the submission and defense of the arguments related to the merits of the case had already been adopted."

15. On January 29, 2008, the representatives "recogniz[ed] that there [had] been an inaccuracy in the transcript of a paragraph of the friendly settlement agreement entered by the parties," which, in the Court's opinion, overcomes the objection raised by the State (supra para. 14).

16. As to the alleged time-barred brief filed by the Civil Rights Association, the Court notes that amici curiai briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court. Hence, they may be submitted at any stage before the deliberation of the pertinent judgment. Furthermore, in accordance with the usual practice of the Court, amici curiai briefs may even address matters related to the compliance with judgment. [FN9] On the other hand, the Court emphasizes that the issues submitted to its consideration are in the public interest or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, amici curiai briefs are an important element for the

strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court. Thus, the Court rejects the objection raised by the State that the brief referred to above was time-barred (supra para. 14). The observations submitted by Argentina regarding the contents of the amicus curiae briefs will be taken into consideration by the Court when the pertinent matters are examined.

[FN9] Cf. Case of Baena-Ricardo et al v. Panama. Compliance with Judgment. Order of the Court of November 28, 2005, Having Seen paragraph No. 14, and Case of Herrera-Ulloa v. Costa Rica. Compliance with Judgment. Order of the Court of September 22, 2006, Having Seen paragraph No. 10.

III. JURISDICTION

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

IV. PARTIAL ACKNOWLEDGMENT OF RESPONSIBILITY BY THE STATE AND PARTIAL WAIVER OF RIGHTS FILED BY THE REPRESENTATIVES

18. In its brief containing the answer to the application, the State made an acknowledgment of responsibility under the following terms:

[Th]e Argentine State has adopted, through all the stages of the proceedings, an attitude of compromising will aimed at reaching a friendly settlement in the instant case. Such political will has been reflected on the answers to the applicant's observations, in the context of which the Honorable Court ma[y] note that, at no procedural stage of the proceedings brought before the Illustrious Commission, has the Argentine State submitted any allegations, neither of fact nor of law, which challenge the alleged violation of the right to freedom of thought and expression to the detriment of Eduardo Gabriel Kimel. On the contrary, the mere reading of the documents submitted in the instant case allows inferring the permanent will of the State to recreate the friendly settlement process and find a satisfactory solution for both parties.
[…]
[Th]e Argentine State agrees with the Illustrious Commission that in the case in point, imposing a criminal penalty to Eduardo Gabriel Kimel constituted a violation of his right to freedom of thought and expression as enshrined by Article 13 of the American Convention on Human Rights.
Furthermore, and taking into consideration the elements generally accepted in analyzing and determining the reasonable duration of a proceeding –the complexity of the case, the diligence of the judicial authorities, and the procedural steps adopted by the interested party-, the Argentine State agrees with the Illustrious Commission that Eduardo Gabriel Kimel was not tried within a reasonable time, as provided by Article 8(1) of the American Convention on Human Rights.

Finally, and bearing in mind that to date the various legislative bills submitted in Congress in order to amend its domestic criminal legislation on freedom of thought and expression have not been passed, the Argentine State agrees with the Illustrious Commission that, in the case in point, 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 on Human Rights.
Therefore, the Argentine State acknowledges its international responsibility and the legal consequences thereof, in relation to the violation of Article 13 of the American Convention on Human Rights, regarding the general obligation to respect and ensure rights, as well as to adopt legislative or other measures as may be necessary to uphold the rights protected, pursuant to Articles 1 (1) and 2 of the Convention [.]
Furthermore, the Argentine State acknowledges its international re[s]ponsibility and the legal consequences thereof regarding the violation of Article 8(1) of the American Convention, in relation to Article 1(1) thereof, as Eduardo Gabriel Kimel was not tried within a reasonable time.

19. In the same brief, the State made its observations on the arguments filed by the representatives, regarding the alleged violations of the right to appeal the judgment before a higher court (Article 8(2)(h)) and the right to have a hearing before a competent, independent, and impartial court (Article 8(1)).

20. As to the reparation measures requested, the State pointed out that, in agreement with the [C]ommission and the [representatives], it "recogniz[es] Mr. Kimel's right to be granted an integral reparation;" it further made some considerations regarding the alleged non-pecuniary damage and the legal costs and expenses requested, and finally it "lef[t] to [the C]ourt to determine in its discretion the scope" of "non-pecuniary" reparation measures.

21. In its brief of observations on the acknowledgment made by the State (supra para. 6), the Commission pointed out, inter alia, that it "positively assesses the acknowledgment of international responsibility […] made by […] Argentina [and] in view of such acknowledgment, the will expressed by the State and the importance of such acknowledgment as a positive step towards the fulfillment of its obligations are to be noted […]." Likewise, the representatives, in their respective brief, (supra para. 6) positively assessed the acknowledgment made by the State.

22. In the "memorandum of agreement" entered by the parties at the public hearing (supra para. 9), it was agreed as follows:

1) […] THE STATE ratifies that it acknowledges its international responsibility for the violation, in the case in point, of Articles 8(1) […] and 13 […] of the American Convention […], in relation to the general duty to respect and ensure human rights, as well as the obligation to adopt legislative or other measures as may be necessary under Articles 1(1) and 2 of the Convention, to the detriment of Eduardo Kimel.
For the purposes of establishing the scope of the acknowledgement of international responsibility made by the STATE, it is expressly put on record that Eduardo Kimel was arbitrarily sentenced to one-year suspended imprisonment and to the payment of twenty thousand pesos ($ 20,000.00) as compensatory damages. Though such amount was never actually paid, in the case in point the

alleged victim was convicted in violation of his right to freedom of thought and expression, in a criminal proceeding for defamation started against him by a retired judge who had been criticized in the book "La massacre de San Patricio" (the San Patricio Massacre) on account of his handling of the investigation into the murder of five clergymen during the military dictatorship. In view of the foregoing, THE STATE acknowledges its international responsibility for the violation of the right to freedom of thought and expression in the case in point, both as a result of the arbitrary sentence imposed on Mr. Kimel in the criminal proceeding started against him and of the amount ordered to be paid to plaintiff as compensatory damages.

Thus, in view of the legal effects and the commitment undertaken by the Argentine State to respect human rights and to fully comply with the domestic and international standards thereon, as has been noted above, THE STATE has decided to acknowledge its international responsibility and abide by the reparation measures ordered […] by the Inter-American Court […].

2) Furthermore, as a gesture of goodwill from THE VICTIM'S REPRESENTATIVES and with a view to reaching an agreement with THE STATE, THE VICTIM'S REPRESENTATIVES waive the claim regarding the alleged violation of the right to appeal the condemnatory judgment rendered in the criminal proceeding started (Article 8(2)(h) of the American Convention); to have a hearing by an independent and impartial court (Article 8(1) of the American Convention); and to have effective judicial protection (Article 25 of the American Convention).

3) THE STATE, THE COMMISSION, AND THE VICTIM'S REPRESENTATIVES request the […] Inter-American Court of Human Rights to determine, pursuant to the provisions of Article 63 of the American Convention, the scope of the reparation measures ordered in behalf of the victim Eduardo Kimel, which should include compensation for pecuniary and non-pecuniary damage, as well as satisfaction and non-repetition guarantees.

[…]

23. As to the early termination of the proceedings, Articles 53, 54, and 55 of the Court's Rules of Procedure regulate the procedures of discontinuance of a case, friendly settlement, and continuance of a case. [FN10]

[FN10] Article 53. Discontinuance of a case

When the party that has brought the case noticed the Court of its intention not to proceed with it, the Court shall, alter hearing the opinions of the other parties thereto, decide wheter to discontinue the hearing and, consequently, to strike the case from its list.

If the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as to the claims of the representatives of the alleged victims, their next of kin or their representatives, the Court, after hearing the opinions of the other parties to the case shall decide whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities (*).

Article 54. Friendly settlement

When the parties to a case before the Court inform it of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute, the Court may strike the case from its list.

Article 55. Continuation of a case

The Court may, notwithstanding the existence of the conditions indicated in the preceding paragraphs, and bearing in mind its responsibility to protect human rights, decide to continue the consideration of a case.

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24. The Court notes that the expressions "whether to discontinue the hearing," "whether such acquiescence and its juridical effects are acceptable," "may strike the case from its list," as well as the entire text of Article 55 of the Rules of Procedure, show that these acts are not, in themselves, binding on the Court. Since proceedings brought before the Court seek the protection of human rights –a matter of international public order which goes beyond the will of the parties–, the Court must ensure that such acts are acceptable for the purposes sought by the Inter-American System. In doing so, the Court must not only verify the formal conditions of said acts, but also examine them in relation to the nature and seriousness of the alleged violations, the requirements and interests of justice, the specific circumstances surrounding a particular case, and the attitude and position of the parties.

25. Taking the foregoing into consideration, the Court has verified that the acknowledgement of responsibility made by the State (supra para. 22) is based on facts which have been clearly established, and is in line with the protection of the right to freedom of thought and expression and the right to have a hearing within a reasonable time, as well as with the general obligations to respect and ensure rights and to adopt domestic measures. In turn, said acknowledgement does not restrict the scope of the fair reparation measures to which the victim is entitled, but is subject to the decision of the Court. Therefore, the Court has decided to accept the acknowledgment made by the State and to deem it as a confession to the facts, as the State's acquiescence to the victim's legal claims contained in the application filed by the Commission, and as the acceptance of the arguments put forward by the representatives. The Court further considers that the attitude of the State is a valuable contribution to the development of these proceedings, to the fulfillment of the judicial functions of the Inter-American system for the protection of human rights, to the effectiveness of the principles underlying the American Convention, and to the conduct to which States are bound in this regard, [FN11] as a result of the commitments undertaken as parties to the international instruments on human rights.

[FN11] Cf. Case of the Rochela Massacre v. Colombia. Merits, Reparations and Legal Costs. Judgment of May 11, 2007. Series C No. 163, para. 29; Case of Bueno-Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 34, and Case of Zambrano-Vélez v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 30.

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26. As to the partial waiver of rights made by the representatives, the Court has noted that the rights waived had been claimed only by the representatives, who are the ones to waive them; that all parties agreed to such waiver by signing the "memorandum of agreement"; that Mr. Kimel explicitly expressed his consent to it; that it does not place him at any procedural or material disadvantage; that the purposes of this proceeding are not affected; and that the matters regarding which the waiver of rights has been made have been the object of the Court's consideration in

prior cases. [FN12] Therefore, it has decided to admit the waiver of claims made by the representatives.

[FN12] The Court has ruled on the independence and impartiality of the courts (Article 8(1) of the American Convention) in, inter alia, the following cases: Case of Castillo-Petruzzi et al. v. Peru. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52; Case of the Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71; Case of the 19 Tradesmen v. Colombia. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109; Case of Lori Berenson-Mejía v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2004. Series C No. 119 and Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. As to the right to appeal the judgment before a higher court (Article 8(2)(h) of the Convention), the Court ruled on this matter in the Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. Finally, Article 25 of the Convention has been one of the most repeatedly examined by the Court in its prior decisions, in, inter alia, the following cases: Case of the "White Van" (Paniagua-Morales et al) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37; Case of Ivcher-Bronstein v. Peru. Merits, Reparations, and Costs. Judgment of February 6, 2001. Series C No. 74 and Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 2001. Series C No. 79.

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27. In light of the foregoing, the Court declares that the controversy regarding the facts alleged in relation to Articles 13, 8(1), 1(1), and 2 of the Convention and their legal effects has come to an end. The Court will now examine the chapter pertaining to the reparation measures which are appropriate in the instant case.

28. Finally, bearing in mind the powers vested in the Court as an international body for the protection of human rights, it deems it necessary to render judgment adjudicating on the issues of fact and the merits of the case and the effects thereof, as a way of contributing to redress the damage inflicted upon Mr. Kimel, to prevent that similar facts may happen again in the future, and in sum, to meet the aims of the Inter-American System for the protection of human rights. [FN13]

[FN13] Cf. Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 57; Case of the Rochela Massacre, supra note 10, para. 54 and Case of Bueno-Alves, supra note 11, para. 35.

V. EVIDENCE

29. According to the provisions of Articles 44 and 45 of the Rules of Procedure, as well as to the Court's prior decisions regarding the evidence and the assessment thereof, [FN14] the Court will now examine and assess the documentary evidence submitted by the Commission, the

representatives, and the State at the different procedural stages or as evidence to facilitate the adjudication of the case as requested by the President, as well as the written expert opinions and testimonies given at the public hearing, on the basis of sound judgment and in line with the applicable legal system. [FN15]

[FN14] Cf. Case of the "White Van" (Paniagua-Morales et al) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para 50; Case of the Miguel Castro-Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, paras. 183 and 184 and Case of the Saramaka People v. Suriname. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 63 .
[FN15] Cf. Case of the "White Van" (Paniagua-Morales et al), supra note 12, para. 76; Case of Cantoral-Huamaní and García-Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 38 and Case of the Saramaka People, supra note 14, para. 63.

A) DOCUMENTARY, TESTIMONIAL AND EXPERT EVIDENCE

30. At the request of the President, the written statements of the following witnesses proposed by the representatives were admitted:

a) Adrián Sapeti, witness. As Mr. Kimel's psychiatrist, he gave testimony on the consequences of the judicial proceeding brought against the victim on his emotional and physical condition.
b) Juan Pablo Olmedo-Bustos, expert witness. He gave testimony on the incorporation to the Argentine legal system of international standards on the right to freedom of thought and expression and their enforcement by Argentine courts, and declared that such right is mainly restricted by the criminal definition of libel and slander, as "after the annulment of the crime of contempt, most cases regarding the restriction on the right to criticize the actions of public officials and to inform the public about issues of public interest have been started on the grounds of the violation of the right to have one's honor respected." Furthermore, he explained that "the application of general liability as set forth in the Civil Code is also inappropriat[e] for the regulation of freedom of thought and expression, which requires stricter and more foreseeable criteria for the subsequent attribution of liability.

31. Besides, the Court heard Mr. Kimel's testimony at the public hearing, wherein he referred to the judicial proceeding brought against him, to the events leading thereto, and to its outcome, as well as to the alleged consequences that the civil and criminal sentence imposed on the victim by the Argentine courts had on his personal life and professional career.

B) EVIDENCE ASSESSMENT

32. In this case, as in others, [FN16] the Court recognizes the evidentiary value of the documents submitted by the parties at the appropriate procedural stage, which have neither been disputed nor challenged and whose authenticity has not been questioned. As to the documents

forwarded as evidence to facilitate the adjudication of the case (supra para. 11), the Court admits them into the body of evidence, pursuant to the provisions of Article 45(2) of the Rules of Procedure.

[FN16] Cf. Case of Velásquez-Rodríguez. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Zambrano-Vélez et al, supra note 11, para. 37 and Case of the Saramaka People, supra note 14, para. 67.

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33. Likewise, the Court deems that the documents submitted by the State and the representatives during the public hearing are useful for the adjudication of the instant case and, therefore, admits them inasmuch as they have not been questioned nor has their authenticity or truthfulness been challenged.

34. As to the additional documents which were forwarded by the representatives together with the brief of closing arguments (supra para. 11) regarding legal costs and expenses, the Court reiterates that, under Article 44(1) of the Rules of Procedure, "the [e]vidence tendered by the parties shall be admissible only if offered in the application and in the answer thereto." Furthermore, the Court has held that "the claims of the victims or their representatives regarding legal costs and expenses, as well as the evidence supporting such claims, must be submitted to the Court at the start of the first procedural stage and at the first opportunity the parties are granted to do so, that is, in the brief of requests and arguments, without prejudice to such claims being updated at a later procedural stage, according to any additional costs and expenses that may be incurred in relation to the proceedings brought before this Court." [FN17] Notwithstanding, it deems that these documents are useful for the adjudication of the instant case and, therefore, it will assess them together with the rest of the body of evidence.

[FN17] Cf. Case of Chaparro Álvarez y Lapo Iñiguez v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, para. 275.

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35. Regarding testimonies and expert reports and statements, the Court deems them admissible inasmuch as they are in accordance with the object set by the Order issued by the President ordering to admit them (supra para. 7). The Court considers that the statement rendered by Mr. Kimel may not be assessed separately, but as a whole with the rest of the body of evidence, as he is the alleged victim and, therefore, has an interest in the outcome of the instant case. [FN18]

[FN18] Cf. Case of Loayza-Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Zambrano-Vélez et al., supra note 11, para. 40 and Case of the Saramaka People, supra note 14, para. 69.

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36. Having assessed the body of evidence in the instant case, the Court will now examine the alleged violations, considering the facts that have already been determined and those which may come to be proven, [FN19] included in each chapter as appropriate. Furthermore, the Court will examine the parties' relevant arguments, taking into consideration the acknowledgment of facts and the acquiescence to the alleged victim's claims made by the State, as well as the waiver of rights made by the representatives.

[FN19] Hereinafter, the Judgment contains facts which this Court deems to have been proven based on the acknowledgment made by the State. Some of such facts have been supported with evidentiary items, in which case the pertinent footnotes are inserted.

VI. ARTICLE 13 (FREEDOM OF THOUGHT AND EXPRESSION) [FN20] AND ARTICLE 9 (FREEDOM FROM EX POST FACTO LAWS) [FN21] IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN22] AND 2 (DOMESTIC LEGAL EFFECTS) [FN23] OF THE AMERICAN CONVENTION

[FN20] In its relevant part, Article 13 of the Convention sets forth 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 print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    a. respect for the rights or reputation of others; or
    b. the protection of national security, public order, or public health or morals. […]

[FN21] Article 9 of the Convention sets forth that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

[FN22] Article 1(1) of the Convention sets forth that:

The Status Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[FN23] Article 2 of the Convention sets forth that:

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

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37. The Commission requested the Court "to declare that the criminal proceeding, the criminal sentence, and the effects thereof –including the additional civil sanction- imposed on Eduardo Kimel for researching into certain events, writing a book, and publishing information[,] necessarily restrai[n] the dissemination and reproduction of information on issues of public interest, thus discouraging the public debate on issues which are relevant to the Argentine society." It further requested the Court to declare the violation of the duty to adapt the domestic legislation "as a result of keeping in full force and effect legal provisions which unreasonably restrict the free circulation of opinions on the officials acts of public authorities."

38. The representatives agreed with the Commission and considered that the criminal definitions used in the instant case "may be applied to bring criminal actions for political criticism," whereby they "are not in conformity with Article 13 of the Convention."

39. The State acquiesced to the parties' claims, pointing out that "[the] criminal conviction of Mr. […] Kimel constituted a violation of his right to freedom of thought and expression" and that "the inaccuracy of the criminal legislation punishing defamation and preventing freedom of thought and expression from being preserved, entails the violation o[f Article 2 of the Convention]." At the public hearing, the State "regret[ted …] that the only person ever convicted for the massacre of the clergymen belonging to the Palotine Order was precisely the journalist who thoroughly investigated such dreadful massacre and its judicial handling."

40. The Court notes that despite the acknowledgement of facts made by the State and its acquiescence to various claims, it is still necessary to determine the significance and seriousness of the violations committed, as well as the scope of the domestic criminal legislation in force which may be used to curtail freedom of thought and expression. The determination of the foregoing will be a contribution to the development of case law on this matter and to the appropriate protection of human rights.

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41. Eduardo Kimel is a historian graduated from Buenos Aires University, Argentina. He has worked as a journalist, a writer, and an investigative historian. [FN24] His book "La masacre de San Patricio" (the San Patricio Massacre) was published in November 1989. [FN25] This book deals with the murder of five clergymen of the Palotine Order committed in Argentina on July 4, 1976, during the last military dictatorship. [FN26]

[FN24] Cf. Statement rendered by Eduardo Kimel at the public hearing (supra para. 9).
[FN25] Cf. Kimel, Eduardo, La masacre de San Patricio (San Patricio Massacre), Ediciones Lohlé-Lumen, second edition, 1995 (record of appendixes to the application, Volume I, Appendix 8, folio 217).
[FN26] Cf. Kimel, Eduardo, La masacre de San Patricio (San Patricio Massacre), supra note 25 (p. 13).

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42. In the above-mentioned book, Mr. Kimel examined, inter alia, the judicial investigation into the massacre. Regarding the judicial decision adopted on October 7, 1977, he pointed out that the federal judge hearing the case:

adopted all applicable steps and procedures. He collected the police reports containing the preliminary information, requested and had forensic and ballistics reports made, and summoned to appear a number of people who might be able to provide information for the elucidation of the case. Notwithstanding, an examination of the judicial record poses an initial question: Did the authorities actually intend to find out clues which might lead to the murderers? Under the military dictatorship judges were normally acquiescent, if not accomplices to the dictatorial regime. In the case of the Palotine clergymen, the [J]udge […] complied with most of the formal requirements regarding the investigation, though it is evident that a number of decisive elements that could have shed light on the murder were not taken into consideration. The evidence that the order to carry out the murder had come from within the core of the military structure in power checked the development of the investigation, bringing it to a standstill. [FN27]

[FN27] Cf. Kimel, Eduardo, La masacre de San Patricio (the San Patricio Massacre), supra note 25 (p. 125).

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43. On October 28, 1991, the judge mentioned by Mr. Kimel in his book (hereinafter, "the complainant") brought a criminal action against him for defamation. [FN28] Subsequently, the complainant requested that if the defendant was not convicted for such crime, "he be convicted [for the crime of false imputation of a publicly actionable crime [FN29]]." On September 25, 1995, the Eighth National Court of First Instance for Criminal and Correctional Matters of Buenos Aires found that Mr. Kimel was not guilty of defamation but of false imputation of a publicly actionable crime. In examining the criminal definition of defamation, the Court established that:

[T]he work described by the defense as "investigation, information, and opinion" has gone beyond this domain […] to become unnecessary and overabundant criticism of and disqualifying and discrediting opinion on the performance of a Judge, which does not contribute to the informative function, social formation, or cultural dissemination and even less to the elucidation of the facts or to social awareness […] said excesses, which are nothing but the overflowing of the limits of the freedom of the press, do not amount to the crime of [defamation], on account of the lack of actual malice and a specific and accurate imputation. [FN30]

[FN28] Article 109 of the Argentine Criminal Code sets forth that:
Defamation or the false imputation of a publicly actionable crime shall be punished with imprisonment from one to three years.
[FN29] Article 110 of the Argentine Criminal Code sets forth that:
Anyone who damages another person's honor or reputation shall be punished with a fine from 1,500.00 to 90,000.00 pesos or imprisonment from one month to one year.

[FN30] Cf. Judgment of September 25, 1995, rendered by the Eighth National Court of First Instance for Criminal and Correctional Matters of Buenos Aires (record of appendixes to the application, Volume I, Appendix 1, folio 62).
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44. Subsequently, the above Court considered the possibility of classifying the facts as false imputation of a publicly actionable crime, stating that "[u]nder our legal system, all that which injures a person's honor and is not tantamount to defamation amounts to the crime of false imputation of a publicly actionable crime," whereby it considered that:

the doubts or suspicion raised by Mr. Kimel on the efficiency of the Judge in handling a case of international relevance, given the seriousness of the events under examination, constitute in and of themselves, an attack to the personal honor of the aggrieved party –dishonor-, aggravated by the massive scope of the publication –discredit-, which constitute the crime punished by Article 110 of the Criminal Code.
[…] neither could the defendant ignore that the assertions and suggestions made and doubts raised regarding, specifically, the [complainant] could tarnish the dignity of the Judge and of the ordinary man behind his official position. Undoubtedly, Mr. Kimel has committed an unjustifiable, arbitrary, and unnecessary excess, on the pretext of informing the general public on certain and specific historical events […]. Mr. Kimel not only informed the public but also issued an opinion on the facts in general and on the actions of the [complainant], in particular. And it is in this excess, which is in and of itself harmful, that the crime which I describe above lies. […N]othing will change by the fact that Mr. Kimel held that he did not intend to damage the complainant's honor […] [t]he only element of malice required is that the perpetrator be aware of the potentially harmful or discrediting nature of the act or omission performed.

45. The judgment referred to above sentenced Mr. Kimel to one-year suspended imprisonment, as well as to the payment of $ 20,000.00 (twenty thousand Argentine pesos) as compensation for the damage caused, plus legal costs and expenses. [FN31]

[FN31] Cf. Judgment of September 25, 1995, supra note 30.
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46. Said judgment was appealed before the Sixth Court of the National Appeals Chamber for Criminal and Correctional Matters, which on November 19, 1996, rendered judgment overturning the sentence imposed under the following terms:

when referring to the judicial investigation, Mr. [Kimel] gives his own opinion about it, which was attacked by the court a quo, as it interpreted that he should not do so but only inform. I do not share this view [, …] what is relevant is determining whether his opinion has harmful effects for third parties or is encouraged by hidden biased or particular purposes, as otherwise it would only serve the purpose of informing and orienting readers on an issue of public interest, as long as he has based his opinion on professional responsibility and the truthfulness of his statements. At present, journalism cannot be conceived as an automatic activity aimed at informing which may not include an opinion […], this does not mean that any ideas can be expressed without

taking into account the limitations imposed by ethics and the criminal laws that repress and punish them, respectively, where they injure honor, trespass on privacy, or damage the dignity of other persons, among other values. [FN32]
[…] This isolated value judgment [,] specifically, the expression "the actions of judges during the military dictatorship made them, in general, acquiescent, if not accomplices to the dictatorial regime"] does not amount to defamation, as the latter requires the false imputation of a specific publicly actionable crime to a specific individual [FN33] […]. [T]he criticism made of the Judge […] is only the opinion of a layman on the progress of a judicial investigation which he would have handled in a different manner, had he been in the place of the complainant [. T]herefore, it cannot affect his honor in his capacity as a public official […] and though Mr. Kimel may not share the manner in which he handled the case, there is nothing in this paragraph to show that his opinion was given with the malice required to constitute the legal definition [of defamation]. [FN34]

[FN32] Cf. Judgment of November 19, 1996, rendered by the National Appeals Chamber for Criminal and Correctional Matters (record of appendixes to the application, Volume I, Appendix 2, folios 85 and 86).
[FN33] Cf. Judgment of November 19, 1996, supra note 32, folio 87.
[FN34] Cf. Judgment of November 19, 1996, supra note 32, folios 88 and 89.
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47. In referring to the false imputation of a publicly actionable crime, the Appeals Court referred to the work of Mr. Kimel as a "brief historical review" and added that "in sai[d] work, he has not gone beyond the ethical limits of his profession." [FN35] Furthermore, it established that "the defendant exercised his legitimate right to inform in a non-abusive manner, and without the intent to injure the [complainant's] honor, as no malice, an element which is sufficient to constitute the illegal act under examination, was proven." [FN36]

[FN35] Cf. Judgment of November 19, 1996, supra note 32, folio 92.
[FN36] Cf. Judgment of November 19, 1996, supra note 32, folio 95.
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48. This decision was appealed by the complainant by means of a motion for special review filed with the Supreme Court of Justice. On December 22, 1998, the Supreme Court reversed the acquittal judgment on appeal and forwarded the case to the Appeals Chamber for Criminal and Correctional Matters so that a new decision be delivered. The Supreme Court considered that the appealed judgment had been arbitrary on the grounds that:

in the instant case, the arguments put forward by the judges who signed the acquittal judgment determining that the statements made by Mr. Kimel did not fit into the definition of defamation are groundless. This is particularly so as only from an incomplete and disjointed reading of the incriminating text could it be said –as does the court a quo- that the criminal imputation is not addressed to the complainant. In his book, the defendant, after mentioning the [complainant] and stating that the performance of the judges during the military dictatorship in general made them

accomplices to the dictatorial regime, expressed that in the case of the Palotine clergymen the [complaining judge] complied with most of the formal requirements regarding the investigation, though it is evident that a number of decisive elements that could have shed light on the murder were not taken into consideration. The evidence [that] the order to carry out the murder had come from within the core of the military structure in power checked the progress of the investigation, bringing it to a standstill […] [. B]esides, the argument that the paragraph referring to the judge and stating that "it is evident that a number of decisive elements that could have shed light on the murder were not taken into consideration" did not constitute defamation as the defendant was a "layman" into the investigation of the case, is groundless.
In rendering this decision, the Chamber failed to take into consideration the special characteristics of malicious intent in crimes against the honor and deemed the circumstance of being a "layman" as an excuse for a crime on no grounds whatsoever. Such an absurd argument disqualifies the judgment on account of its evident arbitrariness. [… A]nother cause of arbitrariness results from the failure to consider the arguments raised by the complainant in that from the record of the case "Barbeito, Salvador et al., victims of homicide (Article 79 of the Criminal Code)," it would not only result the misrepresentation of the criminal imputation attributed to the actions of the judge, but also and particularly, the malice which, in the appellant's opinion, was evidenced by the fact that the defendant, with the only purpose of discrediting the judge, had failed to include in the publication that the [complainant] had ignored the repeated requests for the preliminary proceedings to be discontinued filed by prosecutor Julio César Strassera[.] [FN37]

[FN37] Cf. Judgment of December 22, 1998, rendered by the Supreme Court of Justice of Argentina (record of appendixes to the application, Volume I, Appendix 3, folios 114 to 116).

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49. On March 17, 1999, the Fourth Court of the Appeals Chamber, following the criteria applied by the Supreme Court, partially ratified the condemnatory judgment rendered in the first instance regarding the penalties imposed, but instead of convicting Mr. Kimel for false imputation of a publicly actionable crime, considered that the crime of defamation had been proven. [FN38] The Chamber pointed out that,

from the arguments put forward by the Supreme Court it results that the statements made by journalist [Kimel] regarding the complainant have a malicious nature, whereby the arguments raised by the Sixth Court [of the Appeals Chamber] determining the acquittal based on the non-characterization of the crime of defamation are groundless. [FN39]

[FN38] Cf. Judgment of March 17, 1999, rendered by the Fourth Court of the National Appeals Chamber for Criminal and Correctional Matters (record of appendixes to the application, Volume 1, Appendix 4, folio 134).
[FN39] Cf. Judgment of March 17, 1999, supra note 38, folio 132.

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50. Mr. Kimel submitted a motion for special review against the judgment rendered by the National Appeals Chamber to the Supreme Court, [FN40] which was found to be inadmissible. Subsequently, the victim filed an appeal for complaint against improper dismissal of an appeal with the same Court, which was rejected in limine on September 14, 2000, thus rendering the judgment final. [FN41]

[FN40] Cf. Brief containing the motion for special review filed with the Supreme Court of Justice of Argentina (record of appendixes to the application, Volume 1, Appendix 5, folio 140).
[FN41] Cf. Order of September 14, 2000, rendered by the Supreme Court of Justice of Argentina (record of appendixes to the application, Volume 1, Appendix 6, folio 175).

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51. Regarding these facts, the arguments filed by the parties pose a collision between the right to freedom of thought and expression regarding issues of public interest and the right of public officials to have their honor respected. The Court recognizes that both freedom of thought and expression and the right to have one's honor respected, as enshrined by the Convention, are fundamental rights. It is, therefore, imperative to ensure the exercise of both. In this regard, the prevalence of either of them in a particular case will depend on the considerations made as to proportionality. The solution to the conflict arising between some rights requires examining each case in accordance with its specific characteristics and circumstances, considering the existence of elements and the extent thereof on which the considerations regarding proportionality are to be based.

52. The Court has established the conditions that are to be met regarding the suspension and curtailment of or restrictions on the rights and freedoms enshrined by the Convention. [FN42] In particular, it has examined emergency situations [FN43] and restrictions on the right to freedom of thought and expression, [FN44] the right to private property, [FN45] freedom of movement, [FN46] and personal liberty, [FN47] among others.

[FN42] Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6.
[FN43] Cf. Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) of the American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8; Case of Zambrano-Vélez et al., supra note 11, paras. 45 to 47.
[FN44] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5; Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 96; Case of Palamara-Iribarne, supra note 12, paras. 68 and 79 and Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, paras. 88 to 91.

[FN45] Cf. Case of Ivcher-Bronstein, supra note 12, para. 128; Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 145; Case of Chaparro Álvarez y Lapo Iñiguez, supra note 17, para. 93 and Case of the Saramaka People, supra note 14, para. 127.
[FN46] Cf. Case of Ricardo Canese, supra note 44, paras. 113 to 135.
[FN47] Cf. Case of Chaparro Álvarez y Lapo Iñiguez, supra note 17, paras. 51 to 54.
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53. Regarding the contents of freedom of thought and expression, the Court has pointed out that those who are protected by the Convention not only have the right to seek, receive, and disseminate ideas and information of any kind, but also to receive information and be informed about the ideas and information disseminated by others. Consequently freedom of thought and expression has both an individual and a social dimension:

on the one hand, it requires that no one may be arbitrarily harmed or impeded from expressing his own thought and, therefore, it represents a right of every individual; on the other hand, it implies a collective right to receive any information and to know the expression of the thought of others. [FN48]

[FN48] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 44, para 30; Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 64; Case of Ivcher-Bronstein, supra note 12, para 146; Case of Herrera-Ulloa, supra note 12, para. 108 and Case of Ricardo Canese, supra note 40, para. 77.
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54. Notwithstanding, freedom of thought and expression is not an absolute right. Article 13(2) of the Convention, which prohibits prior censorship, provides for the possibility of placing restrictions on freedom of thought and expression by imposing subsequent liability for abuse of this right. These restrictions in no way should restrict, beyond what is strictly necessary, the full exercise of freedom of thought and expression or become either a direct or indirect mechanism of prior censorship. [FN49]

[FN49] Cf. Case of Herrera-Ulloa, supra note 12, para. 120; Case of Ricardo Canese, supra note 44, para. 95 and Case of Palamara-Iribarne, supra note 12, para. 79.
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55. In turn, Article 11 of the Convention provides that everyone has the right to have his honor respected and his dignity recognized. Hence, this article implies a limitation to the interference of individuals and the State. Thus, it is legitimate for an individual who considers that his honor has been affected to resort to the judicial mechanisms established by the State to protect it. [FN50]

[FN50] Cf. Case of Ricardo Canese, supra note 44, para. 101.

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56. The need to protect the right to have one's honor respected and one's dignity recognized, as well as other rights which might be affected by the abusive exercise of freedom of thought and expression, requires due compliance with the limitations imposed by the Convention in this regard. These limitations must be in accordance with strict proportionality criteria.

57. Given the importance of freedom of thought and expression in a democratic society and the great responsibility it entails for professionals in the field of social communications, the State must not only minimize restrictions on the dissemination of information, but also extend equity rules, to the greatest possible extent, to the participation in the public debate of different types of information, fostering informative pluralism. Consequently, equity must regulate the flow of information. Under these terms is to be explained the protection of the human rights of those who face the power of the media and the attempt to ensure the structural conditions which allow the equitable expression of ideas. [FN51]

[FN51] The Court has pointed out that "the plurality of the media and the prohibition of all types of monopolies in relation thereto, whatever be the form they may adopt, is imperative […]." Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 44, para. 34.

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58. Taking the foregoing into consideration, in order to render judgment in the instant case the Court will i) verify whether the legal definition of the crime of defamation affected the strict legality which is to be observed when restricting the freedom of thought and expression by means of criminal proceedings; ii) examine whether the protection of the reputation of judges serves a legitimate purpose, in accordance with the provisions of the Convention and determine, if appropriate, the suitability of a criminal penalty in order to achieve the purpose sought; iii) assess whether such measure is necessary, and iv) examine the strict proportionality of such measure, that is, whether the penalty imposed on Mr. Kimel has fully guaranteed the right of the public official mentioned by the author of the book to have his honor respected, without rendering nugatory the latter's right to express his opinion.

i) Strict formulation of the rule establishing limitations or restrictions (nullum crimen nulla poena sine lege praevia criminal principle)

59. The Commission alleged that, "crimes against the honor were clearly used to limit the criticism of the actions of public officials." In this regard, it held that "the definition of the conduct of [defamation] is affected by […] such ambiguity, broadness, and openness that it allows […] conducts which were previously considered as contempt to be unduly punished under this criminal definition." Furthermore, the Commission argued that "the mere existence [of the criminal definitions applied to Mr. Kimel], given the threat of being subject to criminal and pecuniary sanctions, acts as a deterrent to criticism of the actions of public officials." In this regard, it stated that "[s]hould the State decide to keep in force the legislation punishing

defamation, it must describe it with such accuracy that it does not impair the right to express critical opinions regarding the actions of public bodies and officials."

60. The representatives pointed out that the criminal definition of the false imputation of a publicly actionable crime "refers to a completely indeterminate conduct," inasmuch as the "terms 'dishonor' and 'discredit' another person, do not describe a particular conduct." Therefore, they considered that "there is no objective pattern against which a person may measure and predict the possible illegality of his expressions. Rather, they refer to a subjective value judgment reached by a judge." They added that "the both criminal definitions are extremely vagu[e]" as Mr. Kimel "was convicted for defamation in the first instance, and [for] false imputation of a publicly actionable crime later."

61. This Court has jurisdiction –based upon the American Convention and grounded in the iura novit curia principle, which is solidly supported in international case law- to examine the possible violation of conventional provisions which have not been alleged in the briefs submitted thereto, in the understanding that the parties have had the opportunity to express their respective positions with regard to the relevant facts." [FN52]

[FN52] Cf. Case of Godínez-Cruz v. Honduras. Merits. Judgment of January 20, 1989, Series C No. 5, para 172; Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 54, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 186.

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62. In the instant case, neither the Commission nor the representatives have alleged the violation of Article 9 of the American Convention which enshrines freedom from ex post facto laws. Notwithstanding, the Court considers that the facts described in the instant case, which have been accepted by the State and on which the parties have had plenty of opportunity to raise their arguments show that such principle has been violated under the following terms.

63. The Court has pointed out that "restrictions on freedom of information must be established by law." [FN53] In this regard, any limitation or restriction must be both formally and materially provided for by law. Now, should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the nullum crimen nulla poena sine lege praevia principle. Thus, they must be formulated previously, in an express, accurate, and restrictive manner. The legal system must affor legal certainty to the individuals. In this regard, the Court has pointed out that:

The court understands that in the formulation of criminal definitions it is necessary to use restrictive and univocal terms, which clearly limit the punishable conducts, thus making the nullum crimen nulla poena sine lege praevia criminal principle effective. This implies an accurate definition of the criminalized conduct, which sets its elements and allows it to be delimited and distinguishable from non-punishable acts or illegal acts punishable with sanctions other than criminal. 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 sanctions which severely affect fundamental rights, such as life or freedom. Rules such as the ones applied in the instant case, which do not strictly delimit the criminal conducts, are in violation of the nullum crimen nulla poena sine lege praevia principle. [FN54]

[FN53] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 44, para. 89.

[FN54] Cf. Case of Castillo-Petruzzi et al., supra note 12, para. 121, and Case of Lori Berenson, supra note 12, para. 125. Furthermore, the Court has emphasized that laws providing for restrictions "must use accurate criteria rather than grant unfettered discretion to the authorities who are to impose them." Cf. Case of Ricardo Canese, supra note 44, para. 124.

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64. As established above, in the first instance Mr. Kimel was found guilty for false imputation of a publicly actionable crime. The criminal definition applied was Article 110 of the Criminal Code which provides as follows:

Anyone who damages another person's honor or reputation shall be punished with a fine from 1,500.00 to 90,000.00 pesos or imprisonment from one month to one year.

65. He was later acquitted by the Sixth Court of the National Appeals Chamber for Criminal and Correctional Matters. Lastly, the Supreme Court of Justice did not adhere to the original criminal definition applied and decided that the facts charged to Mr. Kimel constituted the crime described in Article 109 of the Criminal Code, which provides as follows:

The false imputation of a publicly actionable crime resulting in a criminal proceeding shall be punished with imprisonment from one to three years.

66. The Court emphasizes that in the instant case the State alleged 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 (supra para. 18).

67. In view of the foregoing and taking into consideration the statements made by the State as to the inadequate criminal legislation regarding this matter, the Court deems that the pertinent criminal definition violates Articles 9 and 13(1) of the Convention, in relation to Articles 1(1) and 2 thereof.

ii) Suitability and purpose of the restriction

68. The Commission argued that the sanction imposed on Mr. Kimel served "the legitimate purpose of protecting the honor of a public official." Yet, it pointed out that "public officials should be more tolerant of criticism from individuals" and that democratic checks promote the

transparency of the actions of the State and foster the accountability of public officials, and that "in a democratic state there is no valid argument which allows exempting the members of the Judiciary from such consideration."

69. The representatives pointed out that "the American Convention makes no distinction between the [J]udiciary and other public organs, nor does it establish any specific provision regarding the protection of the reputation of judges." Quite the contrary, "in cases such as this one, the only applicable rule is that which allows restricting freedom of expression for the sake of protecting another person's rights or reputation."

70. At this stage of the analysis, in the first place it is necessary to establish whether the restriction is a suitable or adequate means to help achieve a purpose that is in conformity with the provisions of the Convention.

71. As has been established in paragraph 55 supra, judges, as any other individuals, are under the protection afforded by Article 11 of the Convention, which enshrines the right to have one's honor respected. Besides, Article 13(2)(a) of the Convention sets forth that the "reputation of others" may be the grounds for establishing subsequent liability in the exercise of the freedom of thought and expression. Accordingly, under the provisions of the Convention, the protection of a person's honor and reputation is a legitimate end. Furthermore, criminal proceedings are suitable as, by threatening to impose sanctions, they serve the purpose of preserving the legal right whose protection is sought; in other words, they may help achieve such purpose. Notwithstanding, the Court notes that this does not imply that in the instant case the criminal proceedings are necessary or proportionate, as will be shown below.

iii) Necessity of the measure adopted

72. The Commission considers that "the State may adopt other measures to protect an individual's privacy and reputation which are less restrictive than the application of a criminal penalty." In this regard, "[t]he protection of reputation is to be secured only through civil sanctions, where the person injured is a public official or a person who stands in a position of public relevance, or a private individual who voluntarily participates in issues of public interest" and through "laws which ensure the right to reply or rectify one's statements."

73. The representatives pointed out that "when a person's conduct fits into the regular exercise of a right […], the mere existence of a sanction —whatever be its nature— entails the violation of the provisions of the Convention." Regarding criminal penalties, they argued that "[a]t least as regards criticism of public officials in the performance of their duties or of individuals who voluntarily participate in issues of public interest, resorting to a criminal proceeding is contrary to the possibility of promoting extensive debate, as it discourages the participation of individuals in general, and even of professional journalists, in the debate of public issues." In this regard, "criminal penalties have a strong restraining effect." On the other hand, they objected to the existence of civil sanctions, as they "also have a strong restraining effect, in particular for those who work as journalists," since "the salaries paid by the press are rather low;" and, therefore, "it is virtually impossible for a journalist or an ordinary citizen to pay the amounts set as compensatory damages in condemnatory judgments without going bankrupt,"

and because “except for the big multimedia, no communication media offer guarantees to their employees as to their ability to pay.”

74. In examining this issue, the Court must consider the available alternatives to achieve the legitimate purpose sought and to determine the greater or lesser injuriousness they imply. [FN55]

[FN55] Cf. Case of Chaparro Álvarez y Lapo Iñiguez, supra note 17, para. 93.

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75. Every fundamental right is to be exercised with regard for other fundamental rights. This is a reconcilement process in which the State has a key role in trying to determine responsibilities and impose sanctions as may be necessary to achieve such purpose. Resorting to civil or criminal proceedings will depend on the considerations discussed below.

76. The Court has held that Criminal Law is the most restrictive and harshest means to establish liability for an illegal conduct. [FN56] The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary, appropriate, and last resort or ultima ratio intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.

[FN56] Cf. Case of Ricardo Canese, supra note 44, para. 104, and Case of Palamara-Iribarne, supra note 12, para. 79.

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77. Taking into account the considerations made so far regarding the due protection of the right to freedom of thought and expression; the reasonable reconcilement of the protection of such right, on the one hand, and the right to have one’s honor respected, on the other; and the principle of minimum penal law typical of democratic societies, criminal proceedings should be resorted to where fundamental legal rights must be protected from conducts which imply a serious infringement thereof and where they are proportionate to the seriousness of the damage caused. The criminal definition of a conduct must be clear and accurate, as established by the case law of the Court regarding Article 9 of the American Convention.

78. The Court does not deem any criminal sanction regarding the right to inform or give one’s opinion to be contrary to the provisions of the Convention; however, this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings. Along these lines, the Court takes note of the trends in the case law of other Courts tending to promote, in a rational and balanced manner, the protection of those who are entitled to

rights apparently contradictory, without affecting the guarantees required by the right to freedom of thought and expression as a milestone of democracy. [FN57]

[FN57] In the Case of Mamere the European Court of Human Rights considered that "the eminent value of freedom of expression, especially in debates on subjects of general concern, cannot take precedence in all circumstances over the need to protect the honor and reputation o others, be they ordinary citizens or public officials." Cf. Case of Mamere v. France, no. 12697/03, § 27, ECHR 2006.
Furthermore, in the Case of Castells the European Court stated that "it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith." Cf. ECHR, Case of Castells v. Spain. Judgment of April 23, 1992, Series A, No. 236, § 46.
In a recent decision it held that "the imposition of a prison sentence for a press offense will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention, only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence." Cf. Case of Cumpana and Mazare v. Romania [GC] no. 33348/96, § 115, ECHR 2004-XI.
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79. Furthermore, regarding the right to seek, receive, and disseminate ideas and information, the Court deems that journalists have the duty to verify reasonably, though not necessarily in an exhaustive manner, the truthfulness of the facts supporting their opinion. Therefore, it is valid to claim equity and diligence in the search for information and the verification of the sources. This implies the right not to receive a manipulated version of the facts. Therefore, journalists have the duty to keep a critical distance from sources and match the information against other relevant data.

80. In the instant case, the abusive exercise of punitive power –as acknowledged by the State itself- is evident, taking into consideration the crimes charged to Mr. Kimel, the impact they had on his legally protected interests, and the nature of the sentence imposed on the journalist – deprivation of freedom.

iv) Strict proportionality of the measure adopted

81. The Commission alleged that "Mr. Kimel's conduct fits into the reasonable exercise of his right to work in the field of investigative journalism, as he disseminated information of obvious interest for the Argentine public opinion, based on a previous investigation and aiming at contributing to debate and serving as an element to monitor the actions of a public official in the performance of his duties." In this regard, it pointed out that "in a society which endured a military rule as the Argentine dictatorship from 1976 to 1983, freedom of thought and expression acquires a fundamental importance for the historical reconstruction of the past and the formation of public opinion." Therefore, "everyone should be free to express his opinion in accordance with his own thought; […] to examine, whether thoroughly or not, the actions of public officials who held office at the time, among them, the members of the [J]udiciary; and to criticize, even

fiercely and bitterly, their performance." It added that the judge mentioned by Mr. Kimel "was suppos[ed] to tolerate the critical opinions express[ed] on the performance of his duties as a judge."

82. The representatives agreed with the Commission and alleged that "the events on which Mr. Kimel informed are in the public interest," taking into consideration that the investigation referred to "a case which was paradigmatic of the repression" and that the "investigation conducted by the journalist is part of [the] revision that the Argentine society must make and of the debate on the reasons why the military government carried out their plans without encountering any obstacles in the Judiciary." They added that Mr. Kimel "did not use any language which might be considered abusive," nor did he use "excessive or injurious language;" that he mentioned the judge "only in relation to his actions as a public official and did not encroach on any aspect of his personal life or his personality which was not related to the performance of his duties as a public official;" that in the paragraphs of the books where he included statements of facts "all that was stated was true reality" and that "the paragraphs that were challenged in the criminal proceedings" contained "critical value judgments on the Judiciary of the time," whereby "they cannot be described as true or false, nor can they justify in and of themselves a restriction on freedom of thought and expression, inasmuch as it is everyone's right to give his free opinion on issues of public interest and on the performance of the duties of a judge regarding a matter of great public concern."

83. In this last step of the examination, it is discussed whether the restriction is strictly proportionate, in a manner such that the sacrifice inherent therein is not exaggerated or disproportionate in relation to the advantages obtained from the adoption of such limitation. [FN58] The Court has adopted this method in pointing out that:

in order for restrictions to be in conformity with the provisions of the Convention, they must be justified in terms of collective purposes which, owing to their relevance, clearly outweigh the social need for the full enjoyment of the rights enshrined by Article 13 of the Convention and do not limit the right established in said article more than is strictly necessary. In other words, the restriction must be proportionate to the interest that justifies it and closely tailored to the accomplishment of that legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression. [FN59]

[FN58] Cf. Case of Chaparro Álvarez y Lapo Iñiguez, supra note 17, para. 93.
[FN59] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 44, para. 46; ; Case of Herrera-Ulloa, supra note 12, paras. 121 and 123; Case of Palamara-Iribarne, supra note 12, para. 85, and Case of Claude-Reyes et al., supra note 44, para. 91.

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84. In the case in point, the restriction should serve the purpose of ensuring the full exercise of the right to have one's reputation respected without rendering nugatory the right to criticize the actions of public officials in the performance of their duties. In order to examine this, it is necessary to analyze i) the degree of impairment of one of the rights at stake, establishing

whether the extent of such impairment was serious, limited, or moderate; ii) the relevance of the satisfaction of the opposing right, and iii) whether the satisfaction of the latter justifies the restriction of the former. In some cases the balance will be tilted to the prevalence of freedom of thought and expression, while in others it will be tilted to safeguarding the right to have one's honor respected.

85. Regarding the degree of impairment of the right to freedom of thought and expression, the Court deems that that effects of the criminal proceedings in themselves, the application of a sanction, Mr. Kimel's addition to the criminal offenders registry, the latent risk for him to be deprived of his liberty, and the stigmatizing effect of the criminal sentence imposed thereon show that the subsequent liability imposed on Mr. Kimel was serious. Even the fine constitutes in and of itself a serious impairment of the right to freedom of thought and expression, given the considerable amount set in relation to the beneficiary's income. [FN60]

[FN60] The pecuniary sanction Mr. Kimel was sentenced to pay amounted to $ 20,000.00 (twenty thousand Argentine pesos). Cf. Judgment of March 17, 1999, supra note 36, folio 138. According to the exchange rate prevailing at the time, said amount was equivalent to the same amount in US dollars. According to the representatives' statements, which were not challenged by the State, the execution of this sanction "would imply the economic bankruptcy of Mr. Kimel, who would lose all his property and would go into debt for a very lon[g] time."

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86. Regarding the right to have one's honor respected, the opinions regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection, so that debate in a democratic system is encouraged. [FN61] The Court has pointed out that in a democratic society political and public personalities are more exposed to scrutiny and the criticism of the public. [FN62] This different threshold of protection is due to the fact that they have voluntarily exposed themselves to a stricter scrutiny. Their activities go beyond the private sphere to enter the realm of public debate. [FN63] This threshold is not based on the nature of the individual, but on the public interest inherent in the actions he performs, [FN64] as when a judge conducts an investigation into a massacre committed in the context of a military dictatorship, as in the instant case.

[FN61] Cf. Case of Herrera-Ulloa, supra note 12, para. 128, and Case of Ricardo Canese, supra note 44, para 98.
[FN62] Cf. Case of Herrera-Ulloa, supra note 12, para. 129, and Case of Ricardo Canese, supra note 44, para. 103.
[FN63] Cf. Case of Herrera-Ulloa, supra note 12, para. 129, and Case of Ricardo Canese, supra note 44, para 103.
[FN64] Cf. Case of Herrera-Ulloa, supra note 12, para. 129, and Case of Ricardo Canese, supra note 44, para. 103.

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87. The democratic control exercised through public opinion encourages the transparency of State actions and promotes the responsibility of public officials in the performance of their duties. Hence, the greater tolerance to the statements and opinions expressed by individuals in the exercise of such democratic power. [FN65] These are the requirements of the pluralism inherent in a democratic society, [FN66] which requires the greatest possible flow of information and opinions on issues of public interest. [FN67]

[FN65] Cf. Case of Ivcher-Bronstein, supra note 12, para. 155; Case of Herrera-Ulloa, supra note 12, para. 127; Case of Palamara-Iribarne, supra note 12, para. 83, and Case of Claude-Reyes et al., supra note 44, para. 87.
[FN66] Cf. Case of Herrera-Ulloa, supra note 12, para. 113, and Case of Ricardo Canese, supra note 44, para. 83.
[FN67] Cf. Case of Herrera-Ulloa, supra note 12, para. 127.

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88. In the domain of political debate on issues of great public interest, not only is the expression of statements which are well seen by the public opinion and those which are deemed to be harmless protected, but also the expression of statements which shock, irritate or disturb public officials or any sector of society. [FN68] In a democratic society, the press must inform extensively on issues of public interest which affect social rights, and public officials must account for the performance of their duties.

[FN68] Cf. Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.), supra note 48, para. 69; Case of Ivcher-Bronstein, supra note 12, para. 152, and Case of Ricardo Canese, supra note 44, para. 83.

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89. The critical statements made by Mr. Kimel were related to issues of public concern, regarding a judge in his capacity as public official and amounted to opinions which did not entail the imputation of facts. As stated in the judgment rendered in the first instance (supra para. 43), the paragraph which was the grounds for prosecuting Mr. Kimel contained an opinion rather than the imputation of a fact:

Mr. Kimel […] merely poses a question […]. In no way, in accordance with the existing case law on this matter, may it be validly held that such epithets may be tantamount to the imputation of a criminal conduct, under the terms required by the criminal definition of [defamation]. A question as such may not involve a specific imputation, but a mere judgment which is absolutely subjective –and also exposed to the readers' subjectivity- by the author of a no less subjective appreciation of the value of the evidentiary elements filed in the case by the [complainant]. It is, therefore, criticism containing an opinion on the performance of the public duties of a judge in a given case. But a different assessment of the facts and circumstances may in no way imply the categorical false imputation of a publicly actionable crime. [FN69]

[FN69] Cf. Judgment of September 25, 1995, supra note 28, folio 59.

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90. As to the evident public interest of the issues on which Mr. Kimel gave his opinion, the testimony rendered thereby at the public hearing (supra para. 9), which was not challenged by the State, is to be noted:

The San Patricio Massacre ha[d] been considered the most serious murder suffered by the Catholic Church over its centuries in Argentina [.] The main and only purpose of the book ha[d] evidently been retelling the murder of the Palotine clergymen, bring to light what had been unknown and invisible for society, the tragic history of the killing of five clergymen massacred in their house under the most horrible circumstances. [FN70]

[FN70] Cf. Testimony rendered by Eduardo Kimel at the public hearing (supra para. 9).

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91. The opinion expressed by Mr. Kimel had no bearing on the complaining judge's personal life, nor did it impute an illegal conduct, but referred to his handling of the case.

92. The Court notes that Mr. Kimel made a reconstruction of the judicial investigation into the massacre and, based on that, he issued a critical value judgment on the performance of the Judiciary members during the last military dictatorship in Argentina. At the public hearing in the instant case (supra para. 9), Mr. Kimel highlighted that the text in which he mentioned the complaining judge was "a paragraph which had to be part of the book, as, despite its brevity, contained significant information: it described the performance of the members of the Argentine Judiciary during the tragic years of the military dictatorship, which was essential to conduct an investigation into the murder of the five clergymen." Mr. Kimel did not use excessive language and based his opinion on the events verified by the journalist himself.

93. The opinions expressed by Mr. Kimel can neither be deemed to be true nor false. As such, an opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties. In principle, truthfulness or falseness may only be established in respect of facts. Hence, the evidence regarding value judgments may not be examined according to truthfulness requirements. [FN71]

[FN71] Cf. ECHR, Case of Lingens v. Austria, Judgment of July 8, 1986, Series A no. 103, § 46.

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94. Taking the foregoing into consideration, the Court concludes that the violation of Mr. Kimel's right to freedom of thought and expression has been overtly disproportionate as excessive in relation to the alleged impairment of the right to have one's honor respected in the instant case.

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95. In view of the arguments put forward in this chapter and taking into consideration the acknowledgement of facts and the acquiescence made by the State, the Court finds that the State has violated the right to freedom of thought and expression enshrined in Article 13(1) and 13(2) of the American Convention, in relation to the general duties set forth in Article 1(1) thereof, to the detriment of Mr. Kimel.

VII. ARTICLE 8 (RIGHT TO A FAIR TRIAL) [FN72] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

[FN72] The relevant portion of Article 8.1(1) of the Convention provides as follows:
1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

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96. The Commission argued that the criminal proceedings brought against the victim extended for almost nine years; that the case was not a complex one, as "there was no plurality of parties to the proceedings" and that the evidence consisted basically of Mr. Kimel's book; that "the case file contains no evidence that Mr. Kimel had engaged in any conduct incompatible with his status as an indicted defendant or hindered the processing of the case;" and that "the judicial authorities had failed to act with due diligence and promptness." The representatives submitted arguments to the same effect and further argued that "since offenses against the honor are privately actionable offenses, they are subject to a simplified procedure which involves no investigation stage." As previously noted, the State acquiesced to the allegation that it had violated Article 8(1) of the Convention.

97. Considering the proven facts, the State's acquiescence, and the criteria defined by this Court in connection with the reasonable time principle, [FN73] it is the Court's opinion that the duration of the criminal proceedings instituted against Mr. Kimel extended beyond what is reasonable. Likewise, and according to the Court's prior cases, [FN74] it considers that the State has failed to provide justification for such protracted duration. Therefore, it declares that the State has violated Article 8(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Kimel.

[FN73] Said principles are: i) the complexity of the matter, ii) the procedural activity of the involved party, and iii) the actions of judicial authorities. Cf. Case of Genie-Lacayo v. Nicaragua. Merits, Reparations and Costs. Judgment of January 29, 1997. Series C No. 30, para. 77; Case of Vargas-Areco v. Paraguay. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155, para. 102, and Case of Escué-Zapata v. Colombia. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 102.
[FN74] Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations and Costs. Judgment of June 21, 2002. Series C No. 94, para. 145; Case of Gómez-

Palomino v. Peru. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136, para. 85, and Case of Chaparro-Alvarez y Lapo Iñíguez, supra note 17, para. 161.

VIII. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

98. It is an International Law rule that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation. [FN75] The Court has based its decisions on this particular matter on Article 63(1) of the American Convention. [FN76]

[FN75] Cf. Case of Velásquez-Rodríguez v. Honduras. Merits, Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para 25; Case of Albán-Cornejo et al v. Ecuador. Merits, Reparations and Costs. Judgment of November 22, 2007. Series C No. 171, para. 138, and Case of the Saramaka People, supra note 14, para. 131.

[FN76] Article 63(1) of the American Convention provides that:

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

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99. In the context of the acknowledgment made by the State (supra paras. 18 and 22), in accordance with the considerations on the merits and the violations of the Convention declared in the above chapters, as well as in the light of the criteria laid down in the Court's case law in relation to the nature and scope of the obligation to repair, [FN77] the Court will now rule on the claims made by the representatives and the Commission and on the position of the State regarding reparations, for the purpose of ordering adequate measures intended to repair the damage.

[FN77] Cf. Case of Velásquez-Rodríguez, supra note 75, paras. 25 to 27; Case of the "White Van" (Paniagua-Morales et al.), supra note 14, paras. 76 to 79; Case of Albán-Cornejo, supra note 75, para. 139, and Case of the Saramaka People, supra note 14, para. 187.

A) INJURED PARTY

100. Pursuant to Article 63(1) of the Convention, the Court considers Mr. Eduardo Kimel as the "injured party," given his status as the victim of the declared violations, as a result of which he will be entitled to such reparations as may be set by the Court for pecuniary and non-pecuniary damages.

101. As regards Mr. Kimel's next of kin, the Court notes that in its Report on the Merits (supra para. 1), the Commission did not declare them victims of any violation of the Convention; that in its application the Commission identified Mr. Kimel as the sole beneficiary of the reparations and did not identify his next of kin as victims; that the representatives did not assert a violation to the detriment of Mr. Kimel's next of kin either; and that, in its written closing arguments, the Commission stated that the damage resulting from the facts of the instant case consists, inter alia, of the "moral damage inflicted on the persons close" to Mr. Kimel, without requesting a declaration that a violation of a conventional provision had been committed to their detriment.

102. In this regard, the Court reiterates that an injured party is a person who has been declared a victim of the violation of a right enshrined in the Convention. According to the Court's case law, the alleged victims must be identified in the application and in the Commission's report as adopted pursuant to Article 50 of the Convention. Furthermore, pursuant to Article 33(1) of the Court's Rules of Procedure, it is incumbent upon the Commission and not upon the Court, to accurately identify the alleged victims at the proper procedural stage. [FN78]

[FN78] Cf. Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006, Series C No. 148, para. 98, Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 29, and Case of Chaparro Alvarez y Lapo Iñíguez, supra note 17, para. 224.

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103. The foregoing was not accomplished in the instant case and, accordingly, the Court has not declared that a violation has been committed to the detriment of Mr. Kimel's next of kin.

B) COMPENSATION

104. The representatives and the Commission requested the Court to set compensation for both the pecuniary and the non-pecuniary damage caused to Mr. Kimel as a result of the facts under discussion in the instant case. The Court will now examine the relevant pleadings and evidence.

a) Pecuniary damage

105. The Court has developed the concept of pecuniary damage and the circumstances in which compensation therefor is in order. [FN79]

[FN79] Cf. Case of Bámaca-Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of La Cantuta, supra note 13, para. 213, and Case of Cantoral-Huamaní and García-Santa Cruz, supra note 15, para. 166.

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106. The Commission argued that Mr. Kimel "made significant pecuniary efforts with a view to securing justice at the domestic level and overcoming the moral consequences of the actions of the State of Argentina."

107. The representatives noted that the State must compensate the victim for the "actual damage" and "loss of profits" he sustained. As regards actual damage, they requested that, the Court set on equitable grounds the sum of US$ 10,000.00 (ten thousand United States dollars) for the "16 years of litigation," expenses incurred on account of "photocopies, stamps, transportation for court appearance purposes," and the expenses incurred to publicize "his court case to make it known to the public." As regards loss of profits, they argued that the facts of the instant case caused "Mr. Kimel to be held back as to new work proposals and projects, a change of direction in his professional career, his loss of chance, his impossibility to publish the book due to the historical context then prevailing in Argentina, and the professional limitations brought about by the restrictions that applied for him to leave the country." On this account, they are seeking compensation set on equitable grounds in the sum of US$ 20,000.00 (twenty thousand United States dollars).

108. The State only addressed the subject of "loss of profits." It noted that, "other than their statements, [the representatives] failed to provide concrete documentary evidence" and requested that the Court "resort to the concept of equity to determine reparation on that account."

109. As regards the expenses incurred in connection with the 16 years of litigation before domestic and international courts and the "dissemination" of the matter, the Court notes that, in certain cases, [FN80] it ordered payment of compensation for the expenses incurred by either the victims or their next of kin as a result of the declared violations, provided, however, that a direct causal link exists between such expenses and the facts that entail such violations, and that the expenses are not disbursements made to access justice, as these are accounted for as "reimbursement of costs and expenses," rather than "compensation." In the instant case, the aforementioned expenses were incurred to access justice and, accordingly, they will be analyzed in section D) of this Judgment.

[FN80] Cf. Case of the Serrano-Cruz Sisters v. El Salvador. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, para. 152; Case of the Yakye Axa Indigenous Community, supra note 45, para. 194, Case of the Miguel Castro-Castro Prison, supra note 14, para. 427, and Case of the Rochela Massacre, supra note 11, para 251.

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110. As regards Mr. Kimel's impossibility to move forward with new work proposals and projects and the alleged impairment of his professional career, the Court takes into consideration that the State has not objected to such arguments and has even requested the Court that it set compensation therefor on equitable grounds. Accordingly, the Court has decided to set in equity the sum of US$ 10,000.00 (ten thousand United States dollars) as compensation for pecuniary damage. This sum shall be delivered directly to Mr. Kimel within one year as from the date of notice of this Judgment.

b) Non-pecuniary damage

111. The Court will now rule on non-pecuniary damage in accordance with the standards laid down in the Court's case law. [FN81]

[FN81] Cf. Case of Aloeboetoe et a. v. Suriname. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, para. 52; Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 295; Case of Zambrano-Vélez et al., supra note 10, para. 141; and Case of Cantoral-Huamaní and García-Santa Cruz, supra note 15, para. 175.

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112. The Commission stated that "[t]he infliction of moral damage in these cases is a necessary result of the nature of the violations that were committed."

113. The representatives argued that "the condemnatory judgments brought the serious nature and quality of the investigation undertaken by Mr. Eduardo Kimel into question," that the Argentine courts held it negligent and reckless, that the fine he was sentenced to pay "was a reason for great concern and seriously jeopardized the financial stability of his family group," and that the possibility that he were deprived of his liberty caused "a great deal of suffering and instability" to himself and his family. On this account, they requested compensation in the amount of US$ 50,000.00 (fifty thousand United States dollars).

114. The State did not submit arguments on the subject of non-pecuniary damage.

115. Among the evidentiary items submitted to the Court is the written statement of Mr. Adrián Sapeti, Mr. Kimel's psychiatrist, which statement was neither objected to nor brought into question by the State. According to such statement:

The lengthy court proceedings Eduardo Kimel has been put through, which I found out about in 1990, caused him extended psychic trauma, which in turn caused post-traumatic stress Syndrome with clinical manifestations of generalized anxiety, depressive symptoms and somatization disorders, which worsened as a result of the protracted extension of the traumatic situation created by the decision of 1998 and 1999.
[…]
This impaired his capacity to work and brought about conflicts in his social and family relationships.

116. At the public hearing held before this Court (supra para. 9), Mr. Kimel stated as follows:

The greatest paradox [is] that the only person to be prosecuted and punished in connection with the San Patricio massacre has been the journalist who wrote the book. The murderers, the instigators of this horrendous quintuple murder have never been identified and, most probably, are still at large […]. Somehow, this is the letter of introduction I have used in an attempt to explain the arbitrariness and truly horrendous meaning the trial and, naturally, the judgment, had for me. Personally […], mainly since the lower court's judgment, the court proceeding became an obvious factor of imbalance, of uneasiness, not just for me but for my entire family group as

well. Somehow, and I would like to be accurate in this regard, this created a feeling of strong anguish, a somber idea of what my life's horizon was going to be in connection with this issue.
[…]
From the professional viewpoint, this court proceeding subjected me to a number of restrictions […], one of them being my […] gravitating away from investigative journalism […] towards what we might call areas of journalism that are less invested in reality or, at least, to be more accurate, less exposed to the risk of prosecution.
[…]
Today is not just any day for me, this is not just another day in my life; I stand here with a settlement agreement, and I appreciate the State's willingness to reach that settlement, I am deeply grateful for the State of Argentina's acknowledgement of the violation […] of my rights, but I stan[d] here after 16 years, a very long time. I have a 20-year old daughter; when this whole thing started, she had barely turned four; I shared twenty years of my life with my partner Griselda, who unfortunately passed away last year, and my greatest regret is that I have reached this stage, for which I am deeply grateful, without her here to share this moment with me, because she was deeply committed to my cause, even to the materialization of my book, and I would have truly liked that she could be here with us today, but unfortunately that is not possible.
[…] I celebrate that I have the chance of saying all what I am saying before this Honorable Court today, because this marks, in my case, the end of many years of feeling humiliated. I am not an offender, I am not a criminal, I had never been involved in a criminal proceeding before, I believe I am recognized by my colleagues, by my coworkers, [as] someone who is not just responsible but extremely responsible, when I work I am fully aware of what I am doing. I am not a libeler, I am not a slanderer, that is not the way I conduct myself, I am very careful but, unfortunately, I myself and my family as well have had to suffer […] the consequences of an absolutely unfair situation.

117. The Court has repeatedly held that a judgment declaring the existence of a violation is in and of itself a form of reparation. [FN82] Notwithstanding, considering the circumstances of the instant case, the suffering that has been inflicted on the victim as a result of the violations committed, the change in his way of living and the other non-pecuniary implications he has endured, the Court finds it appropriate to order payment of compensation for non-pecuniary damage, assessed on equitable grounds. [FN83]

[FN82] Cf. Case of Suárez-Rosero v. Ecuador. Reparations and Costs. Judgment of January 20, 1999. Series C No. 44, para. 72; Case of Albán-Cornejo et al., supra note 75, para. 148; and Case of Saramaka People, supra note 14, para. 195.
[FN83] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 84; Case of Chaparro Alvarez y Lapo Iñíguez, supra note 17, para. 250, and Case of Saramaka People, supra note 14, paras. 200 and 201.

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118. In the light of the evidence submitted, the Court finds that, as a result of the facts of the instant case, Mr. Kimel was discredited in his work as a journalist; he suffered anxiety, anguish

and depression; his professional career was impaired; so were his family life and economic stability; and he suffered the consequences of criminal prosecution, including his addition to the criminal offenders registry.

119. Based on the foregoing and on grounds of equity, the Court sets the sum of US$ 20,000.00 (twenty thousand United States dollars) as compensation for non-pecuniary damage. The State shall pay this amount directly to the beneficiary within one year as from the date of notice of this Judgment.

C) MEASURES OF SATISFACTION AND GUARANTEES OF NON-REPETITION

120. The Court will determine the measures of satisfaction required to provide reparation for non-pecuniary damage which are non-pecuniary in nature, and will order measures which have a public scope or impact. [FN84] For that purpose, the Court will take into consideration the fact that the State "le[ft] to [the] Court to determine in its discretion the scope" of "non-pecuniary" reparations.

[FN84] Cf. Case of the "Street Children" (Villagrán-Morales et al.), supra note 83, para. 84; Case of Chaparro Alvarez y Lapo Iñíguez, supra note 17, para. 254, and Case of Albán-Cornejo et al., supra note 75, para. 155.

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a) Annulment of criminal judgment

121. The Inter-American Commission contended that the State must "adopt measures aimed at ceasing in the violations and reinstating the victim's status," among them "the final suspension of the effects of the criminal proceedings instituted against him, including the criminal sentence and the order to pay compensation for moral damage in the amount of 20,000.00 pesos, as well as the expungement of the victim's criminal record[…], and the revocation of the prohibition for him to leave the country."

122. As a measure of reparation, the representatives requested that "the criminal and civil judgment [against Mr. Kimel] be annulled, and that his criminal record be expunged and, along with it, all possible effects of the judgment, eliminated."

123. The Court has found that the condemnatory judgment rendered against Mr. Kimel implied the violation of his right to freedom of thought expression (supra para. 95). Accordingly, in line with its previous decisions, [FN85] the Court hereby orders that the State annul such judgment in all respects, including its effects as far as third parties are concerned, namely: 1) Mr. Kimel's conviction for the crime of libel; 2) the sentence of one year of suspended imprisonment, and 3) the order to pay $ 20,000.00 (twenty thousand Argentine pesos). For such purpose, the State will have a period of six months as from the date of notice of this Judgment. Moreover the State is required to immediately expunge Mr. Kimel's criminal record in connection with the instant case.

[FN85] Cf. Case of Herrera-Ulloa, supra note 12, para. 195.

(b) Publication of the Judgment and public acknowledgment

124. As measures of reparation, the Commission and the representatives requested that this Judgment be published in a newspaper of nationwide circulation and that a public act be organized at which the State acknowledge its international responsibility.

125. As ordered by this Court in previous cases, [FN86] as a measure of satisfaction, the State shall publish only once Chapter VI of this Judgment, without the relevant footnotes, and the operative paragraphs hereof, in the Official Gazette and in another newspaper of large nationwide circulation. For such purpose, the State will have a period of six months as from the date of notice of this Judgment.

[FN86] Cf. Case of Cantoral-Benavides v. Peru. Reparations and Costs. Judgment of December 3, 2001. Series C No. 88, para. 179; Case of Albán-Cornejo et al., supra note 75, para. 157, and Case of the Saramaka People, supra note 14, para. 196.

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126. Furthermore, the Court deems it appropriate that the State hold a public act of acknowledgment of responsibility, within six months as from the date of notice of this Judgment.

c) Adaptation of domestic law to conform to the Convention

127. The Commission noted that "it is essential that the Court order the State of Argentina to adopt, as a priority measure, all such legislative and other measures as may be required to prevent similar facts from occurring in the future." The representatives stated that "a legal reform must be implemented in connection with the offenses of libel and slander, and with the Civil Code provisions, for the manner in which such offenses are regulated –considering the language used and the lack of accuracy– opens the door for Argentine courts to hand down arbitrary rulings, thus encouraging the rendering of a large number of judgments in violation of the freedom of expression."

128. Considering the arguments put forward in Chapter VI of this Judgment, the Court finds it pertinent to order that, within a reasonable time, the State bring its domestic laws in conformity with the provisions of the Convention, so that the lack of accuracy acknowledged by the State (supra paras. 18 and 66) be amended in order to comply with the requirements of legal certainty so that, consequently, they do not affect the exercise of the right to freedom of thought and expression.

D) Costs and expenses

129. Legal costs and expenses are embodied in the concept of reparation set forth in Article 63(1) of the American Convention. [FN87]

[FN87] Cf. Case of the "White Van" (Paniagua-Morales et al.), supra note 14, para. 212, and Case of Albán-Cornejo et al., supra note 81, para. 115.

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130. The representatives requested the reimbursement of US$ 6,000.00 (six thousand United States dollars) to Mr. Kimel on account of the expenses stemming from the domestic court proceedings, "considering that […] he received pro bono counseling from the Buenos Aires Press Workers' Union [Unión de Trabajadores de Prensa de Buenos Aires, UTPBA] for over nine years [and] he wishes he could reimburse UTPBA for a percentage that represents the pro bono work of such entity, such that it can perform similar work in other cases." Furthermore, as noted in paragraph 107 supra, the representatives noted that Mr. Kimel had incurred other expenses. The representatives did not produce any evidentiary document to prove such allegations. Moreover, they requested the sum of US$ 9,919.38 (nine thousand nine hundred and nineteen United States dollars and thirty-eight cents) for the "expenses CELS […] has incurred in the processing of the case under the Inter-American system since 2000." The available evidence relates, for the most part, to the expenses incurred in the processing of the case before this Court. Lastly, the representatives asked for US$ 2,000.00 (two thousand United States dollars) on account of "legal counseling and representation" provided by CEJIL. No evidence of such expenses has been submitted.

131. The State requested that "in awarding possible costs, the acknowledgment of international responsibility be taken into consideration." In this regard, it quoted the following paragraph of the Judgment of reparations and costs issued in the Case of Aloeboetoe et al. v. Suriname:

In view of the foregoing and of the fact that Suriname has expressly accepted its international responsibility and has not in any way hindered the proceedings for determining reparations, the Court dismisses the Commission's request for reimbursement of costs. [FN88]

[FN88] Cf. Case of Aloeboetoe et al. v. Surinam. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, para. 115.

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132. It is the Court's view that such paragraph does not apply to the instant case. Indeed, though the fact that Suriname had acknowledged its responsibility and refrained from hindering the Inter-American proceedings were taken into consideration, these were not the only elements assessed by the Court upon rendering said Judgment. Accordingly, in the paragraphs preceding the one quoted by the State, the Court considered that the facts of that case had been reported to the Commission fifteen days after their occurrence; that the victims' next of kin had not been put through protracted procedures to be able to submit the case to the Commission, as the Commission took the case right away; that they had not been forced to seek professional

counseling; and that the expenses incurred by the Commission in the processing of the case were funded out of the budget of the Organization of American States. None of these elements are found in the instant case.

133. Based on the above considerations and the evidence submitted, the Court finds, on equitable grounds, that the State is to pay US$ 10,000.00 (ten thousand United States dollars) to Mr. Kimel as costs and expenses. Said sum includes any expenses Mr. Kimel may be incurred in the future at the domestic level or in regarding monitoring compliance herewith. Said sum shall be delivered to the victim within a period of one year as from the date of notice of this Judgment. In turn, Mr. Kimel will deliver such amount as he may deem appropriate to his representatives in the domestic proceedings and proceedings before the Inter-American system, based on the assistance received therefrom.

E) METHOD OF COMPLIANCE WITH THE PAYMENTS ORDERED

134. The compensation amounts and the amounts set as costs and expenses are to be delivered directly to Mr. Kimel. Should he pass away before the relevant compensation is settled, such compensation shall be paid to his heirs or beneficiaries, pursuant to the applicable domestic legislation. [FN89]

[FN89] Cf. Case of Myrna Mack-Chang v. Guatemala. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, para. 294; Case of Chaparro Alvarez y Lapo Iñíguez, supra note 17, para. 283, and Case of Albán-Cornejo et al., supra note 75, para. 169.

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135. The State shall comply with its obligations by tendering United States dollars or an equivalent sum in Argentine legal tender, calculated at the rate of exchange prevailing between the two currencies in the New York market, United States on the day before payment is made.

136. Should the beneficiary be unable to receive such payment within the prescribed time periods due to causes within his control, the State shall either deposit said amounts in an account opened in the beneficiary's name or draw a certificate of deposit from an Argentine financial institution, in United States dollars, under the most favorable financial terms available pursuant to the laws and banking practices in force. Should such compensation remain unclaimed after a period of ten years, the amounts thus deposited shall revert to the State, along with the interest accrued thereon.

137. The amounts awarded in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to the beneficiary in full, pursuant to the provisions hereof, free of any tax deductions.

138. Should the State fall into arrears, it shall pay interest on the outstanding amount at the banking default interest rate applicable in Argentina.

139. In line with its constant practice, the Court reserves its right, inherent in its jurisdiction and arising from the provisions of Article 65 of the American Convention, to monitor full compliance with this Judgment. The case will be closed once the State has fully complied with the provisions of this Judgment. Within a period of one year as from the date of service of this Judgment, the State shall submit to the Court a report on the measures adopted to comply herewith.

IX. OPERATIVE PARAGRAPHS

140. Now therefore,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

DECLARES:

Unanimously that,

1. It admits the acknowledgment of international responsibility made by the State, under the terms of paragraphs 18 to 28 of this Judgment, and that a violation of the right to freedom of thought and expression as enshrined by Articles 13(1) and 13(2) of the Inter-American Convention on Human Rights, in relation to the general obligations set forth in Articles 1(1) and 2 thereof has been committed to the detriment of Eduardo Kimel, under the terms of paragraphs 51 to 95 of this Judgment.
2. It admits the acknowledgement of international responsibility made by the State, under the terms of paragraphs 18 to 28 of this Judgment, and that a violation of the right to a fair trial within a reasonable time, as enshrined by Article 8(1) of the Inter-American Convention on Human Rights, in relation to the general obligation set forth in Article 1(1) thereof, has been committed to the detriment of Eduardo Kimel, under the terms of paragraphs 96 and 97 of this Judgment.
3. The State has violated the freedom from ex post facto laws enshrined by Article 9 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, to the detriment of Eduardo Kimel, under the terms of paragraphs 61 to 67 of this Judgment.
4. It admits the waiver of rights made by the representatives, regarding the right to a hearing by an impartial and independent court as enshrined by Article 8(1), the right to appeal the judgment to a higher court as enshrined by Article 8(2)(h) and the right to judicial protection as enshrined by Article 25 of the Inter-American Convention on Human Rights, under the terms of paragraph 26 of this Judgment.
5. This Judgment is in and of itself a form of reparation.

AND DECIDES:

Unanimously,

6. To order the State to pay the amounts set in this Judgment as compensation for pecuniary and non-pecuniary damage, and reimbursement of legal costs and expenses, within the term of

one year as from notice of this Judgment, under the terms of paragraphs 110, 119, and 133 hereof.

7. To order the State to set aside the criminal sentence imposed on Mr. Kimel and all the effects deriving therefrom within the term of six months as from notice of this Judgment, under the terms of paragraphs 121 to 123 hereof.

8. To order the State to write forthwith the name of Mr. Kimel off all public records wherein he has been entered as having a criminal record in relation to the instant case, under the terms of paragraphs 121 to 123 hereof.

9. To order the State to publish the pertinent parts hereof as ordered in paragraph 125 of this Judgment, within the term of six months as from notice hereof.

10. To order the State to hold a public act as acknowledgement of responsibility, within the term of six months as from notice of this Judgment, under the terms of paragraph 126 hereof.

11. To order the State to bring within a reasonable time its domestic legislation into conformity with the provisions of the Inter-American Convention on Human Rights, so that the lack of accuracy acknowledged by the State (supra paras. 18, 127, and 128) be amended in order to comply with the requirements of legal certainty so that, consequently, they do not affect the exercise of the right to freedom of thought and expression.

12. To monitor full compliance with this Judgment and to close the instant case once the State has effectively and fully complied with the measures ordered herein. The State shall, within the term of one year as from the date of notice of this Judgment, submit to the Court a report on the measures adopted in compliance therewith.

Cecilia Medina-Quiroga
President

Diego García-Sayán
Sergio García-Ramírez
Manuel E. Ventura-Robles
Margarette May Macaulay
Rhadys Abreu-Blondet

Pablo Saavedra-Alessandri
Secretary

So ordered,

Cecilia Medina-Quiroga
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE DIEGO GARCÍA-SAYÁN IN THE JUDGMENT RENDERED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON MAY 2, 2008 IN THE CASE OF KIMEL V. ARGENTINA

I. Freedom of thought and expression in the case of Kimel v. Argentina.

1. In the judgment rendered in the case of Kimel v. Argentina, the Court reasserts the concept of freedom of thought and expression as a fundamental right in a democratic society. The conduct of Mr. Kimel, according to the record of the case, fitted into the regular exercise of such right. In the case in point, the investigative journalistic work carried out by Mr. Kimel provided important information and evidence on the actions of a judge regarding the investigation into a serious violation of human rights occurred during the military rule in Argentina. The so-called "San Patricio massacre," in which five clergymen belonging to the Palotine Order were murdered, was a serious event Mr. Kimel investigated in such work.

2. From the record of the case it results that the information and the opinion expressed by Mr. Kimel fitted into the regular exercise of a right and that the criminal sentence imposed on him was disproportionate. In the agreement signed by the parties during the proceedings, they refer to an "unfair criminal sentence" which is, certainly, the main aspect of the international responsibility of the State in the instant case. It is a proven fact that Mr. Kimel had not used excessive language and that his criticism had no bearing on the private life of the judge who brought criminal proceedings against him, but on the judicial handling of the case he was hearing.

3. In the instant case, it is of the utmost importance that the State has acquiesced and accepted that it violated Mr. Kimel's right to freedom of thought and expression, further acknowledging the lack of accuracy of the criminal laws which punish defamation. It is also relevant that the State has regretted "that the only person ever convicted for the massacre of the clergymen belonging to the Palotine Order was precisely the journalist who thoroughly investigated such dreadful massacre and its judicial handling." As a consequence of the State's acquiescence, the Court ordered the State to bring its domestic legislation in line with the provisions of the Convention within a reasonable time, in a manner such that the lack of accuracy admitted by the State "is amended so that the requirements of legal safety are met and, therefore, the right to freedom of thought and expression is not impaired" (para. 128).

4. The Court has determined that in the instant case there has been an abusive exercise of the State's punitive power, taking into consideration the charges brought against Mr. Kimel, the impact they had on his legally protected interests, and the nature of the sentence imposed on the journalist –deprivation of freedom (para. 80).

II. Freedom of thought and expression in the American Convention

5. In the judgment, the Court has recalled that the right to freedom of thought and expression as enshrined in Article 13 of the Convention is not an absolute one (para. 54). This is in line with the Court's case law, as stated in the judgments rendered in the cases Herrera-Ulloa v. Costa Rica (para. 120), Ricardo Canese v. Paraguay (para. 95) and Palamara-Iribarne v. Chile (para. 79). It should also be remembered that, in accordance with the provisions of the Inter-American Democratic Charter (Article 4), freedom of expression and of the press is one of the fundamental components of the exercise of democracy. Being a right to which all individuals are entitled, the right to freedom of thought and expression may not be restricted or matched with the

rights of journalists or with the exercise of the journalistic profession, as it is a right which is enjoyed by all individuals and not only by journalists through the mass media.

6. The Court has repeatedly held in its case law that this right may be subject to subsequent liability and restrictions, as provided for in Article 13 of the Convention (subparagraphs 2, 4 and 5). In this regard, the Court has pointed out that such restrictions have an exceptional nature and must not limit the full exercise of freedom of thought and expression beyond what is strictly necessary so that they do not become a direct or indirect means of prior censorship.

7. In fact, the exercise of the right to freedom of thought and expression is limited by other fundamental rights. In this regard, the right to have one's honor respected is the main legal reference when considering such limitations. This right is specially protected by the Convention in the same Article 13, as it provides that the exercise of the right to freedom of thought and expression must "ensure respect for the rights or the reputation of others" (Article 13(2)). In much the same manner as all individuals are entitled to the right to freedom of thought and expression and not only journalists or the mass media, in accordance with the Convention, not only journalists must ensure the respect for the rights or the reputation of others, respecting the right to have one's honor respected, but also all individuals who exercise such right to freedom of thought and expression.

8. The State must ensure to all individuals who consider that their right to have their honor respected has been impaired, the availability of the appropriate judicial mechanisms so that the pertinent responsibilities be determined and punishment be imposed. Should the State fail to do so, it would be held to have international responsibility. In this judgment, the Court has clearly established the obligations of the State regarding this matter in its capacity as guarantor of all fundamental rights. Along these lines, it is relevant that the Court has reiterated its case law, according to which the State has "a key role in trying to determine responsibilities and impose sanctions as may be necessary to achieve such purpose. Resorting to civil or criminal proceedings will depend on the considerations discussed below" (para. 75). Such is, therefore, the specific corollary of the State's duty to ensure the rights enshrined by the Convention.

9. In the exercise of the right to freedom of thought and expression, the mass media are not the only party involved, but, certainly, an essential one. In its case law, the Court has determined that the mass media play an essential role as "vehicles for the exercise of the social dimension of freedom of expression in a democratic society." [FN1] Notwithstanding, the Court has ruled that, "… it is vital that [the media] are able to gather the most diverse information and opinions. The media, as essential instruments of freedom of thought and expression, are required to discharge their social function responsibly." [FN2]

[FN1] Cf. Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 117.
[FN2] Cf. Case of Herrera-Ulloa, supra note 1, para. 117.

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10. In this judgment, the Court has noted the need to protect the human rights of those who "face the power of the media" (para. 57). It has further established that the State "must not only minimize restrictions on the dissemination of information, but also extend equity rules, to the greatest possible extent, to the participation in the public debate of different types of information, fostering informative pluralism" (para. 57).

11. This is an issue of increasing relevance in societies where at times the rights of individuals are violated by the factual power of the media in an asymmetric context which, as stated in the judgment, the State must seek to balance. As clearly established in the judgment, in order for the State to be able to exercise its right to ensure the right to have one's honor protected, in a democratic society the mechanisms provided by the administration of justice –including criminal responsibility- may be used within the appropriate framework of proportionality and reasonability and the respect for the whole set of human rights prevailing in a democratic society.

12. When opinions on public officials or persons who stand in a position of public relevance are expressed through the media, the former, for the sake of the legitimate general interest at stake, must tolerate some degree of risk that their subjective rights may be impaired by such statements or opinions. Along these lines, this judgment has reiterated what has been stated in prior cases, [FN3] in that "the opinions regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection, so that debate in a democratic system is encouraged" (para. 86).

[FN3] Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 98 and Case of Herrera-Ulloa, supra note 1, para. 128.

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13. Notwithstanding, the Court has ruled that the right of all individuals to have their honor respected is protected and that public officials are "under the protection afforded by Article 11 of the Convention, which enshrines the right to have one's honor respected" (para. 71), as "under the provisions of the Convention, the protection of a person's honor and reputation is a legitimate end" (para. 71). This different threshold of protection does neither amount to a lack of limitations for those who work in the media nor to a lack of rights for said public officials. The right to have one's honor respected is one and indivisible and may be asserted by all individuals, which is why the exercise of freedom of thought and expression does not allow for injurious, degrading or humiliating expressions or insidious insinuations.

14. Accordingly, all individuals –among them journalists-, are subject to the liability that may result from the impairment of the rights of others. Anyone who injures the fundamental rights of others, whether a journalist or not, must assume his responsibility. In turn, the State, must ensure that all individuals, whether journalists or not, respect the rights of others, limiting any conduct which may result in their impairment.

III. The right to have one's honor respected and freedom of thought and expression

15. Article 11 of the Convention provides for the protection of the right to have one's honor respected and one's dignity recognized as legal rights which are set forth in Article 13(2). As human rights protected by the Convention, the duty of the State to act as guarantor thereof, as stated in the Court's case law, is applicable thereto. Thus, the State has the obligation to ensure that the right to have one's honor respected is fully protected, for which purpose it must provide the individuals with the appropriate means to achieve it.

16. The right to have one's honor respected must, therefore, be protected. Particularly, the so-called "objective honor," which refers to the value that others attach to the individual in question insofar as his reputation or his good name in his social context has been impaired. Along these lines, in accordance with the legal provisions that protect the right to have one's honor respected, freedom of thought and expression as a fundamental right does neither sustain nor legitimize the use of abusive expressions or terms which go beyond the legitimate exercise of the right to express one's opinions or the exercise of the right to criticism.

17. Law has the intrinsic capability to properly solve the conflicts which may arise between rules that protect opposing legal rights. Thus, freedom of thought and expression and the right to have one's honor respected are the poles of an important conflict. In this regard, judges play an essential role in effectively determining the limits of each of said rights, while protecting the full exercise of and respect for both. The State must comply with its obligation to simultaneously ensure the right to freedom of thought and expression and the right to have one's honor respected, as established by the Convention.

18. It is not a matter of categorizing these rights, as this would come into conflict with the Convention. The unitary and interdependent nature of rights would be confronted with the attempt to consider rights as being "first" or "second" category. What is relevant is defining the limits of each of these rights while seeking to reconcile them. Every fundamental right must be exercised with regard for other fundamental rights. In this reconcilement process, the State has a key role in trying to determine responsibilities and impose sanctions as may be necessary to achieve such purpose through the appropriate judicial mechanisms.

IV. Legitimacy of the various judicial mechanisms for the protection of the right to have one's honor respected

19. In this judgment the Court has dismissed the dichotomy posed by civil/criminal proceedings as a divortium acquarum regarding the respect or lack of respect for the right to freedom of thought and expression in the exercise of the "subsequent liability" referred to in Article 13 of the Convention. Though in the instant case the Court has ruled that there has been an abusive use of the State's punitive power, the Court has stated that "criminal proceedings are suitable as, by threatening to impose sanctions, they serve the purpose of preserving the legal right whose protection is sought; in other words, they may help achieve such purpose" (para 71). Even more, the Court emphasizes that the State must provide society with the mechanisms needed "to determine responsibilities and impose sanctions as may be necessary to achieve such purpose" (para. 75).

20. One of such possible judicial mechanisms are criminal proceedings, as the Court has clearly established that "it does not deem any criminal sanction regarding the right to inform or give one's opinion to be contrary to the provisions of the Convention" (para. 78). Notwithstanding, it has established that the proportionality and reasonability principles are to be observed when stating that "…this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, the bad faith in which or the injurious purpose with which it was expressed, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings in exceptional cases" (para. 78).

21. Given the need to simultaneously ensure the right to have one's honor respected and the right to freedom of thought and expression, the Court has ruled that "… criminal proceedings should be resorted to where fundamental legal rights must be protected from conducts which imply a serious infringement thereof and where they are proportionate to the seriousness of the damage caused. The criminal definition of a conduct must be clear and accurate, as established by the case law of the Court regarding Article 9 of the American Convention" (para. 77).

22. According to the guidelines set by the Court as regards malicious conduct, awareness and the will to defame, libel or insult, are an essential element. Should any of these elements be absent, the act under discussion would not fit into the criminal definition. Another necessary element is that the expressions made in public are objectively and seriously injurious, that is, that they have the capability to cause harm to the good name of the person to whom they were addressed, which is to be proven and examined by a court in each case. It is clear, for instance, that when the commission of a crime is falsely attributed to someone through a medium, given the implications this implies for his reputation, said individual becomes an offender in the eyes of the public opinion.

23. Insofar as what the Court has defined as "serious damage" has been made, criminal proceedings should be resorted to (para. 77). This is so as certain malicious violations of the right to have one's honor respected may cause serious harm to an individual, quite more serious than the damage it may result from, for instance, the commission of certain crimes against property or personal integrity. Hence, the Court finds it in line with the provisions of the Convention that the State ensures the appropriate means –including criminal proceedings- aimed at ceasing in certain harmful conducts, within the framework of reasonability and proportionality.

24. Accordingly, the Court has established the fundamental basis and criteria to be used in criminal proceedings brought in order to determine subsequent responsibilities where the right to have one's honor respected has been impaired. Along these lines, the lack of reasonability or proportionality of the proceedings or sanctions, both in civil and criminal proceedings, may result in the violation of fundamental rights.

25. What is to be emphasized is not whether the defense and protection of a fundamental right such as the right to have one's honor respected and one's reputation recognized are to be exercised, in the abstract, through criminal or civil judicial proceedings, but rather that, whatever be the mechanisms chosen, they are in conformity with the rules regarding due process of law

and the right to a fair trial. And, what is even more important, with the proportionality of the sanction in terms of the damage caused, which is the task of judges.

26. Along these lines, therefore, the Court has established that criminal proceedings do not restrict in and of themselves freedom of thought and expression. The necessity and proportionality of the criminal proceedings must be in line with the seriousness of the damage caused rather than with an abstract consideration which prohibits them for reasons which are not derived from the provisions of the Convention. This is one of the legitimate mechanisms expressly recognized by the Court –in accordance with the parameters defined- when it established that "it is legitimate for an individual who considers that his honor has been impaired to resort to the judicial mechanisms established by the State to protect it" (para. 55).

Diego García-Sayán
Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE CONCURRING OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ IN THE JUDGMENT RENDERED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON MAY 2, 2008 IN THE CASE OF KIMEL V. ARGENTINA

1. I have concurred with my vote in the judgment rendered by the Inter-American Court of Human Rights in the Case of Kimel as I share the decisions it adopted on the merits, as set forth in the operative paragraphs of the Judgment rendered on May 2, 2008. However, I partially dissent from some considerations raised in such document (which are not included in said paragraphs and which do not affect the decisions which I share) regarding the possible restrictions on freedom of thought and expression and the subsequent liabilities –as referred to in Article 13(2) of the American Convention on Human Rights- which result from non-compliance with said restrictions or from crossing the limits which constitute the framework for the exercise of such freedom.

2. The reservations I refer to, regarding which I take on the position I have held in prior cases with regard to freedom of thought and expression and the responsibilities derived from non-compliance with the legitimate limits thereof, explain this concurring opinion. I issue this opinion with great respect and consideration for those who hold a different viewpoint, as I have always done before, without making irrelevant generalizations or objecting to the –widely recognized- evolving direction of the case law of the Court.

3. In this opinion, I reiterate the position I adopted and the arguments I put forward in my concurring opinion in the Judgment rendered by the Court on July 2, 2004 in the case of Herrera-Ulloa v. Costa Rica. In said judgment, the Court analyzed the right to freedom of thought and expression of journalists who publish news or express their opinions on the actions of public officials, which is naturally subject to a less stringent threshold of protection than the one prevailing for individuals whose conduct is not in the public interest. The cases of Herrera-Ulloa and Kimel are not identical, but prompt a similar reflection on the criteria set forth by the Court

in Advisory Opinion OC-5/85, regarding Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights) of November 13, 1985.

4. In the Judgment rendered in the case of Kimel, the Court reasserts the high hierarchy of freedom of thought and expression as a cornerstone for establishing and preserving democracy. In this regard, I consider –as I pointed out in my opinion in the case of Herrera-Ulloa- that such freedom, which is enjoyed by all individuals and is not confined to any particular professional group, takes on "distinctive features […] when it is exercised through media which allow delivering a message to a great number of people" (para. 2). What is said of journalistic communication, on the same account, may be said of the reception and dissemination of messages through informative or historical works which refer to and assess events which are relevant to society.

5. In the Judgment rendered in the case of Kimel, the Court examines the possible collision between fundamental rights set forth and protected by the American Convention: on the one hand, the right to freedom of thought and expression, and, on the other, the right to have one's honor respected and one's dignity recognized, as set forth in Article 11. Both are related –though this is not the object of the Judgment and of my opinion- to the right to reply or to make a correction as set forth in Article 14(1) where "offensive or inaccurate statements have been made." Said collision is particularly relevant these days, characterized by the massive deployment of powerful mass media, and raises different and often contrary opinions which derive in different legal determinations.

6. The discussion of these issues, which usually poses dilemmas of difficult, and -in any case- controversial solutions, gives rise to relevant opinions on the role of freedom of thought and expression in a democratic society, an issue which the Court has firmly determined in prior cases -as I stated in paragraph 3 supra- and on the respect commanded by the right to privacy and to have one's name and reputation respected, also known as the right to have one's honor respected and one's dignity recognized, which must be discussed within the cultural context which defines and protects them and which may be damaged by the abusive exercise of freedom of thought and expression. The relationship between the subject matter of said adjudicatory cases and my unchanging opinion on such issues explains why in this judgment I repeatedly refer to the opinion I issued in the first above-mentioned case.

7. We are at the meeting point of two rights which are to be protected and reconciled. Both are afforded the superior hierarchy of human rights and are subject to the requirements and guarantees which are stated in the "contemporary statute of rights and freedoms" of individuals. We would never seek to abolish one of them –as it occurs under authoritative arguments-, alleging that the exercise of some rights implies the annulment or impairment of others, as this would amount to going in a direction which is as obscure as predictable.

8. Now, the facts of this adjudicatory case (that is, the statements made by the author of a book, their impact on the honor of a judge and the legal action brought by the latter), when discussed under their own terms and regarding the acknowledgment made by the State, do not have the characteristics which might encourage a lengthy debate on the collision of rights.

9. Even though, the Court has set to define, through a systematic analysis of the validity and operation of the restrictions on freedom of thought and expression, the elements which might justify such restrictions in light of the general principles of Human Rights International Law. This contributes to the assessment and characterization of some requirements set forth in Article 13 –legality, necessity, and suitability in terms of certain lawful purposes- which regulate the matter of restrictions and which may also be applied to the analysis of Articles 31 and 32(2) of the Convention. This guideline for the discussion of restrictions –and the legitimization of legal responses-, is a useful methodological contribution of the Judgment rendered in the case of Kimel to the development of the case law of the Inter-American Court and to the arguments which explain and justify the Court's decisions.

10. Naturally, the analysis of the Inter-American Court has taken into consideration that the rights enshrined in the Convention are not absolute, in that their exercise may not have limitations or be subject to legitimate controls. Such notion would deprive individuals of the protection afforded by law and would leave social order at the mercy of power and discretion. The exercise of rights does have limitations. Beyond these limitations, illegality makes its way, in which case it should be prevented and punished with the appropriate mechanisms available in a democratic State, which is the guarantor of the values and principles whose protection is a matter of concern for both the individuals and society and which bind the actions of the State itself. Democracy does not imply tolerance or leniency for illegal conducts, but rationality. This is what, in essence, the general and special restrictions provided for by the American Convention refer to: the former in Articles 30 and 32(2), the latter in rules regarding certain rights and freedoms, among which is Article 13.

11. It cannot be ignored that in today's world, factual powers have developed and grown along with formal powers and even above them, which may have or do have such devastating effects on the legally protected interests and rights of individuals as the direct actions of public authorities may have in the traditional sense of the expression. Hence the shift in the discussion regarding the individuals bound by constitutional values and principles, which also extend, under the appropriate forms, to the international domain: they link all individuals, whether public or private, as they are necessary conditions for life itself and the quality of life of all individuals, who are to be protected from both formal or informal, collective or individual powers.

12. As regards the issue I mentioned in the foregoing paragraph, it is to be noted that the matter of the international horizontal protection still requires an in-depth discussion by the Inter-American Court, which, notwithstanding, has already clearly determined that it is incumbent upon the State to ensure the effectiveness of human rights in the development of social relationships among the individuals, and that its failure to do so entails non-compliance with individual rights, non-fulfillment of public duties and the international responsibility of the State as a result of its failure to perform its duty to ensure the rights of the individuals who are under its jurisdiction, pursuant to Article 1(1) of the American Convention.

13. It is quite interesting to go deeper into the analysis of these issues, which are so relevant these days in view of the withdrawal of the political power, which is justified on the grounds that the excessive powers the State has should, instead, be kept by society. This entails the extremely

serious danger –the applications of which are quite evident- of depriving the State of some of its duties, with the resulting impairment of the (effective) rights of those who cannot resist by themselves the force of markets and factual powers. Now, I consider that the case of Kimel is not the natural space to discuss this issue –though I recognize its importance-, as its purpose is not the discussion of the exercise of pressing factual powers over the rights and interests of the individuals, but the performance of formal public actions of the State through its jurisdictional and punitive powers.

14. In the case of Kimel, the State itself has admitted that resorting to criminal proceedings to punish the author of a book wherein he expressed his opinion on the actions of a judicial officer in the performance of his duties was excessive or immoderate. In fact, it stated that "imposing a criminal penalty on Eduardo Kimel constituted a violation of his right to freedom of thought and expression as enshrined in Article 13 of the American Convention on Human Rights (para. 18 of the Judgment rendered in the case of Kimel). Such acknowledgement by the State (which does not exclude the analysis and assessment by the Court of the facts submitted thereto, as should be done in accordance the characteristics and purposes of international proceedings on human rights, in which the principle of substantive or procedural dispositivity does not preclude jurisdictional functions, whose impelling force derives from reasons of public interest), favors the international judicial decision, both as regards the existence of a violation of individual rights and the need to amend the applicable domestic legislation, the deficiencies of which have been recognized by the State.

15. Again, with regard to the facts of the instant case and based on them, the issue of examining once more which is the legitimate means in conformity with the values and principles enshrined by the American Convention which allows reacting to wrongful conducts which are injurious to certain legally protected interests and to their holders' rights. I have previously stated that it is not a matter of not reproving wrongful conducts and, therefore, failing to tackle them, but of producing said legal reaction with strict rationality in conformity with such values and principles. Public reaction to wrongful conducts does also have boundaries: those boundaries, which are a safeguard for all individuals, do not amount to indifference, abandonment or impunity, but to the legitimate and careful exercise of power. It is obvious that the purpose sought is not consenting to the infringement of rights on the grounds that the right to cause damage does exist. Freedom is neither a safe-conduct to defamation or injurious words or insults, nor the automatic acquittal of the individual who, through an illegal conduct, causes moral damage.

16. In view of the foregoing, it is necessary to settle on a rational mechanism to prevent and tackle the infringement of rights. Criminal proceedings are sometimes resorted to -with an increasing frequency that should be a cause for alarm and, which, on occasions, is a cause for complacency, which points to a deficient historical memory and a serious lack of precaution- to punish wrongful conducts. In such proceedings, the harshest possible measures, which might be immoderate or excessive in general and in particular, are adopted and often turn out to be inefficient and counterproductive. In sum: disproportionate measures are adopted, if it is accepted that there must be proportionality, which, in essence, amounts to rationality, between the accepted restriction and the measure adopted thereunder. Naturally, this information is available to society and the State in order to fight the most serious infringements of both public

and private legally protected interests, which may not be protected with less stringent instruments and reactions. But access to such information of social control does not mean that criminal proceedings are the only possible mechanism, nor the most relevant or appropriate in all cases.

17. It is necessary to remember at all times and as often as temptation to formulate criminal definitions and criminalize a high number of conducts makes its way, that criminal proceedings must be resorted to carefully and restrictively. In its prior rulings and decisions, the Inter-American Court has emphasized the compatibility from the criminal perspective between the so-called principle of minimum penal law and the values and principles of democracy. The application of a system of offenses –through the criminalization of conducts- and penalties –through the punishment of offenders- contributes to establishing the distance between democracy and tyranny, which is always lurking. Lack of restraint in criminal law intervention breaches the legal code and the political support of democratic societies. Hence, our direct opposition to the maximum penal law.

18. The State has acknowledged that its domestic legislation lacks accuracy as to the criminal definitions which may be applicable to the matter under discussion: "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 its duty to adopt domestic measures as provided for in Article 2 of the American Convention on Human Rights" (para. 18 of the Judgment rendered in the case of Kimel), that is, the failure to bring its domestic legislation into conformity with the duty to ensure rights as set forth in Article 1(1) of the Convention. In my concurring opinion to the Judgment rendered in the case of Herrera-Ulloa, I addressed this matter, arguing that before examining the appropriate formulation of criminal definitions to prevent excesses in the exercise of the right of journalists to inform and give their opinion, which was the object of the case of Herrera-Ulloa and, to some extent, has been the object in the case of Kimel, it is necessary to determine whether criminal proceedings are an appropriate, -on account of their uniqueness, necessity or, even, convenience- mechanism to tackle wrongful conducts.

19. I believe that criminal proceedings are not such appropriate and admissible mechanism. In stating this, I take into consideration that there are other control and response mechanisms which are less restrictive or injurious to the right infringed with which it is possible to achieve the same purpose, so that they come to be: a) consistent with the right of the individual offended by the insult, and b) sufficient to ensure social reprobation, which is a manner to redress the aggrieved party. If criminal proceedings are not such appropriate mechanism, their use will infringe the requirement of "necessity" set forth in Article 13(2), the requirement of "general interest" set forth in Article 30, and the reasons related to the "security of all and the just demands of the general welfare" as set forth in Article 32. Accordingly, these proceedings will not be in conformity with the American Convention and shall then be reconsidered.

20. In my vote in the case of Herrera-Ulloa, to which I now refer and whose considerations I reiterate, I pointed out that "before settling on how best to classify conducts as criminal offenses, one first has to decide whether the criminal law avenue is the one best suited to getting at the crux of the problem –in a manner consistent with the conflicting rights and interests and with the

implications of the alternatives available to the lawmaker- or whether some other avenue, such as administrative or civil law, for example, might be a better juridical response. Indeed most infringements are not addressed as matters of criminal law or through criminal courts, but through measures of other kinds" (para. 14 of my opinion in the case of Herrera-Ulloa).

21. Such other "way of dealing with unlawful conduct" I then held and I reassert now "seems particularly appropriate in the case of (some or all) offenses against honor, good name and the reputation of individuals. Civil law courts can be used to achieve the same results that one might hope to get through criminal courts, without the risks and disadvantages that the latter pose. In fact, a conviction in civil court is in itself a statement that the conduct in question was unlawful, a statement no less emphatic and effective than a conviction in criminal court. Although the forum may be different in name, it can arrive at the same finding that a criminal law court would: i.e., that the respondent's behavior constituted wrongful conduct detrimental to the plaintiff, who has the law and reason on his side. […] Thus, a civil judgment provides two types of reparation that are of greater interest to an aggrieved party and social satisfaction in the form of the court's censure of the unlawful conduct" (para. 18 of my opinion in the case of Herrera-Ulloa).

22. In the case of Kimel, the plaintiff in the criminal proceedings started against the author of the book questioned was a judicial officer. Naturally, public officials must be afforded the legal protection that the State has the duty to provide with diligence and efficiency through legal provisions and courts. I do not object to this in any manner whatsoever. Depriving a public official of his right to seek the protection of his rights would be so unfair as to become untolerable. That would leave him at the mercy of wrongful attacks and would make way for the undesirable possibility of self-justice. Legal protection must then be afforded to everyone.

23. Notwithstanding, as I pointed out in my opinion in the case of Herrera-Ulloa, it is also necessary to recall that "the activities of the State through its various organs[,] are not inconsequential to the ordinary citizen and information on the business of government should not be beyond the reach of ordinary citizens. Democracy is built upon a duly informed public, which steers its way of thinking and allows making decisions on the basis of such information. Information about the business of government should be much more readily available than strictly private information about an individual's personal or private life that does not cross over those strict boundaries. Indeed, the business of government is one of the natural domains for so-called "transparency." (para. 23 of my opinion in the case of Herrera-Ulloa).

24. In the opinion I have referred to, I stated that "in some cases, provision has been made to punish, as criminal offenses, the repeated commission of wrongful acts initially punishable under civil or administrative law. In such cases, the repetition of the offense implies aggravation of the wrongdoing, to the point that it moves from the realm of civil or administrative law to the realm of criminal law, thus becoming punishable with measures provided for under criminal law" (para. 20 of my opinion in the case of Herrera-Ulloa).

25. In the Judgment rendered in the case of Kimel, the Court has sought to confine the scope of punitive sanction, through certain considerations which minimize, but do not suppress, the intervention of criminal proceedings: this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual

malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception" (para. 78 of the Judgment in the case of Kimel).

26. This is a step towards criminal reduction, but not necessarily the last one towards opting for prompt and efficient civil proceedings. As I recommended in my opinion in the case of Herrera-Ulloa, which I now reiterate in the case of Kimel, it will be necessary to advance in that direction. Naturally, when resorting to judicial proceedings whose outcome is a sentence, which though not criminal is not necessarily less effective, it should be taken into consideration that there are other mechanisms, which it is convenient to keep open and active, in the democratic debate on issues of public interest: wrongful or biased information is counterbalanced with true and objective information, and malicious or groundless information is counterbalanced with sufficient and well-founded information.

27. These are the natural issues in a debate which is not likely to be closed at the police headquarters, the courts or jail. The right to reply or to rectify one's statements, as provided for by Article 14 of the Convention, is rooted in considerations of this kind. Naturally, what I am now stating presumes that the mechanisms to reply are available and that the organization of social communications allows a genuine dialogue among those who hold different positions, versions or opinions, as it should happen in a democratic system. Otherwise, we would be witnesses of the monologue of power, whether political or of other type, before itself and a number of captive auditors or spectators.

28. I also consider the demarcation made by the Inter-American Court between the information that makes existing facts available to the public and seeks to portrait reality – dignified by the urgency and the objectivity of a competent and recognized professional- and the opinion expressed by a commentator, analyst, or author in general regarding such facts, to be relevant. If it is possible to assess a piece of news as being true or false, matching it with the reality it seeks to describe, it is not reasonable to assess an opinion in the same manner, as the latter is in itself a viewpoint, a perception, an interpretation, or an assessment with which you can agree or dissent by expressing another opinion and that, therefore, can be assessed as reasonable or irrational, clever or wrong, but never as true or false. It is needless to say how dangerous it may be to debate before the courts the validity of opinions, even more so if done in a criminal proceedings: in crimes against freedom of expression freedom itself is choked and tyranny thrives.

29. Finally, it is important to note that the Court has reiterated its position regarding an issue which is raised once more on account of the criminal proceedings brought on the grounds of alleged crimes against the right to inform and express one's opinion (regarding which I do reiterate the reservations made above): the burden of proof. As pointed out by the Court in prior cases, said principle is applicable to any conduct, as a general guarantee in the relationship between the State and the individuals, which results in the impairment of the latter's rights: "At all stages the burden of proof must fall on the party who brings the criminal proceedings" (para. 78 of the Judgment rendered in the case of Kimel).

Sergio García-Ramírez

Judge

Pablo Saavedra-Alessandri
Secretary