INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF FONTEVECCHIA AND D'AMICO *v.* ARGENTINA

JUDGMENT OF NOVEMBER 29, 2011
(Merits, Reparations, and Costs)

In the case of *Fontevecchia y D'Amico*,

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

Diego García-Sayán, President;
Manuel E. Ventura Robles, Judge;
Margarette May Macaulay, Judge;
Rhadys Abreu Blondet, Judge;
Alberto Pérez Pérez, Judge, and
Eduardo Vio Grossi, Judge

also present:

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant with Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and with Articles 31, 32, 65, and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), [1] orders the present Judgment:

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* Vice-President of the Court, Judge Leonardo A. Franco, of Argentine nationality, did not participate in the case, pursuant to Article 19(1) of the Rules of Procedure of the Court, according to which "[i]n the cases referred to in Article 44 of the Convention, a Judge who is a national of the respondent State shall not be able to participate in the hearing and deliberation of the case."

1 Rules of the Court approved by the Court on its 85th Regular Period of Sessions held on November 16 to 28, 2009 which, in accordance with Article 78, came into force on January 1, 2010.

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I
INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. On December 10, 2010, pursuant to that provided in Articles 51 and 61 of the American Convention and Article 35 of the Rules of Procedure of the Court, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") presented before the jurisdiction of the Court the case of Fontevecchia and D'Amico against the Republic of Argentina (hereinafter "the State" or "Argentina"), stemming from a petition presented on November 15, 2001, by Mr. Jorge Fontevecchia, Mr. Héctor D'Amico, and Mr. Horacio Verbitsky (representing the Journalist Association), with the sponsorship of Mr. Eduardo Bertoni and Damián Loretti.[2] On October 12, 2005, the Inter-American Commission adopted the Report on Admissibility No. 51/05[3] and on July 13, 2010, approved the Report on the Merits No. 82/10, pursuant to Article 50 of the Convention, in which it provided a series of recommendations for the State. Legal notice was provided of this last report to Argentina by way of a communication on August 11, 2010, providing the State with a period of two months to report on the compliance with the recommendations. After an extension was provided and the period expired, the Commission submitted the case to the Court "for the State's failure to comply with the recommendations and the consequent need to obtain justice and a just reparation." The Commission appointed as delegates Mrs. Luz Patricia Mejia, Commissioner, and Mr. Santiago A. Canton, Executive Secretary, and the rapporteur for Freedom of Expression, Catalina Botero, and as legal advisors, Mrs. Elizabeth Abi-Mershed, Deputy Executive Secretary, and María Claudia Pulido, Lilly Ching Soto, and Michael John Camilleri, attorneys of the Executive Secretary.

2. According to the Inter-American Commission, the present case involves the alleged violation of the right to freedom of expression of Mr. Jorge Fontevecchia and Mr. Héctor D'Amico, director and editor, respectively, of the Magazine Noticias. The alleged violation took place due to the civil sentence imposed on them by Argentine Tribunals as further liability for the publication of two articles in November 1995 in the mentioned magazine. In these publications, the journalists referred to the existence of an unacknowledged child of Carlos Saúl Menem, President of the Nation at that time, with a national representative, the relationship between the President and the representative, and the relationship between the President and his alleged child.[4] Both a Tribunal of second instance as well as the

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[2] On January 11, 2006, it was reported to the Inter-American Commission on Human Rights that, from here on, the petitioners would be Mr. Fontevecchia and Mr. D'Amico and the Center for Legal and Social Studies (CELS for its acronym in Spanish). On August 10, 2011, Mr. Damián Loretti resigned from representation in this case.

[3] On Admissibility Report No. 51/05 of October 21, 2005 the Inter-American Commission declared admissible the petition related to the alleged violation of Articles 13 of the American Convention, in relation to Articles 1(1) and 2 therein.

[4] In November of 2006, the paternity of Mr. Menem was officially declared regarding Carlos Nair Meza and, on June 2007, and Mr. Menem publically declared his paternity. *Cf.* Merits report No. 82/10 of the Inter-American Commission on Human Rights of July 13, 2010 (case file on the merits, tome I, folio 15).

Supreme Court of Justice of the Nation (hereinafter "Supreme Court") considered that there existed a violation to Mr. Menem's private life as a consequence of those publications. The Commission, in Report on the Merits No. 82/10, considered that the civil sentence imposed on the alleged victims as further liability for the publication of the mentioned press articles did not head to the requirements of Article 13 of the American Convention. As a consequence, it requested the Court to find and declare the international responsibility of the State for the violation of the right to freedom of thought and expression of Mr. Jorge Fontevecchia and Mr. Héctor D'Amico, enshrined in Article 13 of the American Convention, in relation to Article 1(1) thereof. The Commission requested that the Court order various measures of reparation.

3. Legal notice of the submission of the case by the Commission was provided to the representatives on January 25, 2010. On March 28, 2010, the Centro de Estudios Legales y Sociales [Center for Legal and Social Studies] and Eduardo Bertoni (hereinafter "the representatives") submitted their brief of pleadings, motions, and evidence (hereinafter "brief of pleadings and motions"), pursuant to Articles 25 and 40 of the Rules of Procedure. The representatives coincided, in general, with the alleged violation by the Inter-American Commission in relation to Article 13 of the American Convention and added the alleged noncompliance with the obligation to adopt domestic legal effects, established in Article 2 thereof, to the detriment of the alleged victims. Lastly, they requested the Court to order the State to adopt several measures of reparation.

4. On June 10, 2011, the State presented a brief in response to the presentation of the case and observations to the brief of pleadings and motions (hereinafter "answer to the application or answer" or "answer"). Argentina mentioned several institutional and normative changes, as well as jurisprudential adaptation "to the international standards on freedom of expression that have modified the situation that existed at the time of the ruling of the Supreme Court of Justice of the Nation against the alleged victims." As a consequence, the "Argentine legal system, at the moment, is in consonance with the American Convention and the international standards on freedom of expression. Lastly, the State appointed as Agents Eduardo Acevedo Díaz, Juan José Arcuri, Alberto Javier Salgado, Natalia Luterstein.

II
PROCEEDING BEFORE THE COURT

5. After the presentation of the principal briefs (*supra* paras. 1 to 4), as well as the other briefs submitted by the parties, the President ordered, by way of the Order of July 27, 2011, the expert opinion proposed by the representatives by way of a statement before a notary public (hereinafter also "*affidavit")* where the State had the opportunity to ask questions and make observations. Moreover, by way of an Order, the President summoned the Inter-American Commission, the representatives, and the States to a public hearing to receive the statements of two alleged victims proposed by the representatives, the report of an expert summoned *ex oficio,* and the final oral arguments of the representatives and the

State, as well as the final oral observations of the Commission regarding the merits, reparations, and costs.[5]

6. The public hearing was held on August 24 and 25, 2011, during the 92 Regular Period of Sessions of the Court, in Bogota, Republic of Colombia.[6] At the hearing, the Court requested that the parties, upon presenting their final written arguments, provide specific additional information and documentation.

7. On September 28, 2011, the State, the representatives, and the Inter-American Commission submitted their respective final written arguments and observations. Among their presentations, the Commission and the representatives provided, among other things, documents requested by the Judges of the Court during the public hearing, which were forwarded to the other parties in order for them to formulate any observations deemed relevant. On October 26, 2011, the representatives forwarded their observations of the annex sent by the Commission and the Commission informed that it did not have any observations to make regarding the annexes presented by the representatives.

8. On the other hand, on September 9, 2011, the Court received an amicus curiae brief of the Committee to Protect Journalists.[7]

III
JURISDICTION

9. The Inter-American Court has jurisdiction, pursuant to the terms of Article 62(3) of the American Convention on Human Rights, to hear the present case, given that Argentina has been a State Party to the Convention since September 5, 1984, and recognized the contentious jurisdiction of the Court on that same date.

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5 *Cf. Case of Fontevecchia and D' Amico V. Argentina. Summons to the Public Hearing*. Order of the President of the Inter-American Court of Human Rights on July 27, 2011.

6 At this hearing appeared: a) for the Inter-American Commission: Catalina Botero, Michael Camillieri and Karla Quintana Osuna, Advisor; b) for the representatives, Eduardo Bertoni, Maria Lourdes Bascary Gabriela Kretzel, and, c) for the State:Gustavo Roque Stefanelli, Council of the Argentine Embassy in Colombia, Mariano Zaragoza Ferrer, Minister of the Argentine Embassy in Colombia, and Marina Abasto, official of the Argentine Embassy in Colombia.

7 The brief was received by the Secretariat of the Tribunal on September 9, 2011. It was drafted with the legal advice of the firm Debevoise and Plimpton LLP and is signed by Jeremy Feigelson. Moreover, the Tribunal received a letter the same day as amicus curiae of the organization Article 19. However, this document was not presented in a working language of the Court for this case. The Spanish version was received on November 22, 2011, that is, outside the statutory period. In accordance with Article 44 of the Rules, that brief was not considered by the Court and transmitted to the parties.

IV
EVIDENCE

10. Based on the provisions of Articles 50, 57, and 58 of the Rules of Procedure, as well as on its jurisprudence relative to evidence and the examination thereof, the Court will examine and weigh the documentary evidence submitted by the parties on various occasions during the proceedings, as well as the statements of the victims and the expert witness reports given via affidavit and during the public hearing before the Court, along with the evidence requested by the Court. In doing so, the Court will follow the rules of sound judgment within the applicable legal framework. [8]

A. Documentary, testimonial, and expert evidence

11. The Court received various documents presented as evidence by the Inter-American Commission and the representatives,[9] as well as the testimony given before notary public by the following expert witness:

> *1) Julio César Rivera (h.)*, expert witness proposed by the representatives, attorney specialized in civil rights and constitutional law who rendered his expert opinion on the functioning of civil proceedings in Argentina, procedural and substantive law in these cases, the effect of convictions from this forum, and the difficulties that arise from a legal system that leaves to the discretion of judges the establishment of the amount of reparation without including standards of proportionality.

12. In regard to the evidence provided in the public hearing, the Court received the statements of the following persons:

> *1) Jorge Fontevecchia*, alleged victim proposed by the representatives, who rendered a statement on the alleged facts and circumstances related to the case; his work as director and the nature of the magazine *Noticias,* as well as the role this magazine played in the public debate on Argentine politics, and the alleged effects of the order to pay pecuniary compensation;
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> *2) Héctor D´Amico*, alleged victim proposed by the representatives, who declared on the alleged facts and circumstances related to the case; his work as editor with the magazine *Noticias*, and the alleged effects of the order to pay a pecuniary compensation, and
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> *3) Roberto Saba,*[10] attorney, Dean of the School of Law of University of Palermo, expert summoned *ex oficio* by the President of the Court, who rendered an expert

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[8] *Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 76, and *Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs.* Judgment of October 13, 2011. Series C No. 234, para. 16.

[9] The State did not offer any documentary evidence nor evidence of another kind.

opinion on whether the civil sanctions constitute undue restrictions on freedom of expression and on an appropriate legal framework that offers sufficient guarantees so that the restrictions of freedom of expression comply with the terms of Article 13 of the American Convention.

B. Admissibility of the evidence

13. In this case, as in others, the Court accepts the evidentiary value of the documents presented by the parties at the proper procedural moment that were not contested or opposed, and whose authenticity was not questioned. [11] The documents that the Tribunal requested that were provided by the Commission and the representatives together with their observations and the final written arguments as well as the written report of expert witness Saba are incorporated into the body of evidence under Article 58 of the Rules of Procedure.

14. In relation to press releases, this Court considers that they may be assessed insofar as they refer to public and notorious facts or statements made by State officials or when they corroborate aspects related to the case. [12] The Court decides to admit the documents that are complete or at least, documents where the source and date of publication is identifiable, and will assess them taking into account all of the body of evidence, the State's observations, and rules of sound judgment.

15. On the other hand, regarding the statements of the witnesses and the expert opinions rendered in the public hearing and by way of affidavit, the Court deems them pertinent only so long as they conform to the purpose of the Order of the President wherein they were requested (*supra* paras. 5, 11, and 12). They shall be assessed in the corresponding chapter, together with the other elements of the body of evidence and taking into account the observations formulated by the parties. Moreover, pursuant to the jurisprudence of this Court, the statements ordered by the alleged victims cannot be assessed in isolation, but rather with the evidence in the proceeding, since they are useful to the extent that they can offer more information on the alleged violations and their consequences. [13]

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[10] On August 1, 2011, after legal notice of the Order of Summons, *supra* note 5, the State, *inter alia,* challenged Mr. Roberto Saba. The objection was dismissed by the President of the Court, decision that was communicated to the parties on August 5, 2011 (expediente of *merits*, tome I, folios 444 to 447).

[11] *Cf. Case of Velásquez-Rodríguez v. Honduras. Preliminary Objections.* Judgment of *June 26, 1987.* Series C No. 1, para. 140, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 21.

[12] *Cf. Case of Velásquez Rodríguez v. Honduras, supra note 11, para. 146, and Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs.* Judgment of September 1, 2011. Series C No. 233, para. 19.

[13] *Cf. Case of Loayza-Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of López Mendoza V. Venezuela, supra* note 12, para. 24.

FREEDOM OF THOUGHT AND EXPRESSION, IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS

A. Arguments of the parties

16. Regarding the alleged violation of Article 13 of the Convention,[14] the Commission considers that the central issue in this case "is whether Argentine society had a right to know the information that was published and, therefore, whether freedom of expression should have prevailed or, to the contrary, whether the former President of the Nation was entitled to keep secret the information revealed." It highlighted the two dimensions of freedom of expression and the differential protection of public officials or those who seek to be, who are subject to greater scrutiny by society. However, it also recalled that freedom of expression is not an absolute right and there are permissible restrictions to that right.

17. Moreover, the Commission also stressed the importance of protection of private life[15] regarding it as one of the most important achievements of democratic regimes. It developed the various areas of protection of private life, noting that although the American Convention recognizes this right to every person, its level of protection decreases as with the importance that a person's activities and functions may have for a debate of general interest in a democratic society. It noted that to resolve the conflict between the right to a private life of a public official and the right to freedom of expression, in the first place, it is necessary to verify whether or not there really was damage to the right allegedly affected. This damage is not present in those cases in which the information disseminated is already in the public domain or if the person gave tacit or explicit permission to publish this information, since in these cases there is no legitimate expectation of privacy. Second, any claim for alleged violation of privacy should compel the judge to consider the information allegedly disclosed in the context in which it occurred. Third, the decisive factor in resolving this conflict is the public relevance of the information. In this regard, relevant information is public when: a) in any way, despite having a component that involves private life, it is information that has to do with the functions that person carries out, b) it refers to the noncompliance of citizen's legal obligation, c) it is important information regarding trust in an official; and d) it refers to the competence and capabilities of an official to perform his or her duties.

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[14] Article 13 of the Convention, establish:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others […].

[15] Article 13 of the Convention (Right to Privacy) establish:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

18. In this case, the Commission held that the restriction of the right to freedom of expression was based in the law, specifically in Articles 19 of the National Constitution of Argentina and Article 1071 *bis* of the Civil Code of Argentina. Moreover, the restriction heeded to the purpose allowed by Article 13(2) of the American Convention, which is the protection of respect for the rights or reputations of others, given that judicial decisions analyzed, sought to protect the right to private life of former President Menem. However, the sanction imposed on the alleged victims was unnecessary, since the journalists were sentenced to indemnify the President for publishing information that was already in the public domain and that was of public interest as it involved: a) the possible use of State power for private means on behalf of the President of the Nation; b) the possible unjust enrichment of a State representative; c) the possible existence of death threats against the President's child, and d) the noncompliance with the legal obligation of the former president to recognize the child, an act that is not freely chosen by a parent.

19. Moreover, the Commission held that, according to the information contained in the magazines, from that provided in the international proceeding and from viewing the images, it is evident that the five photographs that illustrate the journalistic question at hand were taken with the consent or knowledge of he who is said to be the aggrieved party and therefore did not require express prior authorization to be published. It would be unreasonable to argue that the media must seek the consent of the President in order to distribute his I mage when taken under the circumstances such as in this case. Involving the President of the Nation, popularly elected public official, who occupies the highest ranking executive position in direction of a country cannot, does not imply an expectation of protection regarding all the events that occur in the forum of social relations or in those that evolve in public contexts or that may be observed by others, despite not being of a public nature or no interest in being disclosed. Taking into account the context in which the photographs were taken, the contents thereof, and the public persona to which the images make reference, the Commission considered that the publication of the images did not constitute an arbitrary interference with the right to private life of Mr. Menem.

20. Finally, the Commission indicated that the civil sanction had a noticeable effect on the alleged victims' right to freedom of expression. The judicial sentence had the effect of declaring the responsibility of Mr. Fontevecchia and Mr. D'Amico for producing, while in the exercise of their professions and due to conduct in violation of a fundamental right, in this case, something to the detriment of he who served as President of the Nation, with the consequent publication of the outcome of the proceeding and the inherent legal and social criticism that comes with it, including the order of publication of an extract of the conviction from the civil sentence. Moreover, the alleged victims had to deal with all the formalities and the consequences of the enforcement of the compensation owed; Mr. D'Amico had to pay the entire compensation plus interest to Mr. Menem, and he also had to endure the repossession of a large percentage of his monthly salary for one year and eight months, equivalent to about forty-six thousand U.S. dollars. The Commission considered that the civil sentence imposed in this case was a violation of the right to freedom of thought and expression recognized by Article 13 of the American Convention, in relation to the obligation to respect and guarantee rights provided for in Article 1(1) thereof to the detriment of the alleged victims.

21. The representatives, in general, agreed with the Inter-American Commission regarding, among other things, the content and scope of Articles 11 and 13 of the American Convention, the importance of freedom of expression in a democratic society, in the permissible restrictions of the latter right, the distinct threshold involved in the protection of the private life of public officials, as well as the publics interest regarding the information published by the magazine Noticias. They recalled that the former President was "a political figure with high exposure and [even] existent public controversy with respect to his family life" and that when the facts of the case took place, Argentina "was undergoing a series of persecution of journalists and social communicators. During those years, it was not uncommon for national and provincial officials to file lawsuits against journalists, with the evident purpose of moderating criticism or conditioning the editorial freedom of the journalist and the media." Many of these cases came to the Inter-American System. During these years, physical attacks against journalists took place, where one of the most serious cases involved the killing of a news photojournalist of *Noticias*, José Luis Cabezas in 1997.

22. The representatives also noted that, although traditionally the inhibitory effect of further liability is usually related to the imposition of criminal sanctions for the restriction of a fundamental right such as freedom of an individual, the application of civil sanctions, fines, compensation or reimbursements also can generate severe restrictions on freedom of expression. The possibility of facing further liability of a pecuniary nature has serious consequences: a) the journalists, to whom no media offers them assurances regarding payment for their work, b) the media, who may also be a victim of the inhibitory effect faced with the danger of bankruptcy, and c) the individual investigators who are not part of a group of professionals or do not have a guild that may support their actions.

23. Regarding the restriction imposed by the judgment of the Supreme Court of Justice, the representatives alleged: a) regarding the legality, that the restriction is not based in the law; although the Argentine Civil Code is law in the formal sense, it is not in the material sense because "a law cannot be vague" or "cannot allow discretion in the interpretation of the merits [...] as well as [in] [...] reparations," and b) regarding the need for the restriction, that the information published was of public interest, as it related to: i) the existence of a child not recognized by the former President, which is associated with the compliance of a moral and legal obligation to recognize the child; ii) the existence of a death threat against the child of a president; iii) gifts of a high economic value, which in principle are not compatible with Mr. Menem's salary, and the possibility that said gifts could have been obtained with public funds; iv) "asylum or refuge" of the mother and the child in Paraguay, and v) Mrs. Meza, who was a public official and there was an eminent interest to report on her relationship with the former President, as well as on the increase in her capital due to the gifts she received from Mr. Menem.

24. In relation to the photographs included in the notes, the representatives affirmed that they were obtained with the consent of the former President, given that for the photographs to be taken, the former President must have allowed the journalists entry into the Presidential residence when the boy was there, in places open to the press, where the President appeared without any qualms and approving of the presence of visual media. On

the other hand, they noted that, pursuant to that affirmed by Mr. D’Amico in the public hearing, the images were delivered to the magazine by the press service of the Office of the President of the Nation. It was not only the government of former President Menem who invited the mother and child to relevant public events and placed them in preferential seating, but it also took photographs and handed over the images in an official manner to the media.

25. Lastly, the representatives considered that the sanction in this case was disproportionate given that the amount established by the Supreme Court was three hundred times higher than the minimum Argentine salary and fifty times higher than the average salary of a journalist, thus far from being a reasonable amount. The originally proposed amount, plus the interests and expenses of the proceeding, ended up being four times greater than the initial compensation amount, thereby being a disproportionate and excessive punishment that inevitably inhibited public debate. Based on the aforementioned, they concluded that the State violated the right to freedom of expression of Mr. Fontevecchia and Mr. D’Amico.

26. The State asserted that the right to information and freedom of speech now has full recognition in its legal code, achieved through the reform of the Constitution in 1994, which gave constitutional status to a number of international instruments on Human Rights, one of which is the American Convention on Human Rights. It noted that "any action against such a right cannot be attributed to the [State], nor can it be said that some media outlets have been censored by its actions, or that [any] journalist and social communicator has been subject to censorship or persecution for published statements." From the ruling that stemmed from the request of Mr. Fontevecchia and Mr. D'Amico, Argentina has "carried out legislative, judicial, and institutional reforms recognizing the existence of a situation regarding freedom of expression that bore no necessary compatibility with international standards of the American Convention. This policy addressed the issue comprehensively, with the clear purpose of repairing the situation being evinced."

27. Among other reforms, Argentina mentioned the adoption of the Law on Audiovisual Communication Services, which replaced the broadcasting law of the military dictatorship, as part of a process of democratization and media demonopolization initiated by the National Executive Branch. It indicated that "the Argentine legal system [...] would be compatible with international standards on [the] matter", following the reform of the penal code for complying with the ruling issued in the case of *Kimel*, which decriminalized libel and slander in cases which relate to matters of public interest. In addition, "the actual malice doctrine has been applied by [the] [h]ighest Court in a consistent and uniform manner [...] leaving no doubt about its application in cases of civil damages as a result of statements regarding information that is of public interest.” The Supreme Court is clear in stating the fundamental importance of freedom of expression in a democratic system and its strong protective nature of other rights, which in matters of public interest, it is not appropriate that financial compensation for officials whose honor has allegedly been affected be provided and that public officials deserve protection that is more attenuated than that corresponding to the simple private citizens. It highlighted the institutional reforms that occurred in the highest court whose composition in the era of Mr. Menem's presidency "threatened judicial independence and stability." These institutional reforms

"had a positive impact on the adaptation of judicial interpretation to international human right standards."

28. Based on the foregoing, the State concluded that "it has steadily and progressively been developing a comprehensive public policy on human rights," which has been accompanied by bodies of Inter-American System. In this sense, in cases before the System "it has maintained a policy of transparency: not denying that which is undeniable, facing its responsibility, even under the State's principle of legal continuity, as in this case, and taking on the legal consequences upon the commission of acts that constitute a violation." Consequently, "it puts itself in the hands of the Court[,] which by virtue of its legal knowledge and democratic spirit will resolve the case."

B. Facts

29. Prior to establishing the proven facts, the Court recalls that under Article 41(3) of the Rules of Procedure, it will admit the facts that have not been expressly denied and the claims that have not been expressly contested. In this case the State did not dispute the facts, regarded as established, in the paragraphs that follow.

30. Mr. Jorge Fontevecchia and Mr. Hector D'Amico are journalists with 30 and 40 years of practice in their profession, who at the time of publication of the articles that gave rise to this controversy served, respectively, as director of Editorial Perfil [Editorial Profile for its translation in English] (hereinafter "the Editorial Profile" or "Editorial") and editor of the magazine *Noticias*. Editorial Profile publishes the magazine *Noticias,* a weekly magazine of general interest to develop investigative journalism, and it is characterized for its critical line with the government. [16]

31. Between October and November 1995, *Noticias* published three editions that included articles related to former President of the Republic of Argentina Carlos Saul Menem, to which he filed a civil lawsuit (*infra* para. 37).[17]

32. The second of these editions was published on November 5, 1995, and included the article entitled "*Zulema Yoma. Un golpe al corazón. Jaqueada por los parentescos del poder, no logra salir del estado depresivo en que la sumió la muerte de su hijo* [Zulema Yoma. A blow to the heart. Hacked by relationships of power, cannot get out of the

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[16] *Cf.* Statements of Mr. Jorge Fontevecchia and Mr. Héctor D'Amico in the public hearing on August 24, 2011. The Court notes that in other documents, the alleged victims appear as director and editor of the Magazine *Noticias.* Nevertheless, the roles were established as of that noted by the alleged victims in the public hearing before this Court.

[17] The first of them, corresponding to the No. 983 issue of the Journal News of October 29, 1995 was not considered a violation of the right to privacy of Mr. Menem by the domestic courts. Therefore, it is not relevant for the purpose of the resolution of this dispute. *Cf.* Judgment of March 11, 1998 of Chamber H of the National Chamber of Civil Appeals of the Federal Capital (File of Attachments to the Report 82/10, annex 10, tome I, folios 387 and 388).

depression regarding the death of her son], which focused mainly on the health of the ex-wife of the former President. Among other issues, the note referred to: a) the existence of an unacknowledged illegitimate son of the former President with provincial representative Martha Meza, born in 1981, when the President was transferred to a location inside the country by the military government, b) the complaint that Mrs. Meza filed in 1994 for the theft of jewelry worth U.S.$230,000.00 that were gifted to her by Mr. Menem, as reflected in the record of the investigation into the theft, c) the meeting of Mr. Menem, Mrs. Meza and their son, Carlos Nair, had in the Government House, and d) the possibility that Mr. Menem would recognize paternity of the child once the divorce with his ex-wife was finalized.[18]

33. In this publication, there appears a footnote entitled "*Carlos Nair. Regalos Presidenciales"* [Carlos Nair. Presidential Gifts], which mentions the various gifts of high value that the former President made to the child and the mother of the child.[19] The note is illustrated with a picture in which Mr. Menem, Mrs. Meza and their son appear, with the caption "*Álbum familiar: Martha Meza, Carlos Nair y Carlos Menem, en Olivos, en 1992. Ella es Diputada Provincial por el PJ*" [Family Album: Martha Meza, Carlos Nair, and Carlos Menem, in Olivos in 1992. She is Provincial Representative of PJ].

34. The next edition was published on November 12, 1995. The cover of the magazine entitled, *La otra familia de Menem. Cómo el Presidente conoció a la diputada Martha Meza, tuvieron un hijo, Carlos Nair, y la relación se convirtió en una cuestión de Estado"*

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[18] *Cf.* Magazine *Noticias*, edition No. 984 of November 5, 1995 (case file of annexes to the Report No. 82/10, annex 3, tome I, folios 137, 206 and 207). There it reads: [The health of the former wife of Mr. Menem was linked] to the knowledge of certain details of the relationship of Carlos Menem (65) with the provincial deputy of Formosa Martha Meza (43), mother of Carlos Nair (14, alleged illegitimate son of President, whom he sees regularly and gives gifts). Meza said the teenager was the result of his circumstantial gatherings with Menem during the years of his confinement in the town of Las Lomitas, a relationship never denied by the President. In a complaint made by Meza due to a robbery, at the end of 1994, she refers to jewelry of a value of U.S. $230,000 'which was gifted to her by the President of the Nation,' as stated in the record of the investigation of the robbery[. O]n Wednesday 31 of [May of 1995], at five o'clock of the afternoon, Menem took in, at the Casa Rosada, Martha Meza with his son Carlos Nair [Meza]. Some fear that the president will fulfill his willingness to acknowledge his paternity over Carlos Nair, once the divorce is finalized.

[19] *Cf.* Magazine *Noticias*, edition No. 984, *supra* note 18, folio 207. It reads: [o]n this final 'Day of Loyalty,' Carlos Menem sent a Honda bike 100 to Formosa. [Carlos Nair Meza] received the presidential gift on his 14th birthday[.] The boy is known as 'the son of Menem,' due to the title his mother, the Martha Meza PJ legislator, makes constantly since she took seat in 1987. [I]n November 94, she declared that she was victim to a robbery and said: '[t]hey took a Rolex of gold inlaid with diamonds, a gift from the President of the Nation, of 140,000 pesos and other jewels.' The 'other jewels' were 'twenty rings, four bracelets, four pairs of earrings, a necklace and several thick chains, all of gold, for a total of $ 230,000', as stated in the case file. [Mrs. Meza's drive] recalls that he charged Meza a $ 50,000 legislative salary for non-existent, employees and that 'once a month he took Carlos Nair to Buenos Aires, for Menem to see him,' whom the boy called 'Daddy' and with whom he shares his passion for vertigo and speed. [Mrs. Meza] earns $ 3,808 per month and is completing the building of a mansion of $ 350,000, thanks in part to the monthly amount that is given to her by the President. In the middle of 1994, the woman agreed [with two people close to Mr. Menem] upon a remittance of $ 20,000, which she religiously collects in Buenos Aires[. T]he agreement was finalized after Meza, and her his son, asked for asylum in Paraguay, due to threats. From there, she claimed they wanted to kidnap Carlos Nair and according to her ex driver, she is the one who threatened the President with initiating a paternity action before the OAS, unless she received $50,000,000.

[Menem's Other Family. How the President Met the Representative Martha Meza, Had a Son, Carlos Nair, and the Relationship Became a Matter of State]. This publication included an article entitled "*Menem vs. Zulema. El Factor Humano",* [Menem vs. Zulema. The Human Factor], which referred to contact between Mr. Menem and his child and to the visit, made in May 1995, by Carlos Nair and his mother to the Government House.[20]

35. Moreover, in this same issue, there was an article entitled "*El otro hijo. Un tal Carlos..."* [The Other Son. A So-Called Carlos…], which reported on various aspects of the unrecognized parentage of former President Menem. Moreover, information was also provided regarding the relationship between Mr. Menem with Mrs. Meza and their son, the gifts to Carlos Nair Meza received from Mr. Menem, and the visits of the child both at the President's official residence as well as at the summer presidential compound. The article also mentioned the threats against Menem's son, which were denounced by Mrs. Meza who required the national government's responsibility for their safety, and which prompted Mrs. Meza's request for asylum in Paraguay, as well as some issues the Argentine President carried out with the President of Paraguay. Finally, it mentions the existence of an agreement between Mrs. Meza and Mr. Menem by which the latter gave her a pension for an amount of twenty thousand U.S. dollars a month, at the same time creating a trust in favor of Carlos Nair of approximately one million U.S. dollars, and he lent his "political support" in connection with an investigation that, at that time, the husband of Mrs. Meza was facing in an investigation for his alleged involvement in embezzling millions from the social work retirees. In this last publication, the theft of the jewelry and money is reiterated as well as her "economic growth." In this article, specific mention is made to a book "*El Jefe. Vida y Obra de Carlos Saúl Menem"* [The Chief. Life and Work of Carlos Saul Menem], from where part of the information published was obtained.[21]

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[20] *Cf.* Magazine *Noticias*, edition No. 985 of November 12, 1995 (case file of annexes to the Report No. 82/10, annex 3, tome I, folios 227 and 243). It reads: [t]his time the trigger was the knowledge that the first lady Zulema Yoma recently met with her ex-husband and the teenager Carlos Nair (14), born in the town of Las Lomitas of Formosa on upon who the weight sits of the illegitimate son of the President. [In May of 1995]: Menem took in, at the Casa Rosada, Mrs. Martha Meza with her son Carlos Nair.

[21] *Cf.* Magazine *Noticias*, edition No. 985, *supra* note 20, folios. 245 to 247. There it reads: ['i]f he does not feed his son, how will he feed the country.' A poster with this legend was put up all over Formosa territory, work of deputy provincial Martha Elizabeth Meza [...]. [Mrs. Meza] found no better way of presenting society with the alleged paternity of her son, Carlos Nair (14). [...] According to Gabriela Cerruti in [...] her book *El Jefe* [The Chief], Carlos and Martha lived a 'passionate romance which culminated in the pregnancy and her willingness to have his son. Carlos tried to convince her of the difficulty of the situation, but finally ended up accepting with the condition that Zulema (Yoma, 52) not find out.' [I]n November [1981] Carlos Nair was born, whose name in Arabic means 'the fatherless'. [A teacher] said that [the child] 'was very secretive about who his father was. Only in recent months did he state that his father was Menem and brought some photos to the school where he was with his dad, when he was little. " [...]
At the age of six, from Buenos Aires, he received a small gift of a bike and later a large computer. The last October 17, the gift was a Honda 100. In more than one opportunity, Charly called Menem to ask for scholarships and school supplies for his peers of lower economic means, something to which the President always responded. [...] Nair was in constant contact with his father, whom he visited once a month and received frequent calls. It was usually the driver of his mother [...] who accompanied him on trips to Olivos, although he did make the trip numerous times with the Mrs. Meza, especially after the expulsion of Zulema Yoma of the presidential country house. In one of his first visits to the official residence [an aide to Menem] managed the department of cuatro ambientes in the neighborhood of Once, where, since then, [Mrs. Meza] staid when visiting the port. [...] Economic Ascent: [...] Menem gave [Meza] an apartment of 4 rooms in the

36. The notes in this edition are illustrated by four photographs of the former President Carlos Menem with his son Carlos Nair Meza. In one of them, alongside the legend *"Chapadmalal '93, una de las tantas visitas de Carlos Nair al complejo oficial para estar con Menem"* [Chapadmalal '93, one of many visits of Carlos Nair to the official complex to be with Menem], the President and the child are playing billards. In another image, Mr. Menem, Ms. Meza and their son appear next to the legend that states *"Las Lomitas '93, un acto menemista, Martha Meza, Carlos Nair y el Presidente, primera fila"* [Las Lomitas '93, a Menemist act, Martha Meza, Carlos Nair and the President, front row]. In the next photo President Menem, Carlos Nair, and his mother appear in a meeting at the presidential residence with the legend "*Olivos '92, Menem preside, Martha a su derecha y Carlos Nair a su izquierda, Mera Figueroa mira*" [Olivos '92, President Menem, Martha on his right, and Carlos Nair on his left, Mera Figueroa mira." In the fourth illustration Mr. Menem is portrayed embracing his son with Mrs. Meza at his side with the legend *"Chapadmalal '91, un familiar día de playa. Frente a los vientos del mar y lejos de otras tormentas"* [Chapadmalal '91, a family beach day. Facing the winds of the sea and away from other

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Once (U.S. $ 70,000). [...] In 1990, Carlos Menem invited his son to spend the end of year holidays in Anillaco, but Meza refused to grant her son permission. However, that summer, the family reunited at the presidential compound of Chapadmalal, which served as refuge for the father and son in the following years. In February of 1993, Menem's electoral obligations limited the arrangement to one specific day, in which the President gloated with cooking for the youngest of his children, who remained there the rest of the week along with the driver of his mother. [The] then counsel of Zulema Yoma in the divorce trial against Carlos Menem [...] presented a questionnaire as [part of the process] that aimed to establish the alleged infidelity committed by him during his stay in Las Lomitas. [Mrs.] Meza refused to answer, but the public importance of this request led the Formosa representative to demand the withdrawal of Yoma's statements before the media, leading to a crossing of letters, documents, and other news scandal regarding the Presidency of the Nation. [I]n mid of last April, Martha Meza and Carlos Nair appeared in the record of the residence of Olives. [T]he next meeting between Meza, Carlos Nair, and the President-end of May, took shape in the safest spaces of the Casa Rosada. [...] On the 14 of February of 1994 [...] Martha Meza reported threats against her son and blamed the national government for its security, seeking political asylum in Paraguay. The scale of the characters at play led the Guarani President Juan Carlos Wasmosy [...] to communicate by telephone with his Argentine counterpart, who sought the protection of the woman and her child. 'Meza and her husband claimed $U.S.50,000,000 to settle in the beaches of Miami. She threatened to camp with her son in the Plaza de Mayo and to initiate a paternity action to the OAS.' [Aides of Mr. Menem] traveled with urgency to Asuncion to calm the waters. The [dispute settlement with Mr. Menem] would be a lifetime monthly pension of $U.S. 20,000 and a trust on behalf of Carlos Nair, of a figure close to one million of dollars; as well as the political cover for [the husband of Martha Meza, Mr.] Dorrego-local PAMI former comptroller during the times of Matilde Menéndez [...] - whom auditing arm carried of the national delegation of social work of retirees was carrying out an investigation for embezzlement of millions. [A] sector of the Government [...] assessed the ability of Menem to suggest similar behavior [recognize the child, as had been done by former French President Mitterrand], going as far as to ask the SIDE to take a survey to confirm the benefits of this option [...]. [T]he political career of Martha Meza was from the beginning marked by the aura of being, as she never tired of repeating, 'the mother of the son of the President.' [I]n November of 1994, Martha Meza reported a case of robbery from the Formosa home safe. According to the record of the cause pending before the court of Rolando Cejas, '20 rings, four bracelets, four pairs of earrings and several chains, all of gold were stolen.' She further stated: '[t]hey took a Rolex of gold inlaid with diamonds, a gift of the President of the Nation', with a value of around $U.S. 40,000.00 According to the representative, the total of the stolen amount was of $US 230,000. [...] Legal versions indicated that [...] the concerns of the representatives also centered on documentation found stored in the safe and that could be linked to the fees received for child support.

storms]. In all the photos of both editions, the child's image is distorted so that he cannot be recognized**.**

37. Mr. Menem, who at the time of the foregoing publications was carrying out his second presidential term, began, under his own right, a legal action against the Editorial Profile, against the editing of the magazine, and against Mr. Jorge Fontevecchia and Mr. Hector D'Amico. The purpose of this action was to obtain reparation for the alleged moral damage caused by the alleged violation of privacy resulting from the publication. The amount of compensation requested in the complaint was $ 1,500,000.00 (one million five hundred thousand Argentine pesos), plus the interests and costs and expenses of the trial. In addition, a request was made for publication of the Judgment, in its entirety, by the defendants.[22]

38. On July 10, 1997, a judge of first instance on civil matters resolved the controversy, rejecting the complaint filed by Mr. Menem and the counterclaim, that is, the counterclaim filed by one of the journalists.[23] However, that ruling was appealed and on March 11, 1998, a chamber of the National Chamber of Civil Appeals of the Federal Capital reversed, by majority, "the appealed judgment [and affirmed] the complaint, sentencing the Editorial Profile S.A., and [Mr.] Jorge Fontevecchia and Mr. Hector D'Amico to pay the plaintiff, within 10 days, the sum of $ 150,000.00 [one hundred and fifty thousand Argentine pesos], in compensation for having violated his right to privacy, with interests [...], and the publication of an extract of the judgment, and the costs incurred at both instances."[24]

39. Given this judgment, the defendants filed an extraordinary federal appeal.[25] On September 25, 2001, the Supreme Court upheld the judgment being appealed but modified the amount of compensation, reducing the amount to $60,000.00[26] (sixty thousand Argentine pesos). Moreover, it confirmed the imposition of "legal expenses" of prior instances and imposed the costs incurred at this instance at 90% for the co-defendants and 10% for the plaintiff. In its judgment, the Supreme Court said that it would not dispute the veracity of the information disseminated by the news magazine *Noticias*, but rather its private nature. The Supreme Court referred to, among other things, the general standards

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22 *Cf.* Petition for damage and detriment filed by the representative of Mr. Menem (case file of annexes to the report No. 82/10, annex 4, folios 305 and seq.). The amount indicated in pesos had the same equivalent to US dollars.

23 *Cf.* Judgment issued on July 10, 1977 by the National Court on First Instance on Civil Matters No. 35 of the Federal Capital (case file of annexes to the Report No. 82/10, annex 8, folios 342 and seq.).

24 *Cf.* Judgment issued on March 11, 1998 by the Chamber H of the National Chamber of Civil Appeals of the Federal Capital, *supra* note 17, folios 369 and seq. The amount indicated in pesos had the same equivalent to US dollars.

25 *Cf.* Extraordinary Federal Appeal filed on April 1, 1998 by the representative of *Editorial Perfil S.A*. and of the alleged victim (case file of annexes to the Report No. 82/10, annex 11, folios 425 and seq.).

26 *Cf.* Judgment issued on September 25, 2001 by the Supreme Court of Justice of the Nation, (case file of annexes to the Report No. 82/10, annex 12, folios 523 and seq.). The amount indicated in pesos had the same equivalent to US dollars.

regarding freedom of expression and private life, to the resolution of possible tensions between them, and when an invasion of privacy can be justified, at different thresholds of protection for "famous people whose life is public or for popular characters," and the restrictions on the sphere of private life for the "public man," and it concluded:

> [t]hat in the case of celebrities, whose lives are public or of popular persons, their public or private lives may be disclosed when the information relates to the activity that gives them prestige or notoriety, and when it is justified by the publics interest. But that progress regarding privacy does not authorize damage the public image and honor of these people and less to argue that they do not have a private life in any sense that is protected from interference [...]. Indeed, even the public man, who sees this restriction in the sphere of his private life because of public exposure which is owed to the performance of his duties, is entitled to preserve an area in his life of peace and secrecy that is essential to every man, so long as the private aspect is not related to the management of public affairs or regards a superior interest in defense of society.
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> […]
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> That, in orders, both the dissemination of issues regarding intimate family matters through the written word as well as the publication of photographic images—when not authorized by the plaintiff in time and in the context in which they were used by the press—regarding alleged family ties and the attitude of the ex-wife regarding such relationships, is an intrusion into the subject's private life that is not justified by the superior interests of the community. Especially when images and names of children are involved, with professional exposure and without prudential matters relating to the parentage of these children, spiritual mortification, not only of man as such, but in his relationship with them, behavior that reveals the arbitrary nature of interference in the intimate sphere of the plaintiff, not justified by the vigorous debate of ideas on matters of public interest nor the transparency that the public man's performance should be in the exercise of his highest responsibilities.[27]

40. Subsequent to that decision, the process of execution of the judgment began, and, on February 26, 2002, a commercial court ordered, at the request of the Editorial Profile, the meeting of creditors. [28] After several circumstances related to the legal and patrimonial

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[27] *Cf.* Judgment of the Supreme Court of Justice of the Nation, *supra* note 26, folios 530 a 533, considered 13 and 16.

[28] *Cf.* Brief presented by the attorney of the plaintiff in the civil suit requesting judicial approval of a new assessment of payment for compensation for court fees. (case file of annexes to the Report No. 82/10, annex 1, tome I, folios 4 and seq.); brief requesting end to the embargo filed on March 4, 2002, by the representative of the *Editorial Perfil S.A.* (case file of annexes to the Report No. 82/10, annex 13, tome I, folio 567), and brief in which the attorney of the defendant reported the openining of the preventive summons to the civil court, requesting the suspension of the proceedings and that the precautionary measures be revoked (case file of annexes to the Report No. 82/10, annex 14, tome I, folios 569 and seq.).

situation of the Editorial, [29] the implementation process continued against the co-defendant, Mr. Hector D'Amico, who was then working in another communication medium.[30] On October 22, 2003, a civil court ordered "to proceed with the execution until [Mr.] D'Amico paid in full the amounts due plus interest and costs of execution."[31] On February 18, 2004, the same court addressed an official letter to the company where Mr. D 'Amico worked, ordering "repossession of assets and/or any sum that for any reason [Mr.] D'Amico received monthly [...] , to cover the sum of [one hundred and eight thousand, five hundred and fourteen U.S. dollars, and seventy-five cents] with over [thirty thousand pesos] budgeted for interest and costs."[32] The victim then underwent this repossession from March 2004 until November 2005.[33] For its part, the Editorial Profile eventually covered the amount corresponding to the litigation fees in the amount of $105,808.50 (one hundred and five thousand, eight hundred and eight pesos, and fifty cents).[34]

41. At the time of the facts, Article 1071 *bis* of the Civil Code established:

> [a]rbitrary interference in the lives of others, by posting pictures, broadcasting correspondence, mortifying others because of their habits or feelings, or in any way disturbing their privacy, and the fact was not a criminal offense, will be forced to stop such activities, unless they have already ceased, and to pay a compensation that shall be equitably established by a judge, according to the circumstances; in addition, the latter may, at the request of the aggrieved, order the publication of the sentence in a newspaper or periodical, if this measure is appropriate for an adequate compensation.

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29 *Cf*. Brief requesting suspension of the sentence and the lifting of the embargo presented on March 4, 2002, by the attorney of the Editorial Perfil S.A. *supra* note 28; brief in which the attorney of the defendant communicated to the civil court regarding the opening of the preventive summons and to revoke the precautionary measures, *supra* note 28, and Statement of Mr. Jorge Fontevecchia, *supra* note 16.

30 *Cf.* Statement of Mr. Héctor D'Amico, *supra* note 16, and Certification of April 23, 2009 issued by the Chief of Severance Pay and Personnel Administration of the *Nación S.A.* (case file of annexes to the Report No. 82/10, annex 15, folios 576 and seq.).

31 *Cf*. Notification license addressed to Mr. Héctor D´Amico by the National Court on First Instance on Civil Matters No. 36 (case file of annexes to the Report No. 82/10, annex, 16, tome I, folio 580).

32 *Cf*. Official letter issued on February 18, 2004 by the National Court on First Instance on Civil Matters No. 36 addressed to the President of the Board of Directors of the newspaper *Nación S.A.* (case file of annexes to the Report No. 82/10, annex 17, tome I, folios 582 and 583).

33 *Cf.* Statement of Mr. Héctor D'Amico, *supra* note 16, and Certificación of 23 of abril of 2009, *supra* note 30, folio 576.

34 *Cf*. Report of Merits No. 82/10 of the Inter-American Commission on Human Rights, supra note 4, folio 29.

C. Considerations of the Court

1. Right to freedom of thought and expression and to private life

42. 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.[35]

43. 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.[36]

44. In its jurisprudence, the Court has established that media plays an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society, which is why it is vital that the media is 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. [37]

45. 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 equilibrium, 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 the protection of the human rights of those who confront the power of the media and the attempt to ensure the structural conditions that allow the equitable expression of ideas can be explained.[38]

46. The Inter-American Court recalls that in its first opportunity to refer to the right to freedom of expression it emphasized that "the profession of journalism […] involves, precisely, the seeking, receiving and imparting of information. The practice of journalism

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[35] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Serie A No. 5, para. 30, and *Case of Tristán Donoso V. Panamá. Preliminary Exception, Merits, Reparations and Costs.* Judgment January 27, 2009. Serie C No. 193, para. 109.

[36] *Cf. Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment July 2, 2004. Serie C No. 107, para. 120, and *Case of Tristán Donoso V. Panamá, supra* note 35, para. 110.

[37] *Cf. Case of Ivcher Bronstein V. Perú. Merits, Reparations and Costs.* Judgment of February 6, 2001. Serie C No. 74, para. 149, and *Case of Herrera Ulloa V. Costa Rica, supra* note 36*,* para. 117.

[38] *Case of Kimel V. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Serie C No. 177, para. 57.

consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees." In contrast to other professions, "the practice of journalism is an activity that is specifically guaranteed by the Convention" and "the practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can be, anything but someone who has decided to exercise freedom of expression in a continuous, regular, and paid manner.[39] The present case involves two journalists who claim the protection of Article 13 of the Convention.

47. Moreover, the Court recalls that the statements regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection, among others, so that debate in a democratic system is encouraged. Moreover, 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. 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. This threshold is not only based on the nature of the individual but also on the public interest inherent in the actions performed. [40]

48. For its part, Article 11 of the Convention, provides that everyone has, among others, the right to private life and prohibits any arbitrary or abusive interference in the private life of persons, stating many areas such as the private life of a person's family, home, or correspondences. The scope of privacy is characterized as being free and immune to invasions or abusive or arbitrary attacks by third parties or public authority[41] and may include, among other dimensions, the freedom to make decisions related to various areas of a person's life, a peaceful personal space, the option of reserving certain aspects of private life, and control of the dissemination of personal information to the public.

49. In addition, Article 11(2) of the first American Convention protects the individual against arbitrary interference or possible abuse of the State. Nevertheless, it does not mean that the State meets its treaty obligations by merely refraining from such interference. Furthermore, Article 11(3) of the Convention imposes on States the duty to provide the protection of the law against those interferences. Consequently, the State has an obligation to guarantee the right to privacy through positive actions, which may involve, in some

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[39] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra* note 35. Serie A No. 5, paras. 72 to 74.

[40] *Cf.* in previous drafts, *Case of Herrera Ulloa V. Costa Rica, supra* note 36, paras. 128 and 129, and *Case of Tristán Donoso V. Panamá, supra* note 35, para. 115.

[41] *Cf. Case of Ituango Massacres V. Colombia. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2006. Serie C No. 148, paras. 193 and 194, and *Case of Tristán Donoso V. Panamá, supra* note 35, para. 55.

cases, the adoption of measures to ensure that private life is protected against interference by public authorities as well as by individuals or private institutions, including the media.[42]

50. In this context, the Court must find a balance between private life and freedom of expression that, not being absolute, are two fundamental rights guaranteed by the American Convention and of great importance in a democratic society. The Court recalls that every fundamental right is to be exercised with regard for other fundamental rights. This is a process of harmonization in which the State has a key role in trying to determine responsibilities and impose sanctions as may be necessary to achieve such purpose.[43] The need to protect the rights that may be affected due to an abuse of freedom of expression requires the proper observance of the limits established in this regard by the Convention itself.[44]

2. The restriction to the right of freedom of expression and the application of further liability in this case

51. Given these considerations and the claims of the parties, the Court will consider if the measure of further liability imposed, namely, the civil penalty applied in this case met the above requirements that are said to be provided for in the law, pursue a legitimate end, and are appropriate, necessary, and proportionate. In this regard, while the Ruling refers to two domestic judgments related to this case (*supra* paras. 38 and 39), the analysis revolves around, mainly, the decision of the Supreme Court that finalized the civil sentence and ruled definitively on the claim of the alleged victims.

Legality of the measure

52. The right to privacy for which the alleged victims were civilly liable under Article 1071 *bis* of the Civil Code, is a law in the formal and material sense. As for the allegation that the challenged regulation does not meet the requisite of a substantive law (*supra* para. 23), the Court finds that although it is a provision that, indeed, has been drafted in general terms, it is not enough to deprive it of its nature as a substantive law (*infra* paras. 89 to 92).

Legitimate end and appropriateness of the measure

53. The Court has held that public officials, like everyone else, are covered by the protection afforded by Article 11 of the Convention, which recognizes*, inter alia*, the right to private life. Article 13(2)(a) of the Convention sets forth that "the respect of the rights […] of others" may be the grounds for establishing subsequent liability in the exercise of

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[42] Similarly, *Cf.* TEDH*, Case of Von Hannover v. Germany,* Judgment of June 24, 2004, para. 57, and Resolution 1165 of the Council of Europe Parliamentary Assembly on the right to privacy of June 26, 1998, article 12.

[43] *Cf. Case of Kimel V. Argentina, supra* note 38, para. 75.

[44] *Cf. Case of Kimel V. Argentina, supra* note 38, para. 56.

the freedom of thought and expression. Consequently, the protection of privacy life of any person is a legitimate purpose consistent with the Convention. Also, the civil forum is appropriate because it serves to safeguard, through actions for damages, the legal right to be protected, that is, it is able to help achieve this goal.[45]

Necessity of the measure

54. Since its first decision on the matter the Court has adopted the standard that for a restriction to freedom of expression to be compatible with the Convention, it must be necessary in a democratic society, "necessary" being the existence of a pressing social need to justify the restriction.[46]

55. Previously, the Court ruled that the State has to provide people the means to establish the responsibilities and penalties as may be necessary to respect and safeguard fundamental rights. In its jurisprudence, the Court has examined cases in which they discussed the need for criminal sanctions, and it has established that "it may not deem any criminal sanction regarding the right to inform or give one's opinion to be contrary to the provisions of the Convention."[47]

56. In a similar vein, the Court also considers a civil action concerning the expression of information or opinions that affect the private life or privacy to be contrary to the Convention. However, this possibility should be carefully analyzed, considering the conduct displayed by the person making the statements, the characteristics of the damage allegedly caused, and other information that demonstrates the need to resort to the civil forum. Both pathways, under certain circumstances and to the extent that they meet certain requirements, are legitimate.

57. In its decision of September 25, 2001, the Supreme Court did not establish specific facts that it considered affected Mr. Menem's private life and that, in its opinion, generated the responsibility of the journalists, but it said the "factual circumstances had been extensively outlined in previous instances" and what remained was to resolve the tension between both constitutional rights.

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[45] *Cf. mutatis mutandi*, *Case of Kimel V. Argentina, supra* note 38, para. 71, and *Case of Tristán Donoso V. Panamá, supra* note 35, para. 118.

[46] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra* note 36, paras. 41 a 46. In this last paragraph, the Court noted: It is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that "necessary," while not synonymous with "indispensable," implied "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable." […].This conclusion, which is equally applicable to the American Convention, suggests that the "necessity" and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest[.]" Similarly, *Cf.* TEDH, *Case of Editions Plon v. France*, Judgment May 18, 2004, para. 42 and *Case of MGN Limited v The United Kingdom,* Judgment January 18, 2011, para. 139.

[47] *Cf. Case of Kimel V. Argentina, supra* note 38, paras. 55 and 78.

58. From that decision, it would appear that "family matters," the disclosure of which constituted a violation to the privacy of Mr. Menem in this case pursuant to the Supreme Court are: a) the alleged family ties; b) the attitude of his ex-wife in connection with such a relationship, and c) images and “names” of "minor children" with exposure of “affiliation” issues of “these children” (*supra* para. 39). This Court finds it appropriate to recall that Mr. Menem sued only in his own right (*supra* para. 37), so it does not correspond to rule on any interference with the private lives of third parties.

59. The Court considers that the standards used regarding the protection of freedom of expression in cases of the rights to honor and reputation are applicable, where appropriate, in cases such as this. Both rights are protected under the same Article under a common formula and involve similar principles related to the functioning of a democratic society. Thus, two important standards for the dissemination of information about potential private life issues relate to: a) the different threshold of protection for public officials, especially those who are popularly elected, for public figures and individuals, and b) the public interest in the actions taken.

60. The different threshold of protection of public officials is due to the voluntarily exposure of these persons to the scrutiny of society, which leads to an increased risk of damages to their right to private life. In this case, it involved a person who held the highest elective public office in his country, President of the Nation, and therefore was subject to greater scrutiny not only regarding his official activities or the exercise of official functions, but also regarding aspects that, in principle, could be linked to his private life but revealed matters of public interest.

61. Moreover, in regard to the public interest, in its jurisprudence the Court has reaffirmed the protection of freedom of expression of opinions or information on matters in which society has a legitimate interest of being informed, to know what affects the functioning of the State, or to know what affects general rights or interests or entails major consequences.[48] In this case, both the Commission and the representatives stated that, for various reasons, the information was of public interest, and thus its dissemination was justified (*supra* paras. 18 and 23).

62. The information on the existence of the unacknowledged child of Mr. Menem, and the latter's relationship with the child and his mother constitute an inseparable and central element, and the main cause of the facts published by the magazine *Noticias* that reported on: a) the provision of large sums of money to these people by the highest ranking public official of the country, b) the delivery to such persons of expensive gifts, and c) the alleged existence of negotiations and economic and political favors to Mrs. Meza’s former husband. This information relates to the integrity of political leaders, and without the need to determine the possible use of public funds for personal purposes, the existence of large sums and costly gifts on behalf of the President of the Nation, as well as the possible existence of negotiations or interference in a judicial investigation, are issues that involve a

[48] *Cf. Case of Tristán Donoso V. Panamá, supra* note 35, para. 121.

legitimate social interest. Due to the foregoing, for this Court, the information released by the magazine *Noticias* is of public interest, and its publication called attention to exercise social control and legal proceedings in respect to such acts.

63. Moreover, it arises from the body of evidence in this case that the information on the "family ties" of the President and the possible paternity regarding Carlos Nair Meza had been disseminated in different media streams, at least two years prior to publication in the magazine *Noticias* in 1995. Indeed, in 1993 a book was published entitled *El Jefe. Vida y obra de Carlos Saúl Menem* [The Chief. Life and Work of Carlos Saul Menem], which tells in detail of the relationship between Mr. Menem and Mrs. Meza when he was moved inside the country under the military regime and the birth of their son in 1981; the agreements made by the parents, which included Menem sending money and silence on behalf of the mother, the campaign for a provincial representative by Mrs. Meza under the slogan *"[si Menem] no le da de comer a su hijo, que va a hacer por el país";* "[if Menem] does not feed his son, what will he do for the country]; the offer made by Mr. Menem to recognize the child and the opposition of his ex-wife who allegedly threatened a public scandal; the visits made by the Meza family to the residence of Olivos after the separation of Menem and his wife and the institution of visits on the first Sunday of each month. [49] Moreover, similar information regarding the paternity of Mr. Menem and the child, the circumstances of his birth, the relationship of the former president with the mother, among other facts, also appeared in Spain's *El Mundo* newspaper in its issue of March 2, 1994, [50] where citing the prior publication, tells the same story and notes that:

> [t]he existence of an alleged unrecognized illegitimate son of President Carlos Menem is no longer a secret in Argentina and the justice system investigates the matter at the request of the former first lady [;]
>
> The President's men do not want to hear about the delicate issue that has been made known in an explosive manner regarding Menem's fame as a womanizer and 'bon vivant' cultivated by Menem himself in public.

64. It follows that, at the time of the publication by the magazine *Noticias*, the facts questioned that gave rise to this controversy—the unacknowledged paternity of a child out of wedlock—had been made widely available in print media in Argentina and abroad. On the other hand, it does not appear to the Court that regarding the prior public dissemination of this information, Mr. Menem had been interested in measures to safeguard his privacy or

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[49] *Cf. El Jefe. Vida y obra of Carlos Saúl Menem [The Cheif. Life and Work of Carlos Saul Menem],* Gabriela Cerruti, Editorial Planeta, Buenos Aires, 1993 (case file of annexes to the Report No. 82/10, annex 5, tome I, folios 334 and 335).

[50] *Cf. El Mundo*, March 2, 1994, *Menem, acusado of tener un hijo extramatrimonial no reconocido. the madre es the diputada peronista Martha Meza [*Menem, accused of having an illegitimate son out of wedlock. the mother is the Peronista representative Martha Meza*]*(case file of annexes to the Report No. 82/10, annex 6, folios 338 and 339).

to avoid, in any other manner, public disclosure that he later contested regarding the magazine *Noticias*.

65. Additionally, the Court finds that Mr. Menem adopted, prior to the publications that he later questioned, behavior patterns favorable that let out that personal relationships, sharing acts and public situations with these people, those of which are recorded in the photographs illustrated in the notes, even receiving the child and his mother in official places like the Government House and the presidential residences (*supra* para. 32, 35, and 36).[51] The Court recalls that the right to privacy is available to the applicant and, therefore, the conduct displayed by him is relevant. In this case, his conduct did not safeguard his own private life in these areas.

66. Finally, as the Court has stated previously, the judiciary must take into account the context in which expressions are made in matters of public interest. The court must "assess respect for the rights or reputations of others with the value these have in the open debate of democratic society on issues of public interest or concern."[52] The Court notes that in its decision, the Supreme Court referred in a general manner to when an invasion of privacy can be justified, regarding the restriction of the sphere of private life of public "man," among others (*supra* para. 39). However, it did not analyze in this specific case if the information in question was or is not of public interest or contributed to the general debate. To the contrary, in its decision the Supreme Court referred to the alleged privacy issues in isolation from the problems of public interest arising from them and which form the main aspect of the notes into question. That same decontextualization is reflected in a majority opinion in the decision of the Civil Chamber, where after stating that in case of doubt between freedom of expression and privacy in the case of the official, the decision was resolved in favor of the privacy of the public official, holding:

> [o]n the other hand, it refers to the alleged fortune acquired by representative Meza, the existence and scope of political favors, which if true is despicable and worthy of being known by the public. This is not the private life to which I refer and which deserves protection because if the President was mishandling public funds it should be judged, and if a representative is unduly enriched as well. Instead, I believe that there is not sufficient public interest to justify the dissemination of current facts related to the emotional life of both and, especially, with the possible presence of a child that is the fruit of that relationship [...].[53]

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[51] *Cf. Noticias Magazine*, editions No. 984 and 985, *supra* notes 18 and 20; *El Jefe. Vida and obra of Carlos Saúl Menem, supra* note 49, and Statement of Mr. Héctor D'Amico, *supra* note 16.

[52] *Cf. Case of Ricardo Canese V. Paraguay. Merits, Reparations and Costs*. Judgment August 31, 2004. Serie C No. 111, para. 105, and *Case of Tristán Donoso V. Panamá, supra* note 35, para. 123.

[53] *Cf.* Judgment of March 11, 1998 of the Chamber H of the the National Court on First Instance on Civil Matters of the Federal Capital, *supra* note 17, folios 386 and 387.

67. In relation to the five photographs that illustrate the notes in question, wherein Mr. Menem appears with his child, the Court recalls that the protection under the American Convention to private life extends to other areas that are specifically named in this norm. [54] Although the right to self-image is not expressly stated in Article 11 of the Convention, images or personal photos are, of course, one of the elements included within the scope of protection of private life. [55] Also, photography is a form of expression that falls within the scope of protection under Article 13 of the Convention. [56] The photograph does not only endorse or lend credence to information provided by means of writing, but it holds in itself important content and expressive, communicative and informative value; in fact, in some cases, images can express and report equal or greater impact than the written word. Therefore, their protection becomes important at times when audiovisual means are predominant. However, for this reason and for the content of personal and intimate information with images, its potential to affect a person's private life is very high.

68. The Court concluded that the issue reported in the articles that accompanied the photographs related to the highest elected authority in the country and were of the public's interest (*supra* paras. 60 to 62). The Court finds that the images were primarily aimed at supporting the existence of the relationship between Mr. Menem and Mrs. Meza and Carlos Nair Meza, supporting the credibility of the written word and thereby drawing attention to large sums and costly gifts, as well as to the possible existence of favors and actions, on the behalf of the former President in favor of those portrayed in the images that were published. Thus, the images represent a contribution to the debate that is of a general interest and are not simply aimed at satisfying the desire of public curiosity about the private life of President Menem.

69. Additionally, the Court considers it relevant to address the circumstances of how the photographs were obtained. In this regard, the State did not object to this Court that which was affirmed by the Commission and representatives regarding the fact that the photographs were taken with consent of the President (*supra* paras 19 and 24), nor that affirmed by Mr. D'Amico in the public hearing held in this case, in the sense that they had not been taken by photographers of the magazine but rather were delivered to *Noticias* by the Office of the Presidency of the Nation.[57] Based on the foregoing, the Court does not find, in this case, an element that indicates that the photographs in question were taken in a climate of harassment or persecution of Mr. Menem or that would have generated a strong

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[54] *Cf. Case of Tristán Donoso V. Panamá, supra* note 35, para. 55, and *Case of Escher et al. V. Brasil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 6, 2009. Serie C No. 200, para. 114.

[55] Similarly, *Cf.* TEDH, *Schussel v. Austria*, *Decisión sobre Admisibilidad,* February 21, 2002, para. 2, and *Case of Von Hannover v. Germany, supra* note 42, para. 50.

[56] *Cf.* TEDH *Case of Von Hannover v. Germany, supra* note 42, para. 59, and *Case of MGN Limited v. The United Kingdom*, *supra* note 46, para. 143.

[57] Statement of Mr. Héctor D'Amico, *supra* note 16.

sense of intrusion, such as entering a restricted physical space or through the use of technological means that enable remote imaging that could have been taken surreptitiously.

70. Moreover, while the Argentina Supreme Court based its decision in that the images "(were) not authorized by the President in time and in the context in which they were used by the media outlet," this Court considers that not all publication of images requires the consent of the person portrayed. This becomes even clearer when the images relate to one who sits in the highest executive position of a country, since it would be unreasonable to require that the media obtain explicit consent each time it intends to publish an image of a President of the Nation. Therefore, in this particular case, the mere absence of Mr. Menem's consent does not transform the images published into a violation of his privacy.

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71. This Court considers that the publications carried out by the magazine *Noticias* regarding the elected pubic official of the highest ranking position in the country involved matters of public interest, which were in the public domain and involving the alleged victim who, by way of his own conduct, had not contributed to protect the information that he later contests. Thus, there was not an arbitrary interference with the right to private life of Mr. Menem. Thus the measure of further liability imposed, which excluded any assessment in the case of aspects of public interest of the information, was unnecessary in relation to the alleged purpose of protecting the right to private life.

72. Therefore, the Inter-American Court finds that the civil proceedings in the Argentine justice system, the imposition civil liability for infringement of a fundamental right, the imposition of economic damages plus costs and expenses, as well as the order to publish an excerpt from the judgment and the repossession imposed against one of the journalists affected the right to freedom of expression of Mr. Fontevecchia and Mr. D'Amico.

73. Mr. Fontevecchia put into context this affectation upon recalling that the former "President, his family, his relatives, his secretaries, [and] his ministers had […] accumulated complaints with very high numbers," in nineteen civil and criminal suits initiated against the magazine *Noticias.* The accumulation of civil cases generated a detriment that placed the company in possible dissolution because it generated consequences from the moment they were waged; some "CFOs [claimed] that they had to change policies because the company was unsustainable in this way." Similarly, in his statement, Mr. D'Amico also noted that the former President and those close to him began nineteen civil and criminal proceedings against the magazine. With regard to the personal consequences that came about due to the Judgment in question, Mr. D'Amico said that his assets were seized, reason for which, during a period of nineteen months, part of his salary was seized to cover the debts of the civil sentence.

74. Finally, the Court has established that the measure of further liability imposed domestically, did not satisfy the requirement that it be necessary in a democratic society and therefore it will not consider whether the amount of the civil penalty in this case was disproportionate or not. Notwithstanding the foregoing, the Court considers it appropriate

to reiterate that the fear of a disproportionate civil sanction may clearly be as or more intimidating and inhibiting for the exercise of freedom of expression than a criminal sanction, as it has the potential to compromise the personal and family life of those who complain, or as in the present case, those who publish information about a public official, with the obvious and unmerited result of self-censorship for the affected and for other potential critics of the performance of a public official.[58]

75. Based on the foregoing, the Court finds that there was no unreasonable or arbitrary interference in the private life of Mr. Menem in the terms of Article 11 of the American Convention, but rather, on the contrary, the challenged publications constituted a legitimate exercise of the right to freedom of expression under Article 13 of that treaty. As a consequence, the Inter-American Court concludes that the measure of further liability imposed in this case violated the right to freedom of thought and expression of Mr. Jorge Fontevecchia and Mr. Hector D'Amico, recognized in Article 13 of the American Convention, in relation to the obligation to respect that right, under Article 1(1) thereof.

VI
OBLIGATION TO ADOPT DOMESTIC LEGAL EFFECTS IN RELATION TO FREEDOM OF THOUGHT AND EXPRESSION

A. Arguments of the parties

76. The Commission recalled that in its report on the merits, it did not rule on the violation of Article 2 of the American Convention, [59] "since in the litigation stage [before it] the petitioners' did not specify how or why Article 1071 bis of the Civil Code violated, *per se*, the [said treaty].'" Although in its final observations the Commission noted it looked "to the new evidence and allegations provided during the hearing stage," it maintained its position, and it did not allege a violation of that Article.

77. The representatives argued that the legislation in Argentina, in particular, Article 1071 bis of the Civil Code, has several flaws that contradict the mandate of the American Convention because: a) the broad discretion of the judge to determine when the intrusion into the private life of a person becomes arbitrary and lack of appreciation of the special nature of information that is of the public interest, and b) the absence of clear standards that can be used for determining the amounts to be paid in cases in which a complaint is filed for moral damages in violation of the right to privacy. It was based on that norm that

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[58] *Cf. Case of Tristán Donoso V. Panamá, supra* note 35, para. 129.

[59] The article 2 of the American Convention on Human Rights establish 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.

Argentine tribunals rendered judgments against journalists on the grounds that the challenged publications involved an arbitrary interference with the privacy of the former president. The aforementioned article is not, being a norm that allows a restriction, a law in the material sense, because it allows for the broad of the judge in the interpretation of the merits and in the determination of reparations.

78. According to the representatives, the laxness of Article 1071 bis of the Civil Code violates the right to freedom of expression by not providing the judge with a mandate upon which he or she should specifically analyze the existence and implications for the right to freedom of expression at play, by not determining more precisely the prohibited conduct and by allowing the selective and discriminatory application of the norm. The vagueness of the norm generates an affectation to freedom of expression, since an inhibitory effect may originate from the implementation of sanctions that are too high, as well as uncertainty prior to the publication of the scope of the restrictions. In these circumstances, persons should not seek self-censorship in order to not be exposed to legal sanctions. The abovementioned norm is generic and guiding, however, upon placing restrictions on a fundamental right, it requires precision.

79. In relation to the State's argument, whereby the normative failures are resolved before judicial system, the representatives noted that "excessive vagueness of the law cannot be solved in [this] forum [...], because [there is] no obligation to follow the Supreme Court's precedents" and the judges of civil courts have a tendency to apply criteria that is more related with reparation of damage than to the protection of freedom of expression. To accept it, "would imply shifting the power of restricting human rights from the legislature to the judiciary," contradicting the standards of the Convention. In addition, the doctrine of actual malice referred to in the jurisprudence being alleged by the State, is not applicable "to cases involving the right to privacy, since in these cases the discussions did not revolve around the publication of erroneous data, but rather on whether information could become public if it refers to [...]the private life of a person." Moreover, the situation is exactly the opposite to that noted by the State, that is, there is no precise legislation on the right to privacy that marks where the protection of that right creates a restriction on the right to freedom of expression.

80. Regarding the absence of standards for the determination of compensatory amounts, the representatives stated that in Argentine law, the standard for establishing the compensatory amount is to weigh the damage and fix an equivalent amount, and since these cases generally involve non-pecuniary damages, justice has the absolute discretion of allocating the amount of compensation. This is evident in the present case since in none of the domestic judgments is there even minimal mention of the standards used to determine the amount of first, one hundred fifty thousand U.S. dollars, and second, sixty thousand U.S. dollars. The judges take on the task of setting amounts as a discretionary action, unrelated to objective parameters. Moreover, in Argentina jurisprudence the standard that governs is that by which all harm to a person's honor or privacy causes damage, without requiring verification. The system for determining the damage set in the Argentine Civil Code is the system designated for all cases involving damages, without considering in a particular way those cases where its designation is also the reason for the restriction of human right, such as freedom of expression. In this sense, upon establishing the existence

of damage and the amount of compensation, the possible effect that the designation of a high amount may have on freedom of expression and on the debate itself of a democratic society in general will not play any role in the logical structure of the ruling, which will be limited to the estimation of the damage and to the amount of money involved in compensation for it.

81. Finally, the representatives indicated that neither existing law nor the deeply rooted jurisprudence, effectively incorporate into the legal system the principle of proportionality in the amounts designated for further liability. On the other hand, the risk of a lawsuit as in this case is not limited to the amount ordered as compensation, but there is also the costs of the opposing party, plus interests, to which the sum may end up paying more than double the amount fixed as compensation for the moral damage, which must be added to the expense generated by the conviction upon publication of the judgment. Therefore, they concluded that Article 1071 bis of the Civil Code does not meet the minimum requirements to be considered a legitimate restriction on freedom of expression**,** and they requested the Court to declare that the State failed to comply with Article 2 of the Convention**.**

82. The State argued that in the context of its public policy on legislative reforms in attempts to adapt into the Argentine legal system concerning freedom of information and expression with the American Convention, after the reform of the Criminal Code as part of compliance with the Judgment in the case of *Kimel*, the Argentine legal system should be compatible with international standards on the matter; "the civil and criminal legislation in force, with the interpretation that the current Supreme Court of the Nation gives to it, is not incompatible with the American Convention." Argentina recalled that the American Convention recognizes the right to freedom of expression and the right to privacy, and that the exercise of each fundamental right recognized in the Convention must be carried out with respect and the safeguard of the other fundamental rights. Hence, a different policy reform could result in tension between freedom of expression and the right to honor and intimacy, leaving certain situations unprotected. To resolve the conflict between these two rights, a case by case examination is necessary, according to the characteristics and circumstances or each case. Thus, judicial activity thereby takes on vital importance, wherein the legislation is interpreted in each particular case to find a proper resolution to the conflict of rights.

83. In addition, the State indicated that in the case of civil sanctions, the jurisprudence of the Supreme Court of the Nation has upheld the doctrine of actual malice in a constant and uniform manner, setting appropriate standards, which are in force in the country, and there is strong jurisprudential evolution aimed at optimizing the Argentine legal system. Finally, it noted that the public policy on freedom of expression implemented by the State has been adapted in a legislative, institutional, and jurisprudential manner with international standards.

B. Considerations of the Court

84. The Inter-American Commission did not allege a violation of the obligations under Article 2 of the American Convention (*supra* para. 76). These allegations were argued only

by the representatives. In this regard, this Court has established that the alleged victim, the next of kin, or the representatives may invoke rights other than those included in the Report on the Merits of the Commission, on the basis of the facts presented by it. [60]

85. The Court has interpreted that such adaption of domestic norms with the Convention, implies adopting two sets of measures, knowingly: a) repealing rules and practices of any nature entailing violations of the guarantees provided for in the Convention or disregarding the rights enshrined thereof or impeding the exercise of such rights, and b) adopting rules and developing practices aimed at effectively ensuring the said guarantees. The first is satisfied with reforming, derogating, or otherwise annulling such rules or practices, as appropriate. The second, obligates the State to prevent further violations of human rights, and therefore, it must therefore adopt all legal, administrative and other measures necessary to prevent further occurrence of similar facts in the future. [61]

86. The Court has ruled on restrictions to freedom of expression based in criminal law. If the restriction stems from this area of law, it is necessary to strictly meet the requirements of the criminal definition [codification], and it must be formulated previously, in an express, accurate, and restrictive manner. [62] In the present case, the representatives have questioned the compatibility of Article 1071 bis of the Civil Code with the American Convention (*supra* paras. 23 and 77 to 81).

87. This Article protects various areas of private life and personal privacy and establishes the measures that a judge can order upon an infraction. The norm challenged by the representatives: a) does not establish, beyond certain examples provided, what is meant by meddling arbitrarily in the lives of others, b) indicates that the impact on privacy, among other circumstances, may cause "mortifying others in their feelings" or "disturbing, in any way, their privacy," and c) establishes as potential reparations, the publication of the judgment and an "equitable compensation fixed by a judge, under the circumstances."

88. Specifically, regarding the alleged incompatibility of Article 1071 bis with the American Convention, expert witnesses Saba[63] and Rivera[64] coincided in noting the

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[60] *Cf. Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs.* Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Family Barrios v. Venezuela. Merits, Reparations and Costs.* Judgment of November 24, 2011. Series C No. 237, para. 33.

[61] *Cf. Case of Salvador-Chiriboga v. Ecuador. Preliminary Objections and Merits.* Judgment of May 6, 2008 Series C No. 179, para. 122.

[62] *Case of Kimel V. Argentina supra* note 38, para. 63.

[63] In this respect, the expert wtiness stated that the vague language of the Article *1071 bis* allows the judicial officer broad interpretative discretion that is not admissible in any legal tradition that had adopted the principle of legality, central to the rule of law. The Article refers to the potential damage as the result of statements that have disturbed "*in any way* a persons privacy", thereby giving the judge a virtually unlimited ability when estimating the amount of compensation for the damage, stating "a fair compensation shall be paid that is established in equity by a judge, pursuant to the circumstances." Finally, the Argentine norm has also entrusted upon the judge, the decision, per request of the victim, of "ordering the publication of the sentence in a journal or newspaper of wide circulation in the country," which in some cases consists of publication via print mediums with the largest circulation in the country, which would also place in the hands

vagueness of the norm and the margin of discretion afforded to the Judge. In addition, among other things, both expert witnesses pointed to the importance of protecting privacy in a manner that does not involve inhibition of freedom of expression and the need for legislative reform in this area. In addition, the expert witness Saba argued that civil measures can result in indirect censorship and that the inhibitory effect of civil sanctions may be even greater than that that arises from criminal liability. In his opinion, expert witness Rivera emphasized the importance of a regulatory reform, which is even more relevant because in the Argentine system the Supreme Court decisions are not binding on lower courts.

89. The Court recalls that it is the law that must establish the restrictions on freedom of expression and only to achieve the ends that the Convention itself says. The legal definition [codification] must be express and explicit. [65] However, the degree of precision required of domestic legislation depends significantly on the subject-matter. The precise definition [taxativeness] of a civil norm may be different from that required by the principle of legality in criminal matters, given the nature of the conflicts that the first is designed to solve. It can not be required that the civil norm, contrary to what usually happens with criminal law, which provides extremely precise factual circumstances that may arise; this prevents the civil norm from resolving countless conflicts that arise permanently and that are impossible to forecast for the legislator.

90. The Court finds that the law must be formulated with sufficient precision to enable people to regulate their conduct so as to be able to predict with a degree that is reasonable under the circumstances, the consequences that a given action may entail. As has been noted, while the certainty of the law is highly desirable, it may bring with it excessive rigidity. On the other hand, the law must be able to remain in force in force despite changing circumstances. Consequently, many laws are formulated in terms, that to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. [66]

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of the subject who exercised his or her freedom of expression, the huge cost of further liability. Legislation that establishes a regimen of responsibility for damages that is designed in such a way that it leaves a wide margin of discretion for the judge to make decisions and designate responsibility, creating uncertainty that leads a prudent person to be inhibited from exercising his or her right to freedom of expression for fear of the unknown and eventually serious risks if he or she were to be found guilty of having caused harm to others. (expediente of *merits*, tome I, folios 642 and seq.).

[64] Moreover, the expert witness Rivera noted that the article presents content that is too vague, limited to only some examples of violations of privacy, but without specifying in particular what behaviors are prohibited. Nor does it distinguish between public officials and private persons, and does not even mention public interest as a justification. The consideration] as a violation of privacy of all mortification of the feelings of another [is] clearly inconsistent with a fundamental principle of freedom of expression under which the State can not prohibit or punish a particular idea or opinion because it is offensive to certain people. Nor does it establish any pattern with respect to the amount of compensation. It simply authorizes a court to determine the amount of a "fair" compensation. (case file on the *merits*, tome I, folios 483 and seq.).

[65] *La Colegiación Obligatoria of Periodistas, supra* note 35, para. 40.

[66] *Cf.* TEDH *Case of Tammer v. Estonia*, Judgment of February 6, 2001, para. 37, and *Case of Editions Plon v. France*, *supra* note 46, para. 26.

91. The Court determined that the violation of Article 13 of the American Convention stemmed from a judicial decision of the Supreme Court that affirmed a civil sentence filed by a civil court of appeals. This measure of further liability proved unnecessary in a democratic society and incompatible with the treaty (*supra* paras. 54 to 75). The Court notes that in this case, it was not the norm itself that determined the harmful result that is incompatible with the American Convention, but rather its application in the particular case by the judicial authorities of the State, who did not observe the mentioned standards on necessity.

92. Although the arguments of the representatives and that noted by the expert witnesses are persuasive arguments on the possible basis that the norm being challenged entail decisions against the right to freedom of expression, the Court considers that, in general, it allows a sufficient liberty to regulate their conduct and reasonably foresee the consequences of that violation. Thus, whether its application is in accordance with the Convention will depend on judicial interpretation in the case.

93. This Tribunal has established in its jurisprudence that it is aware that the domestic judges and tribunals are subject to the rule of law and that, therefore, they are compelled to apply the regulations in force within the legal system. But, once a State has ratified an international treaty such as the American Convention, its bodies and judges, are also subject to it, which compels them to make sure that the effects of the provisions of the Convention are not affected by the application or interpretation of laws contrary to its object and purpose. Judges and bodies related to the administration of justice at all levels shall exercise a "control of conformity with the Convention" *ex officio,* between domestic regulations and the American Convention, evidently under the framework of its respective competences and the corresponding procedural regulations. Within this task, the judges and bodies related to the administration of justice shall take into consideration not only the treaty but also the interpretation the Inter-American Court has made of it. [67]

94. In this regard, the Court emphasizes the importance that the Argentine courts ensure that domestic proceedings wherein debates may arise regarding the right to freedom of expression, comply with the intent and purpose as well as other obligations under the Convention, so that in the analysis of cases such as this, they take into account the distinct threshold of protection for the right to private life of those who are civil servants, the existence of a public interest regarding the information, and the possibility that sanctions do not involve inhibition or self-censorship of those who exercise their right to free speech and citizenship, which unlawfully restricts and limits public debate on media pluralism that is necessary in a democratic society.

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[67] *Cf. Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Serie C No. 154, para. 124, and *Case of Cabrera García and Montiel Flores V. México. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 26, 2010. Serie C No. 220, para. 225.

95. Moreover, the Court takes note of the changes that have occurred domestically in terms of freedom of expression, such as the legislative reforms arising from the case of *Kimel*, which amended the Argentine criminal code, eliminating the possibility that statements or opinions relating to matters of public interest be deemed libel or slander, the enactment of Law 26.522 of the Audiovisual Communication Services, as well as institutional and jurisprudential changes that occurred in the Supreme Court on freedom of expression.

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96. Taking into account the above considerations, the Court concludes that the extent of further liability imposed in this case failed to comply with the obligation to adopt domestic legal effects in Article 2 of the American Convention, in relation to the right to freedom of expression, regarding civil legislation.

VII
REPARATIONS
(Application of Article 63(1) of the Convention)

97. Based on the provisions of Article 63(1) of the American Convention,[68] the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to repair it adequately[69] and that this provision embodies a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility. [70]

98. Reparation of the damage caused by abridgment of an international obligation requires, whenever possible, full reparation (*restitutio in integrum*), consisting of reestablishment of the situation prior to the violation. If this is not possible, as in the instant case, the Court must order a series of measures that, in addition to ensuring respect for the rights abridged, will redress the consequences caused by the infringements and order, *inter alia*, payment of compensation for the damage caused. [71]

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[68] Article 63(1) of the American Convention:

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

[69] *Cf. Case of Velásquez Rodríguez V. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Serie C No. 7, para. 25, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 239.

[70] *Cf. Case of Castillo Páez V. Perú. Reparations and Costs*. Judgment of Noviembre 27, 1998. Serie C No. 43, para. 50, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 239.

[71] *Cf. Case of Velásquez Rodríguez V. Honduras. Reparations and Costs*, *supra* note 69, para. 26, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 240.

99. This Court has established that reparations must be related to the facts of the case, the violations that have been declared, the damage proven, and the measures requested to repair the respective damage. Consequently, the Court must respect all these factors to ensure that its ruling is appropriate and in keeping with the law. [72]

100. The Court will examine the claims of the Commission and the representatives and the State's arguments, in order to provide measures to repair the damage caused to the victims. Regarding the State's arguments, the Court notes that Argentina specifically ruled on the request of the representatives to amend the legislation (*infra* para. 112). Regarding the other measures of reparation, the State said that "it will be subject to what [this] Court decides."

A. Injured Party

101. The Court reiterates that, under Article 63(1) of the American Convention, anyone declared a victim of the violation of any right embodied thereof is considered an injured party. [73] Therefore, this Court considers as injured parties in this case, Mr. Jorge Fontevecchia and Mr. Héctor D´Amico, given they were victims of a violation to their right to freedom of thought and expression (*supra* para. 75). As such, they shall be considered beneficiaries of the reparations ordered by this Court in this chapter.

B. Measures of restitution, satisfaction, and guarantees of non-repetition

102. The international jurisprudence, and in particular the jurisprudence of the Court, has consistently ruled that a judgment is *per se* a form of reparation.[74] However, considering the circumstances of the case and the harm caused to the victims due to a violation of Article 13 of the American Convention to their detriment, the Court deems it appropriate to establish the following measures.

1. Measures of restitution

1.1. Revocation of the civil sentence

103. The Commission requested the Court to order the State to revoke the civil sentence imposed on Mr. Jorge Fontevecchia and Mr. Hector D'Amico and all the consequences resulting therefrom, including the reimbursement of sums paid.

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[72] *Cf. Case of Ticona Estrada et al. V. Bolivia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Serie C No. 191, para. 110, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 241.

[73] *Cf. Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163*, para. 233, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 242.

[74] *Cf. Case of El Amparo V. Venezuela. Reparations and Costs*. Judgment of September 14, 1996. Serie C No. 28, para. 35*, and Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 243.

104. Initially, representatives requested that the Court order the State to adopt measures necessary for the judge executing the judgment to attach to the court record the decision of the Inter-American Court and determine that the judgment passed was declared incompatible with human rights treaties. In its final arguments, the representatives reformulated their request asking the Court to order the State to take the necessary measures so that the ruling of the judiciary in this case lose any binding authority and any ability to be a source of legal effects of any kind. Finally, the representatives reported that, while some attempts could be made to satisfy this measure, there is no mechanism for implementing the decisions of the bodies of the international human rights system, nor is there clear jurisprudence in this regard.

105. This Court has determined that the judgment issued on September 25, 2001, by the Supreme Court of Justice of the Nation that affirmed the conviction imposed by the court of appeals, violated the right to freedom of expression of Mr. Jorge Fontevecchia and Mr. Hector D'Amico (*supra* paras. 54 to 75). Therefore, the Court orders that, according to its jurisprudence,[75] the State must revoke the decision in its entirety including, where appropriate, the reach it has on third parties, namely: a) the attribution of civil responsibility or Mr. Jorge Fontevecchia and Mr. Hector D'Amico, b) the order of payment of compensation, and interest and costs and court fees; such amounts must be compensated with the interests and actualizations that so correspond to date, and c) any other effect that this decision has or has had. In order to comply with this reparation, the State must adopt all judicial, administrative, or other measures as may be necessary, and has a period of one year as of legal notice of this Judgment to do so.

2. Measures of satisfaction

2.1 Publication and dissemination of the present Judgment

106. The Commission requested the Court to order the State to disseminate the Report on the Merits No. 82/10 in the Judiciary Power.

107. The representatives requested the Court to order the State to publish the present Judgment in a newspaper of national scope, in the Official Gazette, on the website of the Judicial Information Center of the Supreme Court of Justice of the Nation in a visible manner, and if possible, in a permanent manner, as well as in the jurisprudential law bulletins distributed in the judiciary.

108. The Court finds, as it has done in other cases,[76] that the State shall publish, within six months from the date of notification of this Judgment:

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[75] *Cf., inter alia, Case of Herrera Ulloa V. Costa Rica, supra* note 36, para. 195; *Case of Tristán Donoso V. Panamá, supra* note 35, para. 195, and *Case of Kimel, supra* note 38, para. 123.

[76] *Cf. Case of Barrios Altos V. Perú. Reparations and Costs.* Judgment of November 30, 2001. Serie C No. 87, Punto Resolutivo 5.d), and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 252.

a) the official summary of this Judgment drafted by the Court, once in the Official Gazette;
b) the official summary of this Judgment made by the Court, once in a newspaper of national circulation, and
c) the present Judgment in its entirety, available for a period of one year, on the website of the Judicial Information Center of the Supreme Court of Justice of the Nation.

3. Other measures of reparation requested

3.1. Public apology and acknowledgment of international responsibility

109. The representatives asked the Court to order the State to publically acknowledge its responsibility for the occurrence of the facts to the detriment of the victims and to give a public apology for the human rights violations. With this measure, the goal is to restore the dignity and respect of journalists in relation to the harm they suffered for having been unjustly sentenced and subject to national and international proceedings that lasted approximately fourteen years.

110. The Inter-American Court considers that the issuance of this Judgment, the measure to revoke the decision of the Supreme Court of Argentina in its entirety, as well as the publication of this Ruling in various media streams, private and social means, as well as official ones, are sufficient and appropriate measures of reparation to remedy the violations inflicted on the victims and to fulfill the purpose stated by the representatives.

3.2. Adaptation of the domestic legal system

111. The Representatives asked the Court that it prevent the recurrence of cases such as the present case, that it order the State to take the measures necessary to adapt the domestic legal system to the standards set by international law on freedom of expression. Moreover, they also noted that many of the improvements reported by the State do not reverse the violations alleged nor demonstrate that similar events cannot be repeated. Recalling the major problems that given its discretion Argentine legislation introduced in this regard (*supra* paras. 77 to 81), they requested that the following norms be declared incompatible with the American Convention: a) the protection of privacy of persons (Article 1071 *bis* of Civil Code), b) protection of moral damage (Article 1078 Civil Code), and c) the parameters for the purpose of allocating compensation for damage caused (mainly regulated by Articles 1068 and 1069 the Civil code). Notwithstanding the abovementioned, they stated that they do not believe that each of the abovementioned norms are in themselves contrary to the Convention, but, taken together, and in the absence of other norms that limit the discretion that is left to the judge in each case, do not meet relevant international standards.

112. The State argued that as a result of legislative, institutional, and jurisprudential reforms that took place in Argentina on freedom of expression, "it may be considered that the legal regime on civil liability in relation to the right to freedom of expression is

regulated in a manner consistent with international standards applicable on the matter." It affirmed that the Argentine legal system is mixed, in such a way that it does not exhaust all the legal instruments in the articulations of the codes to define and regulate rights. It added that it is also necessary to have a flexible system that can take into account diverse and changing factors at the time controversies are decided. Finally, the State highlighted that the Commission, in its Report on the Merits, did not mention the need for a legislative reform.

113. The Court found that the civil sanction against Mr. Fontevecchia and Mr. D'Amico constituted an act in violation of Article 13 of the American Convention (*supra* para. 75), however, it did not find a violation of Article 2 thereof regarding civil law (*supra* para. 96). The Court does not deem it necessary to order the State to carry out the measure of reparation being requested and that indicated regarding the control of conformity with the Convention to be sufficient. (*supra* paras. 93 and 94).

C. Compensation

1. Pecuniary damage

114. The Court has developed in its jurisprudence the concept of pecuniary damages and has established that pecuniary damage encompasses the loss or detriment to earnings of the victims, the expenses incurred based on the facts, and the consequences of a pecuniary nature that have a causal link with the facts of this case.[77] In this case the representatives requested as pecuniary damages, the payment of expenses incurred in the processing of the domestic proceeding and loss of earnings.

1.1. Costs incurred in the domestic judicial proceeding

115. The Commission considered that the State must order a full reparation for the alleged victim, including material aspects.

116. The representatives indicated that in different parts and distinct modes the victims in this case had to pay, due to an entirely illegitimate decision contrary to freedom of expression, the total amount of $ 244,323.25 (two hundred and forty-four thousand, three hundred twenty-three Argentine pesos with twenty-five cents). This amount refers to the original judgment of $60,000 (sixty thousand Argentine pesos), the amounts carried in interest and costs in the amount of $ 138,574.75 (one hundred and thirty-eight thousand, five hundred seventy-four Argentine pesos and seventy-five cents) and reimbursement of court fees in the amount of $ 105,808.50 (one hundred and five thousand, eight hundred and eight Argentine pesos and fifty cents). This reparation should encompass the amount actually paid, of each payment, expressed in historical values, plus interests up until the date of cancellation, and must include an inflationary update system or countervailing interests so as to maintain the value of the claims.

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[77] *Cf. Case of Bámaca Velásquez V. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Serie C No. 91, para. 43, and *Case of López Mendoza V. Venezuela, supra* note 12, para. 231.

117. As expressed in this Judgment, the Court has ordered that the decision be revoked that violated the right to freedom of expression of Mr. Fontevecchia and D'Amico, in its entirety, which includes reimbursement of the amounts paid by each of the victims, or where applicable, the Publisher's Profile with interests and updates that apply according to domestic law (*supra* para. 105).

1.2. Loss of earning

118. The representatives required reparation for loss of earnings, stating that in the case of Mr. Fontevecchia, loss of earnings occurred for two reasons: a) development possibilities were diminished because the judgment reduced their ability to initiate new economic enterprises, since they were renowned businessman in the newspaper-publishing world, and b) upon placing at stake their professional reputations, their employment possibilities were diminished. In the case of Mr. D'Amico, the damage relates to his recognition as a professional, because even when he was director of the magazine, he was also known as a journalist with broad experience, and he has had to face the consequences of having a conviction for violating the privacy of a person. Based on the abovementioned, the representatives requested the sum of US$ 15,000.00 (fifteen thousand dollars of the United States of America) for each of the victims for loss of earnings.

119. The Court observes that the representatives have made a general allegation of an alleged reduction of the possibilities of developing new economic ventures, of new employment possibilities, or of the undetermined consequences. However, they have not provided the specifics of these allegations or evidence to support this contention. Therefore, the Court held that it does not correspond to order compensation in this respect.

2. Non-pecuniary damage

120. The Court has developed in its jurisprudence the concept of non-pecuniary damage and has established that non-pecuniary damage consists of the suffering and the harm caused to the direct victims and their relatives, the erosion of values of great significance to people, as well as the alterations of a non-pecuniary nature, in the living conditions of the victim or the victim's family.[78]

121. The Commission requested that the Court provide a full reparation to the victims for the violation of their right to freedom of expression, to include moral aspects.

122. The representatives stated that the civil sentences questioned the seriousness and the quality of journalism of the victims, as well as their honesty and responsibility, placing them before society between those journalists who, far from providing information that contributes to the debate and awareness regarding informed political decisions, arbitrarily

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[78] *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77*, para. 84, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 257.

interferes in the lives of people. According to the representatives, it is inevitable that having to live through a civil sentence had an emotional impact on the victims. Undergoing a civil trial, which can cause serious damage to a person's assets, also raises personal concerns and suffering. In the case of Mr. D'Amico, aside from the inhibitory effect of the compensation, the emotional impact of the monthly withdrawal must also be considered, for twenty-one months, in his paycheck, which led him to maintain a life with this stigma given this seizure. Based on the foregoing, they requested that the non-pecuniary damage be repaired by way of compensation, in equity.

123. In this regard, the Inter-American Court finds that the issuance of this Judgment, the extent of revoking the domestic decisions in their entirety, and the publication of this Ruling in various media streams, private means as well as those with wide circulation of social and official means, which includes the judiciary, are sufficient and appropriate measures of reparation to remedy the violations inflicted on the victims.

D. *Costs and expenses*

124. As indicated by the Court in prior occasions, the costs and expenses are consolidated under the concept of reparations enshrined in Article 63(1) of the American Convention. [79]

125. Although the Commission did not rule specifically on the payment of costs and expenses, it asked the Court to order full reparation for the victims that includes material aspects.

126. The representatives stated that the victims were assisted by private attorneys and had to pay attorney's fees for the opposing party as well as the costs of the domestic proceeding in general. Therefore, they requested that a compensation be regulated that includes, in equity, the expenses incurred in the domestic forum. They also requested reimbursement of expenses incurred by the victims relating to their participation in the public hearing held in this case. Additionally, the representatives said that the victims were represented before the Inter-American System by the Center for Legal and Social Studies, an organization that incurred in ordinary expenses in the processing of the case an amount of U.S.$ 2,500.00 (two thousand and five hundred dollars of the United States of America) to cover, among other expenses, phone, fax, mail, and supplies. Finally, they requested reimbursement of U.S.$ 5,270.80 (five thousand two hundred and seventy dollars of the United States of America and eighty cents), for expenses incurred by the representatives to attend the public hearing, to which supporting documentation is attached.

127. The Court has indicated that "the claims of the victims or their representatives concerning costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural occasion granted to them, namely, in the brief of pleadings and motions, notwithstanding the possibility that these claims may be updated subsequently, in

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[79] *Cf. Case of Garrido and Baigorria V Argentina. Reparations and Costs.* Judgment of August 27, 1998. Serie C No. 39, para. 79, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 266.

keeping with the new costs and expenses that may have been incurred as a result of the proceedings before this Court."[80] Regarding reimbursement of costs and expenses, the Court must prudently assess the costs, which amounts to the total incurred before domestic authorities, as well as those before the Inter-American System, in consideration of the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that the *quantum* is reasonable. [81]

128. The Court notes that the representatives did not submit any evidence of the amount that the victims had paid their lawyers in the domestic proceedings or in relation to their participation at the public hearing before this Court. However, the Court may infer that the alleged victims have incurred those costs and, therefore, decides, in equity, for each of them, the sum of U.S.$ 5,000.00 (five thousand dollars of the United States of America) for expenses related to the domestic proceeding and U.S.$2,000.00 (two thousand dollars of the United States of America) for expenses related to their participation in the public hearing.

129. Regarding the request for reimbursement of the expenses listed by the Center for Legal and Social Studies in its capacity as representative in the proceedings before the Inter-American System of Human Rights, the Court orders that the State must pay for costs and expenses the sum of U.S. $7,770.00 (seven thousand, seven hundred and seventy dollars of the United States of America).

130. Lastly, the Court finds that the State shall provide the amounts indicated in the preceding paragraphs to the victims (*supra* para. 128) and their representatives (*supra* para. 129). The Court also stated that in the process of monitoring compliance with this Judgment, it may provide for the reimbursement to the victim or their representatives, by the State for the reasonable expenses incurred in this stage of the proceedings.

E. Method of compliance with payments ordered

131. The State must make the payment for costs and expenses as well as for compensation of the amounts accumulated as a consequence of the domestic judgment pursuant to that noted (*supra* 128, 129, and 105), within the period of six months and a year, respectively, as of legal notice of the Judgment, under the terms of the following paragraphs.

132. In case the beneficiaries die before they are delivered the respective sums of money, the sums will be delivered directly to their heirs, in accordance with applicable domestic law.

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[80] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 21, 2007. Serie C No. 170, para. 275, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 270.

[81] *Cf. Case of Garrido and Baigorria, supra* note 79*,* para. 82, and *Case of Barbani Duarte et al. V. Uruguay, supra* note 8, para. 270.

133. The State must comply with its pecuniary obligations by payment in dollars of the United States of America or the equivalent amount in Argentine currency, using the exchange rate in force in the New York exchange, the day before the payment to make the respective calculation.

134. If, for reasons that can be attributed to the beneficiaries of the compensation, it is not possible to pay the amounts established within the time indicated, the State shall deposit the amount in their favor in an account or a deposit certificate in a solvent Argentine financial institute in dollars of the United States of America and in the most favorable financial conditions permitted by law and banking practice. If, after 10 years, the compensation has not been claimed, the amounts shall revert to the State with the accrued interest.

135. The amounts allocated in this Judgment must be delivered to the persons indicated in an integral manner, as established in this Judgment, without any deduction arising from possible taxes or charges.

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

VIII
OPERATIVE PARAGRAPHS

137. Therefore,

THE COURT

DECLARES,

Unanimously, that:

1. The State violated the right to freedom of expression under Article 13 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Mr. Jorge Fontevecchia and Mr. Hector D'Amico, in the terms of paragraphs 42 to 75 of this Judgment

2. The State did not breach its general obligation to adopt provisions of domestic law, recognized in Article 2 of the American Convention on Human Rights, to the detriment of Mr. Jorge Fontevecchia and Mr. Hector D'Amico, in terms of paragraphs 84 to 96 this Judgment.

AND DECLARES

Unanimously, that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State must set aside the civil sentence imposed on Mr. Jorge Fontevecchia and Mr. Hector D'Amico, as well as all of its consequences, within one year from legal notice of this Judgment, pursuant to paragraph 105 thereof.

3. The State must carry out the publications provided for in this Judgment, pursuant to the provisions of paragraph 108 of the same.

4. The State must provide the amounts referred to in paragraphs 105, 128 and 129 of this Judgment, within one year of legal notice and in accordance with the methods specified in paragraphs 131 to 136 of this Ruling.

5. The Court will monitor compliance with this Judgment, in exercise of its powers and in compliance with its obligations under the American Convention, and will close the case once the State has fully complied with the provisions thereof. The State shall, within one year after legal notice is provided of this Judgment, submit a report to the Court on measures taken to comply with it.

Drafted in Spanish and in English, the Spanish text being authentic, in San Jose, Costa Rica on November 29, 2011.

Diego García-Sayán
President

Manuel E. Ventura Robles Margarette May Macaulay

Rhadys Abreu Blondet Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary