

INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF MOHAMED v. ARGENTINA
JUDGMENT OF NOVEMBER 23, 2012
(Preliminary objection, merits, reparations and costs)

In the case of *Mohamed*,

The Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:¹

Diego García-Sayán, President;
Manuel E. Ventura Robles, Vice-President;
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 to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 31, 32, 42(6), 65 and 67 of the Rules of Procedure of the Court² (hereinafter “the Rules of Procedure”), renders the following Judgment structured as follows:

¹ Pursuant to Article 19(1) of the Rules of Procedure of the Inter-American Court of Human Rights applicable in this case, (*infra* note 2), which establishes that “In 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,” Judge Leonardo A. Franco, of Argentine nationality, did not participate in the processing of this case or in the deliberation and signing of this Judgment.

² Rules of Procedure of the Court approved by the Court in its Eighty-fifth Regular Period of Sessions held on November 16 to 28, 2009.

Table of Contents		Paragraphs
I.	INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE	1-3
II.	PROCEEDING BEFORE THE COURT	4-19
III.	PRELIMINARY OBJECTION	20-28
IV.	JURISDICTION	29
V.	EVIDENCE	30-37
	A) Documentary, testimonial and expert evidence	31
	B) Admission of evidence	32-37
	B.1) Admission of documentary evidence	32-34
	B.2) Admission of the statement of the alleged victim and of the expert evidence	35-37
VI.	PROVEN FACTS	38-61
	A) Criminal proceeding against Mr. Mohamed	40-50
	B) Subsequent legal remedies	51-60
	C) Consequence of criminal disqualification from driving	61
VII.	RIGHT TO JUDICIAL GUARANTEES, IN RELATION TO THE DUTY TO ADOPT DOMESTIC LEGAL EFFECTS AND OBLIGATION TO RESPECT AND GUARANTEE RIGHTS	62-126
	A) Introduction	62-64
	B) Arguments of the Commission and of the parties	65-78
	B.1) Alleged violation of the right to appeal the judgment (Article 8(2) (h) of the Convention) in relation to the obligation to adopt domestic legal effects (Article 2) of the Convention).	65-68
	B.2) Alleged violation of the right to adequate time and means for the preparation of the defense (Article 8(2)(c) of the Convention)	69-71
	B.3) Alleged violation of duty to substantiate any accusation and of the right to be heard (Article 8 (1) of the Convention)	72-73
	B.4) Alleged violation of judicial protection (Article 25(1) of the Convention)	74-76
	B.5) Alleged violation of the right protected in Article 8(4) of the Convention	77-78
	C) General considerations of the Court	79-85
	D) Right to appeal the judgment before a higher judge or court (Article 8(2) (h) of the Convention) in relation to the obligation to adopt domestic legal effects (Article 2 of the Convention)	86-119
	D.1) Scope of Article 8(2)(h)of the Convention with respect to criminal convictions issued in a decision against an acquittal	88-95
	D.2) Content of the right to appeal the conviction	96-101
	D.3) Regarding the alleged inability of Mr. Mohamed to appeal his conviction and the procedural mechanisms to which he had access within the Argentine legal framework in light of Article 8(2)(h)of the Convention	102-112
	D.4) Obligation to Adopt Domestic Legal Effects (Article 2 of the American Convention) in relation to the right to appeal the judgment	113-119
	E) Alleged violation of the right protected in Article 8(4) of the American Convention	120-126
VIII.	ALLEGED VIOLATION OF PRINCIPLE OF LEGALITY (ARTICLE 9), IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS	127-139
	A) Arguments of the Commission and of the parties	127-129
	B) Considerations of the Court	130-139
IX.	REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)	140-187
	A) Injured Party	144-147
	B) Guarantee Mr. Mohamed the right to enjoy the right protected in Article 8(2)(h)of the Convention	148-152
	C) Measure of satisfaction: publication and dissemination of the	153-155

	Judgment	
	D) Other measures requested	156-162
	E) Compensation for pecuniary and non-pecuniary damages	163-172
	F) Costs and expenses	173-177
	G) Reimbursement of expenses to the Victims' Legal Assistance Fund	178-180
	H) Method of compliance with payments ordered	181-187
X.	OPERATIVE PARAGRAPHS	188

INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. On April 13, 2011, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted case 11.618 against the Argentine Republic (hereinafter “the State” or “Argentina”) to the Inter-American Court of Human Rights (hereinafter “brief submitting the case”), pursuant to Articles 51 and 61 of the Convention. The initial petition was filed with the Inter-American Commission on March 18, 1996 by Mr. Carlos Alberto Mohamed (hereinafter “Mr. Mohamed”) and his former representative Attorney Roque J. Mantione (hereinafter “Mr. Mantione”). On February 22, 2005, the Inter-American Commission approved the Report on Admissibility No. 02/05³. On November 2, 2010, the Commission approved the Report on the Merits 173/10⁴, pursuant to Article 50 of the American Convention (hereinafter also “the Report on Merits” or “Report No. 173/10”) ⁵. The Commission decided to submit “all the facts and human rights violations described in the [R]eport on the [M]erits 173/10” before the Court, given the alleged “necessity to obtain justice for the alleged victim, in view of the State’s lack of substantial progress regarding “compliance with the recommendations raised in [that] report.” The Commission appointed former Commissioner Luz Patricia Mejía, former Executive Secretary Santiago A. Canton, as delegates, and Mrs. Elizabeth Abi-Mershed, Deputy Executive Secretary, María Claudia Pulido, Silvia Serrano Guzmán and Marisol Blanchard as legal advisors.

2. According to the Commission, this case concerns the alleged disregard for “a number of guarantees, including the principle of legality and non-retroactivity and the right to defense [as well as the lack of guarantee] of the right to appeal his conviction under the terms of the Convention [and of the right] to an effective recourse to provide redress for those violations.” The alleged violations were committed following the criminal conviction for manslaughter imposed on Mr. Mohamed for the first time in a second instance proceeding after an acquittal by a court of first instance, following a traffic accident in which he was involved and in which a person died.

3. Based on the foregoing, the Commission asked the Court to declare the international responsibility of Argentina for the alleged violation of “the principle of legality and non-retroactivity, the right to defense, the right to appeal the judgment and the right to judicial protection enshrined in Articles 9, 8(2)(c), 8(2)(h) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Oscar Alberto Mohamed.” Consequently, the Commission asked the Court to order the State to adopt certain measures of reparation.

³ In its Report, the Inter-American Commission declared admissible petition No. 11.618 in relation to the alleged violation of the rights enshrined in Articles 8, 9 and 1(1) of the American Convention. It also held that “where applicable, it will also examine the possible application of Article 25 [...] and of Article 2”. *Cf.* Admissibility Report No. 02/05, Case of 11.618, Oscar Alberto Mohamed v. Argentina, February 22, 2005 (case file processed before the Commission, Appendix 1, page 1006).

⁴ Merits Report No. 173/10, Case 11.618, Oscar Alberto Mohamed v. Argentina, November 2, 2010, approved during the 140th Regular Period of Sessions (Merits file, Volume I, pages 5 -31 and case file processed before the Commission, Appendix 1, pages 755 to 781).

⁵ The Report was notified to the State in a communication of December 13, 2010, and a two month deadline was set for the State to report on the measures it had adopted to comply with the recommendations formulated in the report. On February 11 and 17, 2011, the State requested an extension “to comply with the recommendations,” and a one-month extension was granted by the Commission on March 9, 2011. On April 1, 2011, Argentina filed the respective report in which it provided information on some of the recommendations made by the Commission.

4.

II PROCEEDINGS BEFORE THE COURT

5. The State and Mr. Roque Mantione, at the time the representative of the alleged victim, were notified of the submission of the case to the Court by the Inter-American Commission on May 18, 2011, and May 20, 2011, respectively.

6. On August 12, 2011, Mr. Mohamed informed the Court of the death of his then representative, which occurred on July 4 of the same year; he provided his contact information and asked the Court to appoint an Inter-American defender to represent him.⁶

7. In an Order issued on August 31, 2011, the Court considered as not submitted a "brief containing pleadings, motions, and evidence" apparently signed by Mr. Mantione, and received by the Secretariat of the Court on July 9, 2011, five days after his death and 12 days prior to the filing deadline. In that same Order, the Court instructed its Secretariat to inform the Inter-American Association of Public Defenders (hereinafter "AIDEF") about Mr. Mohamed's request to be represented by an Inter-American defender and to proceed accordingly. Furthermore, the Court established a non-extendable deadline of two months for the new representative to submit the brief containing pleadings, motions and evidence from the time of notification of the written submission of the case and annexes; similarly, it granted the State two months to present its answer upon receipt of the written brief containing pleadings, motions and evidence.

8. On September 16 and 20, 2011, the General Coordinator of AIDEF informed the Court that he had appointed Mr. Gustavo Vitale and Mr. Marcelo Torres Bóveda, public defenders from Argentina and Paraguay, respectively, as Inter-American defenders to provide legal representation to Mr. Mohamed in the present case.

9. On October 11, 2011, the Court notified the Inter-American defenders (hereinafter "the representatives" or "the Inter-American defenders") of the submission of the case.

10. On December 11, 2011, the representatives submitted to the Court their brief containing pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Article 40 of the Rules of Procedure of the Court. The representatives were in substantial agreement with the allegations of the Commission and asked the Court to declare the State's international responsibility for the alleged violation of the same articles of the American Convention indicated by the Inter-American Commission; they added that Argentina had also violated the rights recognized in Articles 8(1), 8(2)(d), 8(2)(e), 8(4), 25(2)(a), and 25(2)(b) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Mohamed. Consequently, the representatives asked the Court to order the State to adopt various measures of reparation. Moreover, the representatives requested access to the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights (hereinafter "the Legal Assistance Fund" or "the Fund") "both for the exercise of the defense in the inter-American proceeding and with respect to all of the expenses associated with any related activity to it."

11. On February 28, 2012, Argentina presented before the Court its brief containing the preliminary objection, the brief answering the application and observations to the pleadings and motions brief (hereinafter "answer brief"). In said application, the State

⁶ Cf. Brief filed by Oscar Alberto Mohamed on August 12, 2011, before the Inter-American Commission and death certificate of Roque J. Mantione issued on July 6, 2011, by the National Registry of Identity and Civil Status (Merits file, Volume I, pages 123-129).

filed a preliminary objection (*infra* para. 20) and asked the Court to “reject the arguments” regarding the alleged international responsibility of the State for the alleged violation of the rights enshrined in Articles “8(2) (c), 8(2) (h), 9, and 25(1) of the American Convention, in relation to Article 1(1) thereof, as well as Article 2 of that instrument. As to the reparations, Argentina objected both to those requested by the Commission, and those requested by the representatives. The State also indicated that it objected to increasing the number of beneficiaries of the pecuniary reparations requested by the representatives. The State appointed the Minister Eduardo Acevedo Díaz, General Director of Human Rights of the Ministry of Foreign Affairs, International Trade and Worship as its Agent, and, as alternate agents, it appointed Mr. Alberto Javier Salgado, Director of International Legal Affairs at the Department of Human Rights, Ms. Andrea Gualde, Director of International Affairs on Human Rights of the Secretariat for Human Rights, and Ambassador Juan José Arcuri, Ambassador of Argentina to the Republic of Costa Rica.

12. On March 28, 2012 and March 29, 2012, the Inter-American Commission and the representatives submitted, respectively, their observations to the preliminary objection raised by the State (*supra* para. 10).

13. On June 4, 2012, the President of the Court (hereinafter “the President”) issued an Order⁷, in which he declared admissible the request filed by the Inter-American defenders, in their role as representatives of the alleged victim, to access the Victims’ Legal Assistance Fund (*supra* para. 9) and made other determinations in that regard. The President also ruled on the objection filed by the State against the expert witness offered by the Commission, and ordered that his testimony, as well as that of the other expert witness, be rendered at the public hearing. Moreover, the President ordered that sworn statements be rendered before a notary public (affidavits) by the alleged victim and one expert witness; said statements were submitted by the representatives on June 19, 2012. In that Order, the President also summoned the parties and the Commission to a public hearing (*infra* para. 14).

14. On June 8, 2012, the State filed a motion against three points of the Order of the President, of June 4, 2012 (*supra* para. 12). On June 12, 2012, the Commission submitted its observations on the motion presented by the State. The representatives did not submit any observations. On June 18, 2012, the Court issued an Order in which it dismissed the motion filed by the State and, therefore, upheld the President’s Order of June 4, 2012.⁸

15. The public hearing took place on June 20 and 21, 2012, during the 95th Regular Period of Sessions, held at the seat of the Court.⁹ During the public hearing, testimony from two expert witnesses was heard, as well as the observations and final oral arguments of the Inter-American Commission, the representatives and the State.

⁷ Cf. *Case of Mohamed v. Argentina*. Order of the President of the Court of June 4, 2012, available at the web site of the Court at the following link: http://www.corteidh.or.cr/docs/asuntos/mohamed_04_06_12.pdf.

⁸ Cf. *Case of Mohamed v. Argentina*. Order of the President of the Court of June 4, 2012, available at: http://www.corteidh.or.cr/docs/asuntos/mohamed_18_06_12.pdf

⁹ The following individuals appeared at the hearing: a) for the Inter-American Commission: Rosa María Ortiz, Commissioner, and Silvia Serrano Guzmán, advisor to the Secretariat; b) for the representatives: Gustavo L. Vitale and Marcelo Torres Bóveda, Inter-American defenders, and Daniel García Cáneva, Assistant to the Inter-American Defenders, and c) for the State: Javier Salgado, Agent, Director of the Department of International Legal Affairs related to Human Rights, Argentine Foreign Ministry; María Cecilia López Uhalde, Department of International Legal Affairs related to Human Rights, Argentine Foreign Ministry; Yanina Berra Rocca, General Legal Counsel, Argentine Foreign Ministry; María Eugenia Carbone, Coordinator of International Affairs of the National Secretariat for Human Rights, and Ramiro Badia, Advisor of the National Secretariat for Human Rights.

16. On June 28, 2012, the Secretariat of the Court, following the instructions of the President, required the State to submit certain documents on domestic legislation, as well as a copy of the entire record of the criminal proceedings against Mr. Mohamed, in order to facilitate adjudication.

17. On July 6, 2012, the Court received an *amicus curiae* brief from the Chair of Human Rights of the Faculty of Law of the National University of Cuyo.¹⁰

18. On July 23, 2012, the State and the representatives submitted their final written arguments and the Inter-American Commission presented its final written observations. In addition, the State submitted its observations to the statements rendered by affidavits, as well as some of the documents requested as evidence to facilitate adjudication of the case (*supra* para. 15), as well as its observations the statements rendered by affidavits.

19. On July 26, 2012, the aforementioned briefs and final observations were conveyed to the parties and to the Inter-American Commission and the State was ordered to submit the missing documentation requested previously to facilitate adjudication of the case, no later than August 6, 2012. The State presented part of these documents on July 30, 2012. On August 6, 2012, said documents were sent to the representatives and the Commission and the State was asked, once again, to submit, no later than August 10, 2012, the missing documents and legible copies of some of the pages of the acquittal order issued on August 30, 1994, by the Correctional Court No. 3, Secretariat N° 60, of the Federal Capital, which were illegible. On August 10, 2012, the State provided "improved copies" of those pages and made some clarifications with respect to the documents requested to facilitate adjudication of the case. It also indicated that it "does not have a complete copy" of the record of the criminal proceedings against Mr. Mohamed given that "so much time had passed and said records [were] sent to the General Criminal Archive of the National Judiciary Office to be destroyed." On August 21, 2012, the "improved copies" of the pages and the information submitted by the State were forwarded to the representatives and the Commission, and a deadline was set for them to submit any observations they deemed pertinent with respect to the aforementioned evidence. On September 24, 2012, after an extension was granted, the Commission indicated that "it h [ad] no comments to make on the information provided by the State" to facilitate adjudication. The representatives did not submit any observations in this regard.

20. On September 20, 2012, the Secretariat, following the instructions of the President, informed the State about the expenditures covered by the Victims' Legal Assistance Fund in this case and, in accordance with the provisions of Article 5 of the Court's Rules for the Operation of the Fund, granted the State a deadline to submit any observations it deemed pertinent. On October 15, 2012, the State indicated that it had "no comments to make regarding the [aforementioned] expenditures."

III

PRELIMINARY OBJECTION

ALLEGED INABILITY OF THE COURT TO EXAMINE THE ALLEGED VIOLATION OF ARTICLE 8(4) OF THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS

Arguments of the State and observations of the Inter-American Commission and the representatives

¹⁰ The brief was filed by Messrs. Diego Jorge Lavado, Daniel E. Rodríguez Infante, Andrés Rousset Siri, Ignacio G. Perotti Pinciroli and Mrs. María Milagros Noli, of the Chair of Human Rights of the Law School of the National University of Cuyo.

21. The State requested that the arguments of the representatives of the alleged victims regarding the violation of Article 8(4) of the American Convention be rejected, given that this was the first time that the alleged violation of the principle of *ne bis in idem* was being raised in these international proceedings. Argentina held that the alleged victim “has accepted the supposed violation [of the principle of *non bis in idem*] by not having raised it in a timely manner, neither in the domestic courts nor in the international courts” and that “Mr. Mohamed’s conduct should be considered [...] as *estoppel*”. The State indicated that this omission on the part of the representatives had denied it the opportunity to duly address and respond to the issue and that “the subsidiary nature of international law to domestic law prevents [the] Court from dealing with these grievances.”

22. The Commission noted that the legal argument regarding the violation of Article 8(4) made by the representatives was based on the factual framework of the Commission’s Report on the Merits. Likewise, it held that the fact that a petitioner does not argue a specific violation under an Article of the Convention before the Commission “does not itself imply that, during the proceedings before the Court, with legal representation, the petitioner is constrained from raising legal arguments separate to those of the [Commission].” Similarly, it argued that the determining factor with regard to the State’s right to defense is the degree of connectedness and relationship between the legal claim brought before the Court and the purpose of the case processed and decided by the Commission. Furthermore, the Commission mentioned that at the stage of admissibility, the State formulated its defense in a generic manner, in the sense that in the proceedings against Mr. Mohamed, the State had respected the judicial guarantees set forth in Article 8 of the Convention.

23. The representatives stated that their arguments have remained within the factual framework presented by the Commission and therefore asked the Court to dismiss the preliminary objection. They further held that the “violations of the Convention [cannot] be consented to” and thus its argument “is not ‘precluded’ by not having been previously invoked [...] by the affected party”.

Considerations of the Court

24. The Court has stated that preliminary objections are acts that seek to prevent analysis of the merits of a disputed matter by contesting the admissibility of an application or the jurisdiction of the Court to hear a particular case, or any aspect thereof, owing either to the person, matter, time, or place, provided that these objections are of a preliminary nature.¹¹ If these objections cannot be examined without a prior review of the merits of the case, they cannot be examined by means of a preliminary objection.¹²

25. The State essentially bases its preliminary objection on the argument that the violation of Article 8(4) of the Convention, alleged by the representatives, was not litigated in the domestic proceedings nor was it brought before the Commission, thereby denying Argentina the opportunity to address and duly respond to the matter, in accordance with the subsidiary nature of international law (*supra* para. 20). In asking the Court to reject the objection raised, the Commission and the representatives

¹¹ Cf. *Case of Las Palmeras v. Colombia. Preliminary Objections*. Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Vélez Restrepo and Family v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 3, 2012 Series C No. 248, para. 30.

¹² Cf. *Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of Vélez Restrepo and family v. Colombia. Preliminary Objections, Merits, Reparations and Costs*, para. 30.

emphasized that the alleged violation of Article 8(4) is based on the factual framework presented by the Commission in the Report on the Merits (*supra* paras. 21 and 22).

26. In order to rule on the arguments raised by Argentina, the Court refers to its constant case law. This Court has held that alleged victims and their representatives may invoke the violation of rights other than those included in the Merits Report, provided that they adhere to the facts contained in said document, inasmuch as the presumed victims are entitled to the rights enshrined in the Convention.¹³ The application of the aforementioned criteria in the present case requires the Court to ascertain whether the alleged violation of Article 8(4) of the Convention refers to the facts included in the factual context presented by the Commission in its Report on the Merits.

27. The representatives allege the violation of the principle of *ne bis in idem* arguing that allowing an appeal against an acquittal by a party other than the accused, is to allow a double prosecution which violates this principle (*infra* para. 77).

28. The Court finds that the alleged the violation of Article 8(4) of the Convention is related to the factual framework established by the Commission in the Report on the Merits, since it refers to facts established by the judgments rendered in the criminal proceedings against Mr. Mohamed. In said Report, the Commission considered proven that Mr. Mohamed was acquitted of the charge of manslaughter in a judgment issued on August 30, 1994, by the National Correctional Court No.3, Secretariat N° 60 of the Federal Capital, and that this judgment was appealed and that, in a second instance proceeding, on February 22, 1995, the First Chamber of the National Court of Appeals on Criminal and Correctional Matters overturned the acquittal and found Mr. Mohamed guilty of the crime of manslaughter. The Court finds that, upon alleging a violation of Article 8(4) of the Convention, the representatives referred to the same facts mentioned by the Commission in its Report on the Merits, but in their legal arguments they characterize these as an alleged violation of the principle of *ne bis idem*.

29. Therefore, the Court rejects the preliminary objection filed by the State and, accordingly, in its analysis of the merits, it will rule on the alleged violation of Article 8(4) of the Convention as argued by the representatives.

IV JURISDICTION

30. The Inter-American Court has jurisdiction to hear this case, under the terms of Article 62(3) of the American Convention on Human Rights, given that Argentina is a State Party to the American Convention since September 5, 1984 and accepted the contentious jurisdiction of the Court on that same date.

V EVIDENCE

31. Based on the provisions of Articles 46, 47, 48, 50, 57, 58 and 59 of its Rules of Procedure, and on its case law regarding evidence and assessment thereof¹⁴, the Court will examine and assess the documentary evidence submitted by the parties and the Commission at the different procedural stages, the statement of the alleged victim, the

¹³ 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 Vélez Restrepo and Family v. Colombia. Preliminary Objection, Merits, Reparations and Costs*, para. 47.

¹⁴ Cf. *Case of the "White Van" (Paniagua Morales et al) V. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*. Judgment of October 24, 2011. Series C No. 251, para. 13.

expert opinions rendered by affidavit before a notary public and at the public hearing before the Court, as well as the evidence to facilitate adjudication requested by the President of the Court (*supra* paras. 14 and 15). In doing so, the Court will adhere to the principles of sound judgment, within the applicable legal framework.¹⁵

A) Documental, testimonial, and expert evidence

32. The Court received various documents offered as evidence by the Inter-American Commission and the representatives¹⁶, together with their main briefs (*supra* paras. 1 and 9) and the observations of the representatives to the preliminary objection filed by the State (*supra* para. 11), as well as the documents presented by the State as evidence to facilitate adjudication, as requested by the President of the Court (*supra* paras. 15, 17 and 18). Also, the Court received affidavits rendered before a notary public from: the alleged victim and expert witness Alberto Martín Binder. As to the evidence rendered at the public hearing, the Court heard the statements of the expert witnesses Alberto Bovino and Julio B. J. Maier.¹⁷

B) Admission of the evidence

B.1) Admission of the documentary evidence

33. In this case, as in others, the Court recognizes the evidentiary value of the documents submitted by the representatives and the Commission at the proper procedural stage, which have neither been contested nor challenged, and the authenticity of which has not been questioned.¹⁸

34. Likewise, with regard to certain documents identified by the representatives and the Commission by means of their electronic links, the Court has established that if a party provides at least the direct electronic link to the document cited as evidence, and it is possible to access this document, the legal certainty and the procedural balance will not be affected, because it is immediately accessible to the Court and to the other parties.¹⁹ The Court notes that upon offering as evidence several judgments issued by the domestic courts, the representatives, in their brief of pleadings and motions, mentioned an electronic link through which it is possible to access information provided by them. However, this evidence was also attached in an electronic email on December 11, 2011, within the period established for that purpose. In this case, neither the parties nor the Commission raised any objection or made any observations regarding the content and authenticity of such documents.

35. The State submitted certain documentation along with its final written arguments and communications of July 23 and 30, and August 10, 2012, in response to the President's requests for information and evidence to facilitate adjudication (*supra* paras. 15, 17 and 18). The Court deems it appropriate to admit the documents submitted by

¹⁵ Cf. *Case of the "White Van" (Paniagua Morales et al) V. Guatemala. Merits*, para. 76, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 13.

¹⁶ The State offered no evidence when submitting its answer brief.

¹⁷ The purpose of each of these statements is established in the Order of the President of the Court of June 4, 2012 (*supra* note 7).

¹⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 15.

¹⁹ Cf. *Case of Escué Zapata v. Colombia. Merits, Reparations and Costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 17.

Argentina, in accordance with Article 58(b) of the Rules of Procedure, which will be assessed with the body of evidence.

B.2) Admission of the statement of the alleged victim and expert evidence

36. As to the statement of the alleged victim and the expert reports rendered at the public hearing and by way of affidavits, the Court considers these pertinent only insofar as they are consistent with the purpose defined by the President of the Court in the Order requiring them (*supra* para. 12).

37. Pursuant to the case law of this Court, the statement of the alleged victim cannot be assessed on its own, but must be evaluated together with all the other evidence in the proceedings, since it is useful only insofar as it can provide more information on the alleged violations and their consequences.²⁰ Based on the foregoing, the Court admits the statement rendered by Mr. Mohamed (*supra* para. 12), and will assess it in accordance with the aforementioned criteria.

38. Accordingly, the Court admits the expert opinions indicated insofar as these are in line with the defined purpose, and they will be assessed together with the rest of the body of evidence, taking into account the observations of the State and in accordance with the rules of sound judgment.²¹

VI PROVEN FACTS

39. In 1992, Mr. Oscar Alberto Mohamed worked in the city of Buenos Aires as a bus driver of Line No. 2 for the company "Transporte 22 de setiembre."²² On March 16 of that year Mr. Mohamed was driving a bus and at approximately 10:10 am he was involved in a traffic accident at the intersection of Belgrano Avenue and Piedras Street. Mr. Mohamed was driving along Belgrano Avenue, which has six lanes running from west to east, and at the intersection with Piedras Street there was a pedestrian path or crossing and a traffic light. Mr. Mohamed ran over a woman who was walking on the pedestrian pathway or crossing half way across the avenue. The woman suffered severe injuries and died at around 10:45 am at the hospital to which she was taken.²³

40. Mr. Mohamed was married to Mrs. Julia Potenza, with whom he has four children: Javier Oscar, Ariel Alberto, Damián Darío and Daniel Alexis, who at the time of the event were 14, 12, 10, and 6 years old, respectively.²⁴

²⁰ Cf. *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Vélez Restrepo and family v. Colombia. Preliminary Objection, Merits, Reparations and Costs*, para. 72.

²¹ Cf. *Case of Loayza Tamayo v. Peru. Merits.*, para. 43, and *Case of Vélez Restrepo and Family v. Colombia. Preliminary Objection, Merits, Reparations and Costs*, para. 71.

²² Cf. Telegram of June 17, 1995, notification of dismissal addressed to Oscar Alberto Mohamed by "Transporte 22 de setiembre" (case file, attachments to the Merits Report 173/10, Annex 12, page 53), and statement rendered by Oscar Alberto Mohamed before a notary public (*affidavit*) on June 15, 2012 (Merits file, Volume II, page 758).

²³ Cf. Judgment issued on August 30, 1994 by the Correctional Court No. 3 Secretariat No. 60, Federal Capital (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 255 to 264); judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 308 to 323), and declaration rendered by Oscar Alberto Mohamed by affidavit on June 15, 2012 (Merits file, volume II, page 758).

²⁴ Cf. Marriage certificate of Oscar Alberto Mohamed and Julia Potenza, and birth certificates of children Javier Oscar, Ariel Alberto, Damián Darío, and Daniel Alexis Mohamed Potenza (file of attachments to the Merits Report 173/10, Annexes 3 and 4, pages 9 and 11 to 14).

A) Criminal proceeding against Mr. Mohamed

41. As a result of the events of March 16, 1992, on that same day case No. 25.013 was brought before the Correctional Court No. 3, Secretariat No. 60, against Mr. Mohamed for the crime of manslaughter.²⁵ This Court was not provided with the full copy of the criminal case file because “given the time that had elapsed, these proceedings [were] sent to the General Criminal Archive of the National Judiciary to be destroyed,”²⁶ although some court decisions and appeals were presented. The criminal procedural system applied to Mr. Mohamed in the criminal proceeding against him was governed by the Code of Criminal Procedure of 1888 (Law 2372), with its respective amendments.²⁷

42. The National Prosecutor of First Instance on Criminal and Correctional Matters No. 14 filed charges against Mr. Mohamed as the person criminally liable for the crime of manslaughter under Article 84 of the Criminal Code and requested “a prison sentence of one year and special disqualification from driving for six years with costs.” The prosecutor filed charges against Mr. Mohamed for having run over the aforementioned woman. The plaintiff’s lawyer requested that Mr. Mohamed be sentenced to “one year in prison, with special disqualification from driving for six years and payment of court costs.” Mr. Mohamed’s defense lawyer asked the judge to acquit him.²⁸

43. Article 84 of the Argentine Criminal Code (Law 11.179) states that:

“Any person who, through imprudence, negligence or incompetence in his or her art or profession, or failure to observe the regulations or duties under his or her responsibility, causes the death of another, shall be punished with imprisonment of six months to three years and special disqualification, as appropriate, for five to ten years.”²⁹

44. After receiving the evidence, the Public Prosecutor requested a permanent stay of proceedings in the case, the plaintiff’s representative “filed charges” and the defense requested an acquittal.³⁰

²⁵ Cf. Judgment issued on August 30, 1994 by the Correctional Court No. 3 Secretariat No. 60, Federal Capital, *supra* note 23, pages 252 to 267; notification slip of September 7, 1994 of the judgment issued on August 30, 1994 Correctional Court No. 3 Secretariat No. 60, Federal Capital (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 277) and official letter issued on September 29, 1994 by the Correctional Court No. 3 Secretariat No. 60, Federal Capital (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 284 and 285).

²⁶ Cf. Note DCINT No 624/2012 of August 10, 2012 sent by the State to the Inter-American Commission (Merits file, volume III, page 1173), and official letter of May 21, 2012 signed by the National Correctional Court N° 3, Secretariat N° 60 (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 374 and 375).

²⁷ The criminal procedural law applied in the proceeding was not included in the body of evidence in this case. However, the Court understands that the norm was applied on the basis of: the comments made by the representatives in their brief of pleadings and motions (File on the Merits, volume I, page 327); documents provided from the criminal case file (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012), and the explanation provided in the *Amicus curiae* brief in the section entitled “Status report on current criminal procedural law in Argentina at the time of the incident and subsequent reforms” (File of Merits, volume II, pages 811 and 812).

²⁸ Cf. Judgment issued on August 30, 1994 by the Correctional Court No. 3 Secretariat No. 60, Federal Capital, *supra* note 23, pages 254 to 267.

²⁹ Cf. Criminal Code of Argentina and Complementary Legislation, Law 11.179 of October 29, 1921 (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 79).

³⁰ Cf. Judgment issued on August 30, 1994 by the Correctional Court No. 3 Secretariat No. 60, Federal Capital, *supra* note 23, page 266.

A.1) Judgment of first instance issued by the National Court for Correctional Matters N° 3, Secretariat N° 60, of the Federal Capital

45. On August 30, 1994, the National Court on Correctional Matters No. 3 issued a judgment, wherein it decided, *inter alia*:

- I) TO ABSOLVE OSCAR ALBERTO MOHAMED of blame and responsibility [...] for the crime of manslaughter, defined and punished in Article 84 of the Criminal Code, in which Adelina Vidoni de Urli was a victim.
- II) WITHOUT COSTS (conf. Article 29, sect. 3 of the Criminal Code and Art. 144 and 496 sect. 3 of the Code of Criminal Procedure).
- III) REGULATING the professional fees of Dr. Roque Mantione in the amount of [...] ³¹.

46. In its considerations regarding Mr. Mohamed's criminal responsibility, the judgment held, *inter alia*, "that the version rendered by the accused cannot be rebutted with the onerous plexus of these proceedings." The court pointed out that it considered, among other evidence, the fact that the individuals who testified did not witness the incident, with the exception of one person, and explained the reasons why it considers that the latter's account contains contradictions, with one of these contradictions being "serious" and that therefore it "assessed [this person's] statements [...] with great caution." The court also mentioned that the indictment did not accuse Mr. Mohamed of having disregarded the red traffic light. In this sense, the court stated that "[i]n the presence of the traffic signal, the person with the green light has the right of way, and in this case, there is no evidence to refute the statements made by the defendant, [that] he had right of way along the avenue because there was a green traffic light at that intersection." It added that it took into account the fact that the person who was run over "was in the middle of the avenue and she was hidden from view by the bus [positioned] to her right." Next, the court examined the complaint that alleged that Mr. Mohamed was traveling at an excessive speed and, in this regard, it assessed the reports rendered by engineer of the Federal Police's Traffic Accidents department and of the expert witness for the defense, who concluded that it is possible to stop the bus sharply and suddenly going at 10 km/h, which according to the court contradicts the plaintiff's position. Finally, the court considered that "while there may be a suspicion in the [court's interpretation] as to whether or not [Mr. Mohamed] ran the red traffic light, his guilt has not been convincingly proven" and stated that it "[d]oes not find any clear legal proof that would invalidate the original presumption of innocence and that would rule out the 'favor rei' principle (Art. 13 of the adjectival Code [...])."³²

A.2) Appeal of the acquittal

47. On August 31, 1994, upon being notified of the acquittal, the prosecutor of the Public Prosecutor's Office lodged an appeal against operative points I and II of the judgment concerning the acquittal and costs (*supra* para. 44)³³. On September 9 and 20,

³¹ Cf. Judgment issued on August 30, 1994 by the Correctional Court No. 3, Secretariat N° 60, of the Federal Capital, *supra* note 23, page 266.

³² Cf. Judgment issued on August 30, 1994 the Correctional Court N° 3, Secretariat N° 60, of the Federal Capital (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 252 to 267).

³³ Cf. Appeal lodged on August 31, 1994 by the representative of the Public Prosecutor's against the judgment issued on August 30, 1994 by the Correctional Court N° 3, Secretariat N° 60 (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 268), and ruling issued on August 30, 1994 by the Correctional Court N° 3, Secretariat N° 60, *supra* note 23, pages 266 and 267.

1994, Mr. Roque J. Mantione, Mr. Mohamed's defense counsel, appealed against the fees established in point III of the acquittal.³⁴ On September 14, 1994, the representative of the plaintiff filed an appeal against points I and III of the judgment, in regard to the acquittal and the fees of the defense lawyer (*supra* para. 44)³⁵. In the criminal case file provided, it appears that the current regulations allowed an appeal to be filed without presenting grievances or supporting arguments, something that was done subsequently (*infra* para. 47). On September 29, 1994 the National Correctional Court No. 3, Secretariat No. 60, of the Federal Capital allowed these appeals and ordered the case to be transferred to a higher court.³⁶ The following day the case was assigned by drawing lots to the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters, composed of three judges.³⁷

48. On October 31, 1994, a "hearing [was set] for November 17, 1994 at 10 am, establishing a period of 15 minutes for the plaintiff and the defense to present arguments in their favor."³⁸ On November 15, 1994, the plaintiff's representative filed his list of grievances, requesting that the court "revoke the appealed judgment and convict [Mr. Mohamed] for the offense defined and punished in Article 84 of the Criminal Code, and require him to pay the costs of that trial."³⁹ On November 16, 1994, Mr. Mohamed's defense attorney filed his list of grievances, in which he requested "confirmation of the judgment of first instance" and justified his appeal against the fees. In that brief, Mr. Mohamed's defense attorney also requested that the court admit "the list in replacement of the oral report ordered" to present the respective legal arguments.⁴⁰ The Public Prosecutor did not file complaints to support the appeal filed. As the State explained to this Court, under the procedural law in effect at that time, this "did not prevent the deciding court from hearing the appeal."⁴¹

A.3) Conviction issued in a second instance proceeding

³⁴ Cf. Appeals filed on September 9 and 20 1994 by the defense attorney of Oscar Alberto Mohamed against the decision issued on August 30, 1994 by the Correctional Court N° 3, Secretariat N° 60 (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 270 and 279); list of grievances presented by Mr. Roque J. Mantione, defense counsel of Oscar Alberto Mohamed, on November 16, 1994 to the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 301 to 307).

³⁵ Cf. Appeal filed by the plaintiff's representative on September 14, 1994 against the judgment issued on August 30, 1994 by the Correctional Court No. 3 Secretariat No. 60 (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 274).

³⁶ Cf. Official letter of September 29, 1994 issued by Correctional Court No. 3 Secretariat No. 60, Federal Capital, (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 284 and 285).

³⁷ Cf. Certification issued on September 30, 1994 by the Secretariat of the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 287), and Judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters, *supra* note 23, pages 320 and 323).

³⁸ Cf. Official letter issued on October 31, 1994 by the Secretariat of the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 292).

³⁹ Cf. List of grievances filed by the representative of the plaintiff on November 15, 1994 in the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 293).

⁴⁰ Cf. List of grievances presented by the defense attorney of Oscar Alberto Mohamed on November 16, 1994 in the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 305).

⁴¹ Cf. Note DCINT No 624/2012 on August 10, 2012 sent by the State to the Inter-American Court (Merits file, volume III, page 1173).

49. On February 22, 1995, the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters issued a ruling in which it decided, *inter alia*: to revoke operative point I of the appealed judgment (*supra* para. 44) and convict Mr. Mohamed “for his criminal responsibility in the crime of manslaughter, and to sentence him to three years in prison, suspended, and to disqualify him from driving any type of vehicle for eight years (Arts. 26 and 84 of the Criminal Code)”, and to revoke operative point II of the appealed judgment and order the offender to pay the costs of both court proceedings.⁴²

50. In that ruling, the First Chamber stated, *inter alia*, that it did not share the position of the lower court, which “to assess blame [...], focused exclusively on whether the defendant or the victim had the green light, as if such a municipal authorization could absolve the accused of all responsibility and obviate the need to investigate the behavior that, contrary to the objective duty of care, resulted in the punishable act”. The Chamber then affirmed that Mr. Mohamed “violated the law that prohibits passing another vehicle at an intersection, precisely to ensure that drivers have the necessary visibility at all times and are therefore in control of their actions.” Similarly, the Chamber held that “Mr. Mohamed’s account, when he rendered his preliminary statement, demonstrates the defendant’s recklessness in driving the vehicle for which he was responsible.” The Chamber described the defendant’s version of events as “virtually a confession of reckless conduct.” It asserted that “[t]he standards of care, being objective standards of prevention, are not at the disposal of individuals and therefore are not abrogated by lack of use” and, regarding such norms, stated the following:

Among the internationally accepted norms applicable to this case, is the duty of one who creates a risk for third parties to act in a manner so as to have full control of that risk at all times, in order to prevent any damage to others, which could result from possible and foreseeable circumstances; a related obligation is for one who passes another vehicle to maintain sufficient visibility, and not to begin passing at an intersection, curve, bridge or other dangerous place; and a third duty is to yield to pedestrians on a pedestrian crossing at all times in areas where there are no traffic lights, and as indicated where there are traffic lights. In our legislation, these principles are contained in Articles 37, 39 and 40 of Decree Law N°, 692/92, which regulates automobile traffic.⁴³

Next, the Chamber found that “Mohamed, failing to exercise reasonable care to guarantee third party assets, started up his bus in order to pass to the left of another bus, so that when he was behind he voluntarily deprived himself of any possibility of preventing a collision with the pedestrian who was still crossing on the crosswalk, unlike the bus of line 103, which by maintaining the necessary field of view from his position, avoided a collision.” The Chamber added that “in order to establish reproachable criminal liability” it also took into account the testimony of an eye-witness, which the court had assessed with caution, and referred to that evidence.⁴⁴

⁴² Cf. Judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters, *supra* note 23, page 321.

As for the “suspended” prison sentence, the Court notes that Article 26 of the Criminal Code provides that “[i]n cases of a first sentence to prison that does not exceed three years, the courts shall have the authority to suspend the sentence in the same ruling. This decision shall be duly justified [...]. There shall not be conditional sentencing for penalties of fines or disqualification.” Cf. Criminal Code of Argentina and Complementary Legislation, Law 11.179 of October 29, 1921, *supra* note 29, page 67.

⁴³ Cf. Judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters, *supra* note 23, pages 308 to 323.

⁴⁴ Cf. Judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters, *supra* note 23, pages 308 to 323.

51. The legal system applied in the process against Mr. Mohamed did not provide any ordinary remedy to appeal the conviction of second instance.⁴⁵

B) Subsequent legal remedies

B.1) Special federal appeal⁴⁶

52. The only remedy available against that final conviction was the special federal appeal, contemplated in Article 256 of the Code of Civil and Commercial Procedure, whose admissibility requirements established by law were limited to the federal matters and the clearly arbitrary nature of the judgment (*infra* paras. 102 and 103). The appeal had to be filed “before the judge, court or administrative body that issued the decision that prompted it,” which “shall decide on the admissibility of the appeal” and, “[i]f it admits it, [...] shall refer the case to the Supreme Court” of Justice.⁴⁷

53. On March 13, 1995, Mr. Mohamed’s defense attorney filed a special federal appeal against the conviction before the First Chamber of the National Chamber of Appeals on Correctional Matters, which rendered its decision, “in accordance with Articles 256 and 257 of the Code of Civil and Commercial Procedure” and “based on Articles 14 and 15 of Law 48.” The defense requested that the Chamber consider the appeal lodged in a timely manner, admit it, and transfer the proceedings to a Superior court and that the higher court, “decide the annulment of the final judgment [...] ordering the issuance of a new decision according to law.”⁴⁸ In the appeal, Mr. Mohamed’s defense counsel argued that constitutional guarantees of access to the federal level had been affected and, among the reasons for the complaint, he mentioned: i) the “error in the legal basis” for having “sought justification in a rule not applicable to this case” given that the decree cited in the ruling was not in effect at the time of the traffic accident; ii) the self-contradiction in the judgment; iii) having disregarded decisive evidence, including “the planimetric survey [...] that] indicates that there is a distance of 76.06 meters from the

⁴⁵ Cf. Expert opinion rendered by Julio B. J. Maier before the Inter-American Court in the public hearing held on June 20, 2012, and expert opinion rendered by Alberto Bovino before the Inter-American Court at the public hearing held on June 20, 2012. Likewise, the *amicus curiae* brief filed by the Chair of Human Rights of the Law Faculty of the National University of Cuyo (Merits file, volume II, page 823).

⁴⁶ In this Judgment the Court will use the terms “special federal appeal” or “special appeal” to refer to the procedural mechanism for challenging a judgment enshrined in Article 256 of the Code of Civil and Commercial Procedure of Argentina, as a “special recourse of appeal before the Supreme Court of Justice” and Law 48 of 1863, to which the previous norm refers, wherein Article 14 establishes the cases in which one can “appeal final judgments to the Supreme Court” (attachments to the Report on Merits 173/10, Annex 16). The Court points out that the Commission, the parties, the expert witnesses and the *amicus curiae* brief, refer to this remedy interchangeably as “special appeal”, “special appeal before the Supreme Court” or “special federal appeal.” In this Judgment, the Court shall refer to said remedy mainly as “special federal appeal”, bearing in mind that this meaning identifies this procedural institution according to its purpose. In this regard, the expert witness Julio B. J. Maier informed this Court that “the special appeal in Argentina only introduces federal matters, it is a remedy that is very limited to certain legal issues and federal legal matters.”

⁴⁷ Cf. Code of Civil and Commercial Procedure (Law 17.454), Articles 256 and 257 (Attachments to the Merits Report 173/10, Annex 16). The Commission submitted as Annex 16 the “relevant parts of the Code of Civil and Commercial Procedure Argentina. Available at: [http://novo.dir_eitoprocesual.org.br/fileManager/Codigo procesal civil y comercial de la nacion.pdf](http://novo.dir_eitoprocesual.org.br/fileManager/Codigo%20procesal%20civil%20y%20comercial%20de%20la%20nacion.pdf)”. According to Article 256 of this Code, the admissibility requirements for the special appeal are established “in Article 14 of Law 48”. The Inter-American Commission did not provide the aforementioned Law 48, but in Article 256 of the Code of Civil and Commercial Procedure, submitted as Annex 16, the content of Article 14 of Law 48 is transcribed. The Court points out that the State did not submit any observations with respect to the content of the document offered by the Commission as Annex 16 to its Report on the Merits, despite the fact that the electronic link provided by the Commission does not come from an official web site of Argentina.

⁴⁸ Cf. Special appeal filed on March 13, 1995 by the defense attorney of Oscar Alberto Mohamed against the judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 330 and 344).

line 2 bus stop to the beginning of the intersection with Piedras" [street], which would prove that "the maneuver described by Mohamed, of turning left and proceeding past [bus] 103 is correct [... and that] he did so more than 70 meters from the intersection and without causing any inconvenience to traffic"; and iv) that the ruling was based "on dogmatic statements, which are not consistent with the facts or with the law."⁴⁹

54. On April 7, 1995, the Prosecutor of Chamber No. 1 filed a report in which he considered it appropriate to "reject the special appeal", because the doctrine of arbitrariness invoked by the defense counsel "is of an exceptional nature" and "[its] automatic concession would require opening a third ordinary instance where the parties would consider the decision rendered by the judges in the case mistaken." As to the citing of Decree 692/92 in the judgment, the prosecutor stated that "although [said regulation] is not applicable, the final decision does not differ from the one that would have been reached on the basis of traffic regulations in effect at the time of the event, which contain similar guidelines to the objective duty of care because they pertain to the general rules of conduct, manner of passing other vehicles and the right of way of pedestrians [...]."⁵⁰ On April 27, 1995, the plaintiff's representative filed an answer brief in response to the special appeal filed by Mr. Mohamed's defense lawyer, calling on the Chamber to reject the appeal.⁵¹

55. On July 4, 1995, the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters issued a ruling in which it decided to "reject the special appeal" and ordered the appellant to "pay costs."⁵² The Court held, *inter alia*, that the arguments presented by the defense "refer to matters of fact, evidence and common law, that were assessed and debated in the challenged judgment" and that this remedy "does not seek to make the Supreme Court of Justice a third ordinary instance, nor to correct erroneous or allegedly erroneous decisions." The Court emphasized that this remedy "seeks to address exceptional cases in which the total absence of a legal basis prevents consideration of the ruling of the ordinary judges as a judgment based on law, with reference to Arts. 17 and 18 of the National Constitution [...]". Next, the Court stated that:

[a]lthough the Court has made a material error in citing [said] decree, which was not in force at the time of the incident, the conviction of the defendant is based on the violation of the

⁴⁹ Cf. Among which the defense emphasized the following: a) the ruling stated that Mr. Mohamed should not have begun overtaking "before an intersection", when, according to his defense counsel, the overtaking "complied with all required preventive measures" and was done when Mr. Mohamed was 76.06 meters from where the accident occurred; and b) the ruling is not logical in reasoning that Mr. "Mohamed had voluntarily deprived himself of any possibility of not hitting the victim". On this last point, the defense counsel stated that "it is obvious that passing parallel to another vehicle, in an avenue with five or six lanes, it is not possible to see to the sides" and that "[p]recisely Avenida Belgrano, with one-way multi-lane traffic, is made for all lanes to be used and for vehicles to move at different speeds or at the same speed if traffic conditions so require." According to the defense attorney, the lack of logic in the reasoning of the conviction "is evident if we imagine that in all avenues with traffic light signals, all vehicles that do not have visibility to the sides must break." Cf. Appeal filed on March 13, 1995 by the defense counsel of Mr. Oscar Alberto Mohamed against the Judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 343 and 344).

⁵⁰ Cf. Prosecutor's report presented on April 7, 1995 by the Prosecutor of the Chamber regarding the special appeal filed by Oscar Alberto Mohamed's defense attorney (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 351 and 352).

⁵¹ Cf. Answer brief submitted on April 27, 1995 by the plaintiff's representative against the special appeal lodged by the defense counsel of Mr. Oscar Alberto Mohamed (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 360).

⁵² Cf. Decision issued on July 4, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 363).

objective duty of care, a circumstance that has been duly demonstrated in the proceedings and that, as has been noted previously, is not a matter for discussion in this forum.⁵³

56. The aforementioned Decree 692/92, which establishes the Traffic and Transportation Regulations, was published in the Official Gazette No. 27,379 of the Argentine Republic on April 30, 1992.⁵⁴

B.2) Recurso de queja (motion for review of appeal)

57. If the special federal appeal is declared inadmissible, a “complaint over the appeal denied” can be filed to ask the Supreme Court to grant the denied appeal.⁵⁵

58. On July 18, 1995, Mr. Mohamed’s defense attorney filed a motion for review with the Supreme Court of Justice “for having been denied the special appeal filed against the final judgment rendered at the second instance,” and requested that the judgment be annulled and a new decision be issued. The defense attorney noted that “the judgment and also the ruling denying the special appeal are arbitrary.” He reiterated his position on the *ex post facto* application of Decree 692/92 in this case and added that in “[Argentine] legislation there is no offense for “the violation of the objective duty of care” as an autonomous legal definition and that it must be based on “specific regulations.” According to the defense, having referred to the aforementioned decree as the regulatory source, the Chamber “create[d] an autonomous legal definition” since this rule is not applicable to the facts of this case. Regarding the possibility that the Supreme Court “may reject the [special] appeal [...]when the matters raised are insubstantial or lacking transcendence” under Article 280 of the Code of Civil and Commercial Procedure, emphasized that in this case Mr. Mohamed had been convicted subsequent to the annulment of the acquittal rendered at first instance and that “[this] compromised international agreements signed by the country”, regarding which the Supreme Court had recently ordered their application. It further noted that the decision to reject the special appeal violated Article 9 of the American Convention.⁵⁶

59. On September 19, 1995, the Supreme Court of Justice issued a ruling in which it “reject[ed] the motion for review” given that “the special appeal, whose denial gave rise to the [...] complaint, [was] inadmissible (Art. 280 of the Code of Civil and Commercial Procedure).”⁵⁷

B.3) Motion for “revocation”

60. On September 27, 1995, Mr. Mohamed’s defense attorney filed a brief before the Supreme Court of Justice calling on it to revoke its decision to dismiss the motion for review. Among other arguments, he stated that by dismissing the motion for review, the

⁵³ Cf. Decision issued on July 4, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters, *supra note* 52, pages 362 and 363.

⁵⁴ Cf. Decree 692/92 which approved the “Traffic and Transportation Regulations” of April 27, 1992, published in the Official Bulletin of the Argentine Republic N° 27.379 on April 30, 1992 (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 40 to 49).

⁵⁵ Cf. Code of Civil and Commercial Procedure (Law 17.454), Articles 282 to 287, *supra note* 47.

⁵⁶ Cf. Motion for review “for denial of the appeal” filed by the defense attorney of Oscar Alberto Mohamed ante the Supreme Court of Justice on July 18, 1995 (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 2 to 9).

⁵⁷ Article 280 of the Code of Civil and Commercial Procedure, concerning the “Proceeding before the Supreme Court”, states that “[...] The Court, at its own discretion, and based solely on this norm, may reject the [special] appeal for lack of sufficient federal harm or when the questions raised are insubstantial or lacking transcendence. [...]”. Cf. Code of Civil and Commercial Procedure (Law 17.454), Articles 282 to 287, *supra note* 47, and decision issued on September 19, 1995 by the Supreme Court of Justice (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 13).

Supreme Court “ha[d] denied its jurisdiction and [Mr. Mohamed] ha[d] not been hear [d] with the proper guarantees,” which constituted violation of Article 8 of the American Convention on Human Rights. He also argued that “by having applied a regulation retroactively,” the revocation of the acquittal had also violated Article 9 of the Convention. He further stated that in filing the motion to revoke the decision he sought to comply with the requirement to exhaust domestic remedies in order to have access to the inter-American System of Human Rights.⁵⁸

61. On October 19, 1995, the Supreme Court of Justice dismissed the motion filed by Mr. Mohamed’s defense lawyer, indicating that “the Court’s decisions are not subject to replacement or revocation.”⁵⁹

C) Consequence of criminal disqualification from driving

62. On July 17, 1995, after the special federal appeal was rejected (*supra* para. 54), Mr. Mohamed was fired from his job as a bus driver. According to the telegram sent to notify him of his dismissal, he was dismissed because of “his criminal disqualification from driving.” The same telegram also stated, “work contract terminated [,] your fault.”⁶⁰ Mr. Mohamed received a monthly salary of 500 pesos and 75/100.⁶¹

VII RIGHT TO JUDICIAL GUARANTEES, IN RELATION TO THE DUTY TO ADOPT DOMESTIC LEGAL EFFECTS AND OBLIGATION TO RESPECT AND GUARANTEE RIGHTS

A) Introduction

63. In this case, both the Commission and the representatives have alleged that in the criminal proceedings against Mr. Mohamed, which established his responsibility for committing the crime of manslaughter, his right to appeal the judgment was violated, a judicial guarantee protected under Article 8(2) (h)⁶² of the American Convention, as well

⁵⁸ Cf. Brief filed on September 27, 1995 by the defense attorney of Oscar Alberto Mohamed against the decision issued on September 19, 1995 by the Supreme Court of Justice (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, pages 15 and 16).

⁵⁹ Cf. Ruling issued on October 19, 1995 by the Supreme Court of Justice (evidence file to facilitate adjudication presented by the State on July 23 and 30 and August 10, 2012, page 18).

In this regard, on October 31, 1995 Mr. Mohamed’s defense attorney “formulated] statements” in connection with the payment of a deposit for the filing of a motion for review in accordance with the provisions of Article 286 of the Code of Criminal Procedure, Law 2372 of 1888, and reiterated his request to the Supreme Court that “[he] be exempted” from said payment. Statement - Deposit Article 286 CPCC filed by Roque J. Mantione, defense attorney of Oscar Alberto Mohamed received by the Supreme Court of Justice on October 31, 1995 (evidence file to facilitate adjudication presented by the State el July 23, 2012, pages 19 to 21).

⁶⁰ Cf. Telegram dated June 17, 1995 notifying Oscar Alberto Mohamed of his dismissal from “Transporte 22 de Setiembre” (File of attachments to the Report on Merits 173/10, Annex 12, page 53).

⁶¹ Cf. Receipt for payment No. 4/0041 of April 1995 by “Transporte 22 de septiembre” to Oscar Alberto Mohamed (File of attachments to the Report on Merits 173/10, Annex 2, page 7).

⁶² Article 8 (Judicial Guarantees) of the Convention states:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

h) the right to appeal the judgment to a higher court

as the duty established in Article 2⁶³ thereof, to provisions of domestic law. The representatives argued that, in revoking the acquittal of first instance, a violation of Article 8(4) of the Convention occurred, and they also alleged a violation of Mr. Mohamed's right to defense in said criminal proceeding.

64. Furthermore, the Commission and the representatives argued that the judicial decisions issued by the First Chamber of the Appeals Court and by the Supreme Court of Justice when ruling on the admissibility of the special federal appeal and of the motion for review (*recurso de queja*), resulted in violations of the right to defense protected in Article 8(2)⁶⁴ (c) of the Convention and of the right to a simple, prompt and effective recourse enshrined in Article 25(1)⁶⁵ thereof. The representatives held that these decisions by the court also implied violations of Article 8(1)⁶⁶ of the Convention, in relation to the right to be heard and the duty to substantiate the decision.

65. The arguments of the Commission and the arguments of the parties regarding these alleged violations are summarized in the next section, which is followed by the considerations of the Court.

B) Arguments of the Commission and arguments of the parties

B.1) Alleged violation of the right to appeal the judgment (Article 8(2)(h) of the Convention) in relation to the obligation to adopt domestic legal effects (Article 2 of the Convention)

66. The Commission held that the guarantee established in Article 8(2)(h) of the Convention is not "the right to 'two instances', but rather to a review by a higher court, of the conviction [...] regardless of the stage at which [this] occurs," a conclusion that supports "not only [the] text of Article 8(2)(h)) [...] which does not distinguish between procedural stages, but of the preparatory work of the American Convention that reflects the modification of an initial draft that was limited to a review of the judgment in the "first instance". Likewise, it referred to the "view of the Human Rights Committee which has interpreted Article 14(5) of the Covenant." It also emphasized that "any person convicted, even at the second instance [on appeal] following an acquittal at first instance, has the right to request a review of various types of issues and to have these effectively analyzed by the higher Court that conducts the review, precisely for the purpose of correcting possible errors of interpretation, assessment or analysis of evidence, as alleged by the defense of [Mr.] Mohamed in each of the instances to which

⁶³ Article 2 of the Convention establishes that "[w]here 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."

⁶⁴ Article 8 (Judicial Guarantees) of the Convention establishes that:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[...]
- c) adequate time and means for the preparation of his defense

⁶⁵ Article 25(1) of the American Convention establishes that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or Court for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

⁶⁶ Article 8(1) of the American Convention establishes that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial Court, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

he resorted.” The Commission held that given the criminal conviction imposed in the second instance against Mr. Mohamed “the only remedy was the special appeal” and that this “did not provide a timely, accessible and effective review in accordance with the standards [of the Convention],” given that the scope of that review is limited and restricted to matters of patent unconstitutionality and arbitrariness. It also pointed out that the invocation of Article 280 of the Code of Civil and Commercial Procedure allows the Supreme Court of Justice to render a discretionary review of the special appeal, since it can reject it “without [...]examining the merits of the matter.” For the Commission “[t]he absence of an effective remedy that allows for a review in accordance with the parameters established in the [...] Report [on Merits], constitutes a violation by [the State] of its obligation to adopt domestic legal effects enshrined in Article 2 of the Convention.”

67. The Commission also referred to the argument made by Argentina in its answer (*infra* para. 68) regarding the Court’s alleged inability to examine the merits with regard to Article 8(2)(h), and stated that this is a preliminary matter, even if it was not classified as such by the State. Similarly, regarding the State’s argument that it had stated in “all its replies” in the proceedings before the Commission that Mr. Mohamed did not present an argument regarding the right to appeal the judgment, the Commission indicated that it considers that this allegation was never proposed in order to “provide legal consequences on compliance with the requirements of admissibility of the petition [...] nor did it argue that this situation would prevent the Commission from hearing the facts of this case.” In the Commission’s view, the foundation for the argument presented by Argentina before the Court is based on elements of the conventional requirement of admissibility of the non-exhaustion of domestic remedies, which contradicts what was expressly stated in its brief of October 31, 1996, where it affirmed “that domestic remedies have been pursued and exhausted in accordance with the principles of international law as required in Article 46(1)(a) of the Convention.” Therefore, the Commission considers the State’s arguments to be time-barred.

68. The representatives of the alleged victim stated that for judicial guarantees to be respected in a criminal proceeding, “the accused must have the opportunity to challenge decisions that cause him harm, such as [...] a criminal conviction.” They pointed out that Mr. Mohamed had no remedy available to him under the terms guaranteed by Article 8(2) (h) of the Convention given that, the special federal appeal was the only remedy provided by Argentine procedural law to challenge the conviction in second instance, which “did not allow for a timely, effective, and accessible review.” They stated that the reasons for admitting a special federal appeal are limited to patent unconstitutionality and arbitrariness, which does allow for a review of the facts and the law contained in the judgment. For the representatives, the rejection of the special appeal by the First Chamber of the National Chamber of Appeals, the subsequent denial of the motion for review and the revocation by the Supreme Court of Justice also constituted a violation of [Mr.] Mohamed’s right to [...] be heard on appeal and, therefore, to a fair trial [judicial guarantees].” The representatives likewise agreed with the views of the Commission regarding the obligation to adapt domestic legal effects.

69. The State argued that the Court is unable to hear the merits regarding Article 8(2) (h) of the Convention because Mr. Mohamed “at no time [...] alleged [a] violation [of the right to appeal the judgment] upon filing the relevant recourses (special appeal, motion for review and revocation), thereby accepting such a situation, for which reason the State could hardly address, in its domestic proceedings, grievances that were never submitted to its consideration”. Argentina held that “it is not relevant to argue an alleged domestic flaw in the judicial response, since it should be understood that the result in the domestic courts arose from the appellant’s omission to raise such grievances.” In support of this argument, the State referred to a decision handed down by the Superior Court of Justice of the Autonomous City of Buenos Aires in ruling on a motion of unconstitutionality, similar in nature to the special federal appeal, where the “principle of

the right to review by a higher court” was protected. Furthermore, the State argued that “[i]n all its answers to the Inter-American Commission [...] it always referred to the fact that the petitioner did not raise the federal question” regarding “the violation of his right to have his conviction reviewed pursuant to the terms of Art. 8(2) (h) of the Convention.” The State affirmed that, based on such reasons and the subsidiary nature of international law, “the Court cannot address grievances that have not been heard in the domestic courts.” Moreover, the State argued that comparative international law provides exceptions to the right to appeal criminal convictions, for which it referred to paragraph 2 of Article 2 of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

B.2) Alleged violation of the obligation to provide adequate time and means to prepare a defense (Article 8(2) (c) of the Convention)

70. The Commission held that the State had violated the right to a defense, because the decision of the First Chamber of the National Chamber of Appeals to declare inadmissible the special appeal “change[d] the grounds for the conviction” without granting Mr. Mohamed the procedural opportunity to be heard regarding this “new basis for the charges.” It added that Mr. Mohamed was not heard during the processing of the appeal, nor afterwards, given that both the motions of review and of revocation filed subsequently were rejected *in limine* by the Supreme Court of Justice. The Commission referred to the case law of the Inter-American Court and the European Court of Human Rights in arguing the need to ensure the right to defense when modifying the legal definition of the facts during a proceeding.

71. The representatives indicated that the attempt to correct the “material error” by the First Chamber of the National Chamber of Appeals was a “new and surprising argument” which, since it did not form part of the appealed conviction, could not be taken into account by Mr. Mohamed’s defense as a basis for the appeal, and it had “no opportunity to rebut” the new grounds, constituting a violation of the right to defense under the terms of Article 8(2)(c).

72. The State indicated that “it is not true that the decision which denied the special appeal filed by [Mr.] Mohamed’s defense, had changed the grounds for the criminal charge, upon arguing that the sentence was based mainly on the violation of the ‘objective duty of care’ under Article 84 of the Argentine Criminal Code.” It noted that in the judgment of February 22, 1995, the Appeals Court convicted Mr. Mohamed “finding him criminally responsible for the crime of manslaughter under Article 84 of the Criminal Code,” and that in the ruling it had expressly stated that such norm provided “the legal grounds for the conviction.” The State asserted that in the decision which denied the special appeal, the Chamber confirmed this analysis. Argentina considered the allegations relating to the “alleged inability of the accused to prepare his defense for lack of time or appropriate means” to be “clearly unfounded.”

B.3) Alleged violation of the duty to substantiate any accusation and of the right to be heard (Article 8(1) of the Convention)

73. The representatives argued that the State had an obligation to respect and guarantee the right to be heard, but that Argentina did not consider or respond to Mr. Mohamed’s claim in the special appeal in which he challenged the conviction. The representatives indicated that, when ruling on the admissibility of the special appeal, the very same judges who convicted Mr. Mohamed at the second instance rejected the recourse considering that it was not a comprehensive remedy and “disregard [ing] the

constitutional issues invoked." They also "affirmed, improperly, that due to a 'material error' they based their conviction on a traffic regulation that was not in effect at the time of the incident". The representatives argued that said judges did not have jurisdiction to rule on these issues but rather only "to formally accept or reject the appeal." Referring to the guarantee to provide solid grounds, the representatives pointed out that Article 280 of the Code of Civil and Commercial Procedure is contrary to the American Convention, since the terms used in this norm encompass an enormous margin of imprecision and "appear to ensure [...] complete arbitrariness on the part of the highest Argentine Court to choose the cases it seeks to rule upon." The representatives considered that invoking reasons of insubstantiality and lack of transcendence regarding a constitutional violation to deny access to justice, "acquires an unacceptable magnitude when, due to that transgression, the punitive mechanism is enabled", and they argued that Article 280 as rule of civil procedure should not be used with respect to exceptional remedies within a criminal proceeding.

74. In response to the Supreme Court's alleged discretion to reject an appeal, the State argued that this "does not violate any judicial guarantee, since no right exists to have the Supreme Court of a country review all the cases referred to it, neither at the domestic nor the international levels." It explained that with Law 23774 of 1990, "Argentine *certiorari*" was introduced, which contains "in its various versions, the *negative* to forestall a review, [and] the *positive* to open one.

B.4) Alleged violation to the right to judicial protection (Article 25(1) of the Convention)

75. The Commission held that Mr. Mohamed, in addition to seeking a review of the conviction imposed on him for the first time in the second instance, filed the special federal appeal with the intention that the "violation of the principle of non-retroactivity of criminal law, a right enshrined in the American Convention," be heard, but that when the court handed down the decision of inadmissibility of the appeal, "it assessed the allegation *in limine*" declaring that "the inclusion of the [...] traffic regulation [Decree 692/92] was a 'material error' in the conviction, interpreting that the conviction was based on a violation of the objective duty of care." The Commission held that this meant that "the violation of the principle of legality was not remedied, while closing off access to an effective remedy [...], violating the right to have access to a simple and prompt recourse that would protect him against a violation of his right to the non-retroactivity of criminal law."

76. The representatives argued that "[t]he State of Argentina [...] denied [Mr.] Mohamed his *right to a simple and prompt recourse*, by declaring inadmissible the special appeal and then [declaring] inadmissible the remedies of review and revocation."

77. The State pointed out that "Mr. Mohamed was afforded the opportunity to challenge the conviction, which the Inter-American Commission and the representatives of the victim consider violates the principle of legality, through the special appeal rejected by the National Court of Appeals." Similarly, it affirmed that "the Inter-American Commission [may] not share the content of the ruling challenged, but it cannot infer from it that Mr. Mohamed was not guaranteed access to a simple and prompt recourse, given that the effectiveness of a remedy has to do with its potential capacity to produce the result required in order to protect the right, but does not guarantee a particular outcome." Similarly, the State pointed out that "Mr. Mohamed had at his disposal a prompt and simple recourse to complain about matters which in his view have caused him harm [, ... but] he did not use it", since the violation of this guarantee is a federal matter, and if Mr. Mohamed had argued so, the highest domestic court could have ruled on the matter, which "shows that in this situation it cannot be asserted that the

appropriate remedy was not available to the interested party," and therefore "the alleged violation of Article 25(1) of the Convention has not existed."

B.5) Alleged violation of the right protected under Article 8(4) of the Convention

78. The representatives argued that Mr. Mohamed's right to not be judged twice for the same matter was violated because the acquittal of first instance was revoked. They stated that the "possibility of appealing to another higher court to review the criteria [...] used by the court that heard the case [...] has only been established as an individual right of the accused." Likewise, referring to the doctrinal position of Julio Maier, they stated that the prosecutor's appeal against the acquittal obtained in a legitimate trial "provoked a new criminal prosecution seeking conviction or a more severe sentence, which subjected the defendant to a new risk of conviction and, eventually, to a new trial." Furthermore, they referred to certain case law of the Supreme Court of Justice⁶⁷ in which "it held, continuously", that the principle of *non bis in idem* "not only forbids the application of a second sentence for same cause but also exposure to the risk of that occurring" and that "the failure to validate the acquittal following the prosecution's appeal implied a new procedural risk for the accused, which had already been successfully overcome [...]". The representatives noted that if this had been admitted by the Supreme Court of Justice, then "it must be respected by the Inter-American Court of Human Rights (in accordance with the provisions of Article 29)" of the Convention.

79. The State argued that the representatives of the alleged victim were basing the alleged violation of the principle of *ne bis in idem*, "on cases in which the factual basis is very different to that of the present case", where there were procedural defects that "have nothing to do with the case of the alleged victim." Furthermore, Argentina argued that the principle of *ne bis in idem* requires the existence of a final acquittal. The State indicated that Mr. Mohamed "has been tried only once and did not have a final acquittal," so that there was no double jeopardy.

C) General Considerations of the Court

80. In similar cases, the Court has established that the determination of whether or not the State has violated its international obligations due to the actions taken by its

⁶⁷ In their pleadings and motions brief the representatives specifically referred to the following rulings of the Supreme Court of Justice: 314:377; 319:43; 320:374; 321:1173, dissenting opinions of the judges Petracchi and Bosert; "Appeal for review argued by the defense of Yong Soo Kang in the case of Kang, Yong Soo s/ case No. 5742" [K. 75. XLII. APPEAL FOR REVIEW, Kang, Yong Soo s/ case N° 5742], ruling of May 15, 2007; Case of Polak, Federico G, ruling of October 15, 1998 (Rulings 321:2826); Case of Mattei (Rulings 272-188); case of Sandoval, decided on August 31, 2010 by the Supreme Court of Justice, ("Appeal for review argued by the defense of David Andrés Sandoval in the case of Sandoval, David Andrés s/homicide aggravated by cruelty -3 victims-, Sandoval, Javier Orlando s/concealment, case No 21.923/02"); 329:1147 (considering paragraph 17 of the opinion of Judge Petracchi). In offering evidence in said brief (chapter "IX. Submission of Evidence"), in the chapter entitled "3. Documentary evidence", the representatives did not submit a list of the domestic judgments offered as evidence, but in general indicated "[w]e add, as documentary evidence, in Annexes 2 to 8, an enormous number of Rulings of the Supreme Court of Justice". In their final written arguments, in presenting their position regarding the "scope that should be given to the guarantee against double jeopardy, contained in Article 8[...]4" they stated, with respect to the Rulings of the Supreme Court, "we have included as evidence (among which we emphasize the Case of Sandoval, because of its importance and proximity in time, the Case of Kang [...]). Here we refer to our brief of pleadings and evidence and to the corresponding attachment." However, the Court notes that, from a review of 2204 pages of domestic judgments submitted as Annexes 2 to 8 of the pleadings and motions brief, it finds none of the judgments of the Supreme Court to which the representatives alluded when referring to the principle of *ne bis in idem*. The only ruling provided by the representatives was the one mentioned in the brief of observations to the Preliminary Objection: "CSJN, K. 121. XLIV. Kang, Yoong Soo s/ rec. Special proceedings: 'Kang, Yoong Soo s/ special record.' Buenos Aires, December 27, 2011".

judicial bodies, may require the Court to examine the respective domestic proceedings⁶⁸ to establish their compatibility with the American Convention.⁶⁹

81. It is important to point out that the Court, when referring to the judicial guarantees protected in Article 8 of the Convention, also known as procedural guarantees, has established that in order to ensure that these guarantees truly exist in a proceeding, according to the provisions of Article 8 of the Convention, it is necessary to observe all the requirements that “serve to protect, ensure or assert entitlement to a right or the exercise thereof”⁷⁰, in other words, which “comply with the terms required to ensure the adequate defense of those whose rights or obligations are under judicial consideration.”⁷¹ The aforesaid provision of the Convention contemplates a system of guarantees that condition the exercise of *ius puniendi* by the State and that seek to ensure that the accused or defendant is not subject to arbitrary decisions, as “due guarantees” must be observed that ensure the right to due process in the corresponding procedure.⁷² Moreover, this Court has stated that “every person subject to a trial of any nature before a State body must have the assurance that said body [...] will act according to the terms of the procedure legally established for hearing and deciding the case.”⁷³

82. Furthermore, the Court considers it pertinent to recall that in cases such as this, in which the proceedings carried out in the context of a criminal case and in subsequent judicial remedies are being called into question, the organs of the Inter-American System of Human Rights do not operate as an instance of appeal or review of judgments issued in domestic processes,⁷⁴ nor do they act as a criminal court that analyzes the criminal responsibility of individuals. Their function is to determine the compatibility of the actions carried out in said processes with the American Convention and,⁷⁵ in particular, to analyze the actions and omissions of domestic judicial bodies in light of the guarantees protected in Article 8 of that treaty.⁷⁶

⁶⁸ Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Palma Mendoza et al. v. Ecuador. Preliminary Objection and Merits*. Judgment of September 3, 2012. Series C No. 247, para. 18.

⁶⁹ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 146, and *Case of Palma Mendoza et al. v. Ecuador. Preliminary Objection and Merits*, para. 18.

⁷⁰ Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations and Costs*. Judgment of June 21, 2002. Series C No. 94, para. 147, and *Case of Tiu Tojin v. Guatemala. Merits, Reparations and Costs*. Judgment of November 26, 2008. Series C No. 190, para. 95.

⁷¹ Cf. *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Serie A No. 9, para. 28, and *Case of Tiu Tojin v. Guatemala. Merits, Reparations and Costs*, para. 95.

⁷² Cf. *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights)*. Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 28, and *Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs*. Judgment of October 13, 2011. Series C No. 234, para. 117.

⁷³ Cf. *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, para. 77, and *Case of Yvon Neptune V. Haiti. Merits, Reparations and Costs*. Judgment of May 6, 2008. Series C No. 180, para. 80.

⁷⁴ Cf. *Case of Fermín Ramírez V. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005. Series C No. 126, para. 62, and *Case of Yvon Neptune v. Haiti. Merits, Reparations and Costs*, para. 37.

⁷⁵ Cf. *Case of Castillo Petruzzi et al. v. Peru. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para. 83; *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs*. Judgment of May 30, 1999. Series C No. 52, para. 90, and *Case of Yvon Neptune V. Haiti. Merits, Reparations and Costs*, para. 37.

⁷⁶ Cf. *Street Children” (Villagrán Morales et al.) V. Guatemala. Merits*, para. 220, and *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 144.

83. Under Articles 8 and 25 of the American Convention, States are required to provide effective legal remedies to victims of human rights violations, which must be substantiated pursuant to the rules of due process of law.⁷⁷ Likewise, the Court recalls that it is a basic principle, embodied in International Human Rights Law, that every State is internationally responsible for any action or omission committed by any of its powers or bodies in violation of internationally recognized rights.⁷⁸ The Court has pointed out that the guarantee of an effective remedy "constitutes a basic pillar, not only of the American Convention, but of the Rule of Law in a democratic society under the terms of the Convention."⁷⁹

84. States have the responsibility to establish in law and to guarantee the proper application of effective remedies and guarantees of due process of law before the competent authorities, to protect all persons subject to their jurisdiction from acts that violate their fundamental rights or that imply the determination of their rights and obligations.⁸⁰

85. Taking into account the facts which the Court considers have been established in the present case, in this chapter the Court will rule on the alleged violations in the following order: 1) the right to appeal the judgment before a higher judge or court, in relation to the duty to adopt domestic legal effects, and 2) the right protected in Article 8(4) of the Convention. Also, in the legal analysis of the right to appeal the judgment the Court will refer to the alleged violations of the right to defense, the right to be heard, the obligation to substantiate a decision, and the right to a simple and prompt recourse.

86. The Court will not rule on the alleged violations of Articles 8(2)(d), 8(2)(e), 25(2)(a), and 25(2)(b) of the American Convention, included by the representatives in their pleadings and motions brief, given that representatives did not present legal arguments regarding these alleged violations, nor did they even mention the facts on which they were based. Furthermore, the Court will not rule on the alleged violation of Mr. Mohamed's right to defense during the criminal proceeding against him,⁸¹ which was argued only by the representatives, given that they base their arguments on rules of criminal procedure that were not submitted in the body of evidence of this case.

D) Right to appeal the judgment before a higher judge or court (Article 8(2)(h) of the Convention), in relation to the obligation to adopt domestic legal effects (Article 2 of the Convention)

87. The Court will determine whether Mr. Mohamed had the right to appeal the conviction, which requires the Court to rule on the scope of the right protected by Article

⁷⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Massacres of Rio Negro V. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 4, 2012. Series C. No. 250, para. 191.

⁷⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 164, and *Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs*. Judgment of April 3, 2009 Series C No. 196, para. 72.

⁷⁹ Cf. *Case of Castillo Páez v. Peru. Merits. Judgment of November 3, 1997. Series C No. 34*, para. 82, and *Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of June 30, 2009. Series C No. 197, para. 59.

⁸⁰ Cf. *Case of the "Street Children" (Villagrán Morales et al.) V. Guatemala. Merits*, para. 237, and *Case of Furlan and Family V. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2012 Series C No. 246, para. 209.

⁸¹ According to the representatives there was a violation because Mr. Mohamed was convicted in a second instance proceeding in "a judgment [in which there was no] [previous] indictment," which was a requirement at the time when the events of the present case occurred and it was necessary for a court to issue "a conviction." Moreover, they argued that at that time, in Argentina, "the complaint [...] was merely of an additional nature [to the prosecution's charge]". The representatives argued that "there was no legitimacy to a conviction without an indictment."

8(2)(h) of the Convention in regard to one specific point that is relevant to resolve this case (*infra* section D.1). The Court recalls that the conviction for the offense of manslaughter was imposed on Mr. Mohamed for the first time in second instance, in the judgment of the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters, which overturned the acquittal issued by Correctional Court No. 3, Secretariat No. 60. (*supra* paras. 48 and 49).

88. After ruling on the content of said right established in the Convention (*infra* section D.2), the Court will consider whether the special federal appeal and the subsequent remedies of a motion for review and for revocation filed by Mr. Mohamed met the conventional requirements (*infra* section D.3) and will settle the dispute as to whether there was a violation of the obligation to adopt domestic legal effects established in Article 2 of the Convention (*infra* section D.4).

D.1.) Scope of Article 8(2)(h) of the Convention with respect to criminal convictions issued upon resolving an appeal against acquittal

89. On several occasions, this Court has referred to the standards that must be observed to ensure that the right to appeal the judgment before a higher judge or court is guaranteed, in accordance with Article 8(2)(h) of the Convention.⁸² In this case, Argentina has not disregarded or contradicted those precedents, but it has alleged as a main point that Mr. Mohamed could have had access to the aforementioned right if he had made proper use of the legal remedies available, and did not do so.⁸³

90. However, at the same time, Argentina presented another argument related to the scope of the right to appeal the judgment. The State held that comparative international law provides exceptions to the right to appeal criminal convictions, whereupon it referred to paragraph 2 of Article 2 of the Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which stipulates the exception in respect of a person who has been convicted after an appeal against his acquittal. The State indicated that Mr. Mohamed falls under that category, since he was convicted for the first time in a second instance proceeding, "and therefore there was no violation of Article 8(2)(h) of the Convention." On this aspect of the right to appeal the judgment, both the Commission and the representatives (*supra* paras. 65 and 67) understand that this guarantee favors the accused and that, regardless of whether the conviction was imposed in a first or second instance, the right to a review of that decision must be guaranteed through a remedy that meets the standards defined by the Court in its jurisprudence.

91. The Court points out that this case has the peculiarity that the defendant was subject to a criminal proceeding in two instances, and was convicted in the second instance which overturned the acquittal issued by the court of first instance. To determine whether Mr. Mohamed had the right to appeal before a higher judge or court, the Court must decide whether the protection enshrined in Article 8(2)(h) of the

⁸² Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs*, para. 161; *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, paras. 157 to 168, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, paras. 88 a 91.

⁸³ The State argued that when Mr. Mohamed filed the extraordinary appeal and the motion for review, he did not allege a violation of the right to appeal the judgment, which, according to the principle of subsidiarity, the Court cannot rule on issues that have not been heard at the domestic level (*supra* para. 68). The Court points out that this allegation was made by Argentina in its answer brief, within its considerations on the merits regarding "[t] he alleged violation of Article 8(2)(h) of the American Convention." Given that the State did not raise this argument as a Preliminary Objection, the Court has not reviewed this in a preliminary manner, but rather it will consider the arguments raised upon ruling on the State's alleged international responsibility for failing to guarantee the right protected by Article 8(2)(h) of the Convention.

American Convention allows for an exception, as Argentina claims, when the accused has been declared guilty by a court that hears the appeal against his acquittal.

92. Article 8(2) of the Convention provides for the protection of basic guarantees in favor of “[e]very person accused of a criminal offense.” In the last paragraph in which it sets forth these guarantees, which is h), it refers to “the right to appeal the judgment before a higher court.” The Court understands that Article 8(2) refers, in general terms, to the minimum guarantees of a person that is subject to an investigation and criminal proceeding. These minimum guarantees must be protected within the context of the various stages of criminal proceedings, which encompass the investigation, accusation, prosecution, and conviction.

93. Bearing in mind that judicial guarantees seek to ensure that anyone involved in a proceeding is not subject to arbitrary decisions, the Court interprets that the right to appeal a judgment cannot be effective unless it is guaranteed in respect of all those who are convicted, since the sentence is the manifestation of the exercise of punitive power of the State.⁸⁴ It is contrary to the purpose of that particular right that it should not be guaranteed to someone who is convicted in a judgment that overturns an acquittal. To interpret it otherwise would leave the convicted person without the right to an appeal against the conviction. This involves a guarantee to the individual against the State and is not merely a guide for the design of appeal systems within the domestic legal systems of the States Parties to the Convention.

94. To confirm this Court’s interpretation that this is a right that assists the convicted person, it is appropriate to consult the specific language used in Article 14(5) of the International Covenant on Civil and Political Rights⁸⁵ which, in referring to the right to appeal the judgment, expressly states that this is a guarantee of “[e]veryone *convicted* of a crime” (italics added). On another occasion, the Court has held that this rule of the Covenant is “very similar” to Article 8(2)(h) of the American Convention.⁸⁶

95. The State has argued that it would be allowed to establish exceptions to the right to appeal criminal convictions (*supra* para. 68), based on the fact that Article 2 of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms allows certain exceptions.⁸⁷ In this regard, the Court does not agree with the scope that Argentina gives to that provision of the European System to interpret the corresponding provision of the American Convention, precisely because the latter did not provide exceptions as did the European System.

96. Based on the foregoing considerations, the Court concludes that, under the terms of the protection afforded by Article 8(2)(h) of the American Convention, Mr. Mohamed was entitled to appeal the ruling handed down by the First Chamber of the Chamber of

⁸⁴ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72, para. 107.

⁸⁵ Article 14(5) of the International Convention on Civil and Political Rights states that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

⁸⁶ Cf. *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, para. 84.

⁸⁷ Article 2 of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental freedoms states:

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Appeals on February 22, 1995, inasmuch as this ruling convicted him of the offense of manslaughter (*supra* para. 48).

D.2) Content of the right to appeal the conviction

97. The Court will refer to the content of the guarantee afforded by Article 8(2)(h) of the Convention and, in the next section, it will determine whether that right to appeal was guaranteed to Mr. Mohamed. The Court's considerations in this regard will be based on the view of the protection that said Conventional norm guarantees to a person convicted of a criminal offense.

98. The Court has indicated that the right to appeal the judgment is an essential guarantee that must be respected in the context of legal due process, in order to allow an adverse ruling to be reviewed by a different judge or court of higher rank.⁸⁸ The right to appeal, expressed through access to a remedy that offers the possibility of a comprehensive review of a conviction, confirms the grounds and affords greater credibility to the State's judicial actions, and at the same time provides greater security and protection to the rights of the convicted person.⁸⁹ Furthermore, the Court has stated that the important point is that the remedy should guarantee the possibility of a comprehensive review of the appealed decision.⁹⁰

99. The right to challenge the ruling seeks to protect the right of defense, to the extent that it offers the possibility of bringing an action to prevent a decision adopted in a flawed process and one that contains errors from becoming final, which would be unduly prejudicial to a person's interests.⁹¹

100. The Court has held that Article 8(2)(h) of the Convention refers to an ordinary accessible and effective remedy⁹². This means that it should be guaranteed before the judgment becomes *res judicata*.⁹³ The efficacy of the remedy implies that it must seek to provide results or answers for the purpose for which it was conceived.⁹⁴ Similarly, the remedy must be accessible, that is, it should not involve great complexities that render this right illusory.⁹⁵ Accordingly, the Court considers that the formalities required for the appeal to be admitted should be minimal and should not constitute an obstacle to the remedy fulfilling its purpose of examining and resolving grievances argued by the appellant.

101. It should be understood that, regardless of the regimen or system of appeals adopted by States Parties and of the name given to a means for challenging the

⁸⁸ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 158.

⁸⁹ Cf. *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, para. 89.

⁹⁰ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 165, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, para. 89.

⁹¹ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 158, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, para. 88.

⁹² Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, paras. 161, 164, 165 and 167, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, paras. 88, 89 and 90.

⁹³ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 158, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, para. 88.

⁹⁴ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 161, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, para. 90.

⁹⁵ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 164, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*, para. 90.

conviction, in order for it to be effective, it must constitute an appropriate means for attempting to correct a wrongful conviction. This requires it to analyze questions of fact, evidence, and law upon which the contested judgment is based, since in judicial activity there is interdependence between the factual determinations and the application of law in such a way that an erroneous finding implies a wrong or improper application of law. Consequently, the reasons for which the remedy is admissible should allow for extensive control of the contested aspects of the sentence.

102. The Court also considers that the regulations that States develop in their respective systems of review, must ensure that an appeal against a conviction respects the minimum procedural guarantees that are relevant and necessary under Article 8 of the Convention to resolve grievances raised by the appellant, which does not necessarily imply a new trial.

D.3) Regarding Mr. Mohamed's alleged inability to appeal the conviction and the procedural mechanisms to which he had access within the Argentine legal system in light of Article 8(2)(h) of the Convention

103. The Court points out that it is not a disputed fact that the legal system applied to Mr. Mohamed did not contemplate any ordinary criminal recourse to enable him to appeal his conviction (*supra* para. 50). In this regard, the Court has considered proven that the conviction of second instance was a final judgment that could be appealed only through a special federal recourse and a subsequent motion for review (*supra* paras. 51 and 56).

104. As to the special appeal under analysis in this case, its admissibility is decided by the same court which issued the sentence that is being contested, and if admitted, it is decided on the merits by the Supreme Court of Justice of (*supra* para. 51). The appeal is governed by the Code of Civil and Commercial Procedure, which in turn refers to Law 48 of 1863, which establishes the following procedural requirements:

1) when in a trial, the validity of the treaty, a law of Congress, or of an authority exercised in the name of the Nation is questioned, and the decision goes against its validity; 2) when the validity of a law, decree or provincial authority has been called into question under the claim of being abhorrent to the National Constitution, treaties, or laws of Congress, and the decision was in favor of the validity of the law or provincial authority; 3) when the interpretation of a clause of the Constitution, a treaty, or act of Congress, or a committee exercised on behalf of the national authority has been questioned and the decision is against the validity of the title, right, privilege or exemption of that clause, and it is subject to litigation.⁹⁶

105. Based on said regulation, and on the expert opinions received by this Court, it is possible to confirm that the aforementioned special federal recourse is not a remedy under criminal procedure to challenge a conviction, but rather it is an exceptional recourse regulated by the Code of Civil and Commercial Procedure, which has its own purpose in the Argentine legal system. Moreover, the causal elements that condition the admissibility of such a remedy are limited to review issues relating to the validity of a law, treaty, or constitutional provision, or the arbitrariness of a judgment, factual and evidentiary issues, as well as those of a non-constitutional legal nature.

106. Notwithstanding the foregoing, and bearing in mind that the State argued that the special federal appeal could have guaranteed the right to appeal a conviction, the Court will make some additional observations in its examination of the treatment given by the judicial bodies in this case to the actions brought by Mr. Mohamed. Because Mr.

⁹⁶ *Supra* note 47.

Mohamed did not have, under law, a remedy to protect his right to appeal his conviction, he made use of the special federal appeal because it was the only remedy available to try to challenge his conviction. It is also pertinent to refer to the motion for review, since it was the procedural means to challenge the denial of the special federal appeal and, therefore, also compromised Mr. Mohamed's possibilities of having the right to appeal the judgment. As for the motion for revocation filed by Mr. Mohamed's defense attorney before the Supreme Court of Justice (*supra* paras. 59 and 60), the Court considers that it is not appropriate to rule on this matter, since it was not a procedural means available to Mr. Mohamed given that, according to the Supreme Court of Justice, "[its] judgments [...] are not subject to reversal or revocation" (*supra* para. 60).

107. The Court considers it necessary to emphasize that, even when analyzing whether these remedies would have effectively protected Mr. Mohamed's right to appeal his conviction, due to the regulations of the special federal appeal (*supra* paras. 51 and 103), the nature and extent of the grievances filed by the Mr. Mohamed's defense was conditioned *a priori* to the procedural grounds of that recourse. These grounds *per se* limited Mr. Mohamed's chances of raising grievances calling for a broad and effective examination of the challenged conviction. Therefore, it should be noted that such a limitation negatively impacts the effectiveness that this remedy could have in practice.

108. Likewise, the Court notes that the ruling by the Supreme Court of Justice which rejected the motion for review, did so stating only that "the special appeal, whose denial prompt[ed] the [...] motion, [was] inadmissible (Article 280 of the Code of Civil and Commercial Procedure" (*supra* para. 58). The Court considers that the fact that the remedy had been rejected based on Article 280 of the Code of Civil and Commercial Procedure makes the accessibility of the recourse uncertain, since this provision enables the unsubstantiated denial of the recourse, so that those who turn to the justice system, in this case Mr. Mohamed, do not know the reasons why they were unable to have access to that procedural mechanism. This was clearly expressed by Mr. Mohamed's defense in his grounds for the request for revocation, submitted after the motion for a review was rejected (*supra* para. 59), in which he stated that "[t]here is no parameter or any regulatory element to guide appellants on matters that may be substantive or transcendent for [the Supreme Court]. Therefore, it is a situation that is impossible to assess *a priori*."

109. As to the argument put forward by Argentina that in the case of *Lori Berenson Mejía v. Peru*, the Court had decided not to examine the merits of a particular claim, even though the State did not file an objection to the requirement of non-exhaustion of domestic remedies, the Court makes it clear that in that case it decided not to rule on the merits of the argument regarding the alleged lack of independence and impartiality of the judges in the ordinary jurisdiction because the appeal for disqualification to which there was access had not been filed in a timely manner by the alleged victim's defense.⁹⁷ This situation is not present in the case, since the Court considers it proven that Mr. Mohamed filed the special federal appeal and the motion for review, contemplated in the legal system to challenge the final judgment, precisely to attempt, through those channels, to obtain the guarantee of his right to appeal (*supra* paras. 52 to 58), a situation to which he was subjected because the legal code did not contemplate an ordinary appeal to enable him to challenge his conviction. By filing those appeals, Mr. Mohamed requested that a higher court review his claims against certain issues of law and fact regarding the challenged conviction, including the principle of non-retroactivity, and he also made it clear in those recourses that the conviction had been issued for the first time at the second instance [on appeal] overturning the acquittal issued in the first instance.

⁹⁷ Cf. *Case of Lori Berenson Mejía v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2004. Series C No. 119, paras. 151 to 156.

110. Regarding the State's argument concerning a decision by the Superior Court of Justice of the Autonomous City of Buenos Aires wherein it considered "formally admissible" an appeal on unconstitutionality and the "guarantee of legal defense and the principle of the right to review by a higher court had been protected, (*supra* para. 68), the Court considers that this, by itself, is not sufficient for Argentina to comply with the burden of demonstrating the effectiveness of the special federal appeal.⁹⁸ As is evident, this does not involve an argument that specifically refers to the latter remedy nor does it grant minimum legal certainty that the decisions of the Supreme Court of Justice would allow challenges against convictions and effectively ensure the aforesaid right to appeal a judgment.

111. The Court has found that in this case the limited scope of the special federal appeal is evident from the decision handed down by the First Chamber of the Chamber of Appeals, which dismissed *in limine* the appeal filed by Mr. Mohamed's defense attorney given that the arguments concerned "matters of fact, evidence and common law, which ha[d] been assessed and disputed in the contested judgment" (*supra* para. 54).

112. The Court further emphasizes the seriousness of the fact that, in this case, Mr. Mohamed was not guaranteed the right to appeal the conviction, taking into account that it appears that deficiencies arose in guaranteeing the right of defense in the second instance of the criminal proceedings against the appeal filed against the acquittal. The Court notes that in the criminal proceedings, the Public Prosecutor accused Mr. Mohamed of manslaughter, and subsequently requested the stay of proceedings, and then, after the acquittal in the first instance, appealed without stating the reasons for the appeal (without stating grievances). The complainant also appealed and filed grievances or grounds for the appeal, but there is no evidence in criminal proceedings that the brief had been provided to Mr. Mohamed's defense attorney, so that he could render statements on those grievances prior to the issuance of the judgment of the second instance which overturned the acquittal and criminally convicted Mr. Mohamed.

113. For the foregoing reasons, the Court concludes that the Argentine criminal procedure system that was applied to Mr. Mohamed did not guarantee an accessible and effective ordinary appeal that allowed for a review of the conviction against Mr. Mohamed under the terms of Article 8(2)(h) the American Convention, and it also considers that the special federal appeal and the motion for review, while safeguarding access to the first, were not effective remedies to guarantee the protected right in this specific case.

D.4) Obligation to Adopt Domestic Legal Effects (Article 2 of the American Convention) in relation to the right to appeal the judgment

114. Article 2 of the American Convention establishes the general obligation of States Party to adapt their domestic legislation to its provisions in order to ensure the rights set forth therein. The Court has held that this obligation involves an action on two fronts. First, the suppression of provisions and practices that result in the violation of the guarantees set forth in the Convention. Secondly, the adoption of rules and the development of practices leading to the effective observance of those guarantees.⁹⁹

115. The Court points out that the facts of this case involve a necessary relationship between Mr. Mohamed's right to appeal his conviction, on the one hand, and the

⁹⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*, para. 88, and *Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs*, para. 25.

⁹⁹ Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs*, para. 207, and *Case of González Medina and relatives v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 27, 2012. Series C No. 240*, para. 243.

obligation to adopt domestic legal effects to guarantee the right, on the other. The Court has established that Argentina had a duty to ensure that Mr. Mohamed had access to an effective, timely and accessible remedy that guaranteed a comprehensive and extensive review (*supra* paras. 90 to 101) of the conviction imposed on him for the first time in second instance. In this regard, the Court determined that the remedies that were available to Mr. Mohamed under the laws in force at that time in Argentina, that is, the special federal appeal and the motion for review, did not guarantee that right (*supra* paras. 102 to 112).

116. As to Argentina's arguments concerning the legal and jurisprudential developments for guaranteeing the right to appeal a ruling, the Court will not rule on this matter in this case since it involves measures supposedly adopted after the facts of this case, and which refer to legal norms governing the cassation appeals that were not applied in the criminal proceedings against Mr. Mohamed.

117. Accordingly, the Court concludes that the absence of a judicial remedy to guarantee comprehensive and extensive review of Mr. Mohamed's conviction and the application of judicial remedies that also did not guarantee the right to appeal the judgment implied a failure by the State to fulfill its general obligation to adapt its domestic law to ensure compliance with the judicial guarantee protected by Article 8(2)(h) of the Convention.

118. Based on the foregoing considerations, the Court concludes that Argentina violated the right to appeal the judgment protected under Article 8(2)(h) of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Mr. Oscar Alberto Mohamed.

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119. As to the alleged violations of the right to defense, the right to be heard, the duty to substantiate the decision and the right to a simple, prompt and effective recourse supposedly derived from the judicial decisions issued by the First Chamber of the Court and by the Supreme Court of Justice upon ruling on the admissibility of the special federal appeal and the motion for review (*supra* paras. 69, 70, 72, 74 and 75), the Court finds that the alleged damages suffered by Mr. Mohamed due to these judicial decisions are encompassed within the violation of the right to appeal the judgment. It was precisely the absence of a comprehensive integrated appeal under the terms of Article 8(2)(h) of the Convention, which would have guaranteed the possibility of challenging the conviction in second instance, which propitiated and enabled the situations alluded to by the Commission and the representatives.

120. The Court also emphasizes that, notwithstanding the fact that each of the rights contained in the Convention has its own sphere, meaning and scope¹⁰⁰, the failure to guarantee the right to appeal the judgment prevents the exercise of the right to defense which is protected through this mechanism and implies the lack of protection of other basic guarantees of due process that must be assured to the appellant, as applicable, so that a higher judge or court may rule on the grievances argued. Accordingly, the Court does not consider it necessary to issue an additional ruling on the alleged violation of the rights to defense, the right to be heard, the duty to substantiate the decision and the right to a simple and prompt remedy.

E) Alleged violation of the right protected in Article 8(4) of the American Convention

¹⁰⁰ Cf. *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of May 26, 2010. Series C No. 213, para. 171.

121. The principle of *ne bis in idem* is contemplated in Article 8(4) of the American Convention in the following terms:

An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause

122. This principle is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause. Unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14(7), which refers to the same "crime"), the American Convention uses the expression "*the same cause*," which is a much broader term in favor of the accused or defendant.¹⁰¹

123. The Court has consistently held that among the elements that establish the situation covered by Article 8(4) of the Convention, is the holding of a first trial which ends in a non-appealable acquittal.¹⁰² The Court has also noted that the criminal proceeding is one complete process carried out in various stages,¹⁰³ including the ordinary remedies filed against the judgment.

124. In this case, the judgment convicting Mr. Mohamed for the crime of manslaughter was issued in the second instance of criminal proceedings. That conviction overturned the acquittal that had been issued in the first instance in the same criminal proceeding. The conviction was not issued in a retrial after a non-appealable judgment that had taken on authority of *res judicata*, but rather it was issued in a stage of the same criminal proceeding initiated against Mr. Mohamed for the events of March 16, 1992. (*supra* para. 38).

125. As to the arguments of the representatives that Argentina has developed a protection "standard [...] that is more protective than that which would arise from a literal interpretation of the text of Article 8(4) of the Convention" on *non bis in idem*, and that this should be taken into account by this Court in interpreting the protection afforded by such a norm of the Convention, this Court points out that the representatives did not include in the body of evidence of this case the rulings of the Supreme Court of Justice to which they referred in their pleadings and motions brief (*supra* para. 77 and footnote 67). Even though the experts Maier and Binder addressed this issue in their expert opinions, from a doctrinal position or making reference to the rulings of the Supreme Court, it has not been proven before this Court, with the required certainty, that in Argentina the principle of *ne bis in idem* is legally protected and must be more broadly guaranteed than under the terms stated in the Convention. Therefore, the Court finds no grounds for considering the request of the representatives regarding the standard of interpretation of Article 29.b) of the Convention.

126. The Court reiterates that the principle *ne bis in idem*, enshrined in Article 8(4) of the Convention, is based on the prohibition of a new trial on the same facts that have been the subject of the judgment under authority of *res judicata*. The Court finds that Mr. Mohamed was not subjected to two different trials or judicial proceedings for the same cause.

127. Based on the foregoing, the Court considers that the State did not violate Article 8(4) of the Convention to the detriment of Mr. Oscar Alberto Mohamed.

¹⁰¹ Cf. *Case of Loayza Tamayo v. Peru. Merits*, para. 66.

¹⁰² Cf. *Case of Cantoral Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69, para. 137, and *Case of Lori Berenson Mejia v. Peru. Merits, Reparations and Costs*, para. 202.

¹⁰³ Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs*, para. 161, and *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*, para. 159.

VIII
ALLEGED VIOLATION OF PRINCIPLE OF LEGALITY (ARTICLE 9, FREEDOM FROM EX POST FACTO LAWS), IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS

A) Arguments of the Commission and of the parties

128. The Commission indicated that in this case the judgment of the Chamber of Appeals in which Mr. Mohamed was convicted, "integrated the crime of manslaughter established in Article 84 of the [Argentine] Criminal Code, with the provisions of Decree No. 692/92." The Commission argued that this regulation entered into force on April 27, 1992, while the events of the present case took place on March 16 of the same year, thereby violating the principle of legality, enshrined in Article 9 (Freedom from Ex Post Facto Laws) of the American Convention. Furthermore, it pointed out that said violation "was not remed[ied] by the judgment of the Chamber of Appeals that declared inadmissible the special appeal", because the ruling of the Appeals Court "eliminated the [r]egulations not in effect and determined that, in any case, Mr. Mohamed had breached his duty of care." For the Commission, this action by the Chamber of Appeals resulted in a new violation of the principle of legality with respect to the precise definition of criminal offenses.

129. The representatives pointed out that in this case the principle of legality was violated because the conviction was based on a regulation that was not in effect, given that, at the time of the events, Decree No. 12.689, issued in 1945, was in force. The representatives further stated that, on the sole basis of Article 84 of the Argentine Criminal Code, no one would be able to assess the prohibited actions, since "[o]nly when the prohibitions or mandate are known and comprehended (for which, the regulations must precede the acts being tried), may acts or omissions in breach of the duty of care be criminally enforced." In addition, they indicated that the "act attributed" to Mr. Mohamed "was (and is), not only punishable by prison sentence, but mandatory disqualification," which only applies to regulated conduct." They further argued that, for this reason, the application of the disqualification "must necessarily be based on the violation of a regulation or law that regulates the activity in the context in which it takes place." The representatives also referred to the danger of infringing the principle of criminal legality entailed in negligent criminal offenses and argued that, in these cases, it is necessary to increase precautions so as not to violate the already jeopardized principle of legality. In addition, they pointed out that "the text of Decree N° 12689/45 is markedly different from Decree 692/92" and that even the aforementioned Decree of 1945 "impeded any possibility of a criminal conviction against Mr. Mohamed." As to the retroactivity of the lighter penalty, the representatives noted that it is irrelevant that the American Convention refers only to the non-retroactivity of the "crime and not the punishment", since there is no crime without punishment.

130. The State argued that when dealing with cases of offenses of negligence, it is not possible to identify the prohibited conduct without referring to another regulation that indicates the duty of care, and that even though "[o]ften, the objective duty of care is established by law, [...] no regulation exhausts all of the possible forms of violation of the duty of care that may arise" and, for this reason, "it always refers to a general formula" that deals with "social patterns of care." Regarding the alleged application in the case of Mr. Mohamed of a regulation that was not yet in force, Argentina noted that "to the extent that the sentence describes the negligent or reckless conduct used to establish the elements of the crime, the mere mention of a regulation not in effect at the time of the facts does not constitute a violation of the principle of legality, so long as these classifications were set out in a regulation which was itself in effect." In addition, Argentina stressed that the operative part of the conviction of the Chamber of Appeals, dated February 22, 1995, "mentions as the criminal law violated and legal source of the

conviction, only Art [icle] 84 of the Argentine Criminal Code, which was in full force at the moment [of the facts]". According to the State, the mention of the provisions contained in Decree No. 692-92 "is absolutely incidental and non-essential in the development of the legal argument presented", as "they are not part of the operative part of the ruling." It argued that the Court that convicted Mr. Mohamed found him criminally responsible for the offense of manslaughter, "expressly referring to [Article 84] of the [Argentine] Criminal Code as the legal source for the conviction," and to the standards of international practice on the matter.

B) Considerations of the Court

131. The principle of legality constitutes one of the central elements of criminal prosecution in a democratic society by establishing that "no one may be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed." This principle governs the conduct of all State bodies, in their respective spheres of competence, and particularly with regard to the exercise of the punitive power.¹⁰⁴ In a democratic State governed by the Rule of Law, it is essential to strengthen precautions to ensure that punitive measures are adopted with absolute respect for the basic rights of the individual and with prior careful verification of whether or not unlawful behavior exists.¹⁰⁵

132. Likewise, the Court has held that the definition of an act as unlawful and the determination of its legal effects must precede the conduct of the person considered an offender. Otherwise, individuals would not be able to guide their behavior according to a valid and certain legal system that articulates social censure and its consequences.¹⁰⁶ The Court has also indicated that the principle of non-retroactivity is designed to prevent a person from being penalized for an action that was not a punishable or prosecutable offense at the time when it was committed.¹⁰⁷

133. The Court has emphasized that, when applying criminal law, the judge is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the conduct of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by law.¹⁰⁸ The Court considers it necessary to add that, in dealing with an offense of negligence, whose unlawfulness is minor compared with that of intentional crimes and whose typical elements are defined in a generic manner, the judge or court is required to observe the principle of legality when ascertaining the effective existence of the defined conduct and determining criminal responsibility.

134. The Court does not share the view of the Commission and the representatives that the decision by the First Chamber of the National Chamber of Appeals, on July 4, 1995 (*supra* para. 54), to declare inadmissible the special federal appeal changed the grounds of the conviction, thereby constituting a "new source of charges." The Court

¹⁰⁴ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs*, para. 107, and *Case of Fermín Ramírez V. Guatemala. Merits, Reparations and Costs*, para. 90.

¹⁰⁵ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs*, para. 106, and *Case of De La Cruz Flores V. Peru. Merits, Reparations and Costs*. Judgment of November 18, 2004. Series C No. 115, para. 81.

¹⁰⁶ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs*, para. 106, and *Case of de la Cruz Flores v. Peru. Merits, Reparations and Costs*, para. 104.

¹⁰⁷ Cf. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111, para. 175, and *Case of García Asto and Ramírez Rojas v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 25, 2005. Series C No. 137, para. 191.

¹⁰⁸ Cf. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*, para. 82, and *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*, para. 90.

considers that the ruling issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals is the judicial decision that established the defendant's criminal responsibility, and not the aforementioned ruling on the inadmissibility of the special appeal. Likewise, the Court does not consider that the State is correct in arguing that on that occasion the Chamber did not exceed its authority when expressing its opinion on what it characterized as a "material error." This did not constitute a correction of a material error, since that court carried out a legal assessment on the merits of the complaint regarding the retroactive application of Decree No. 692 of 1992.

135. The Court stresses that, by filing the special federal appeal and the motion for review, Mr. Mohamed's defense lawyer emphasized that one of the aspects of the conviction that needed to be revised was its legal basis and, in this regard, he stated that "the essential point of the grievance" was that the Appeals Chamber had "sought to base the [offense] on regulations that were not applicable to the case" since the decree mentioned in the judgment was not in force at the time of the traffic accident (*supra* paras. 52 and 57). He added that in the motion for review of appeal there had been a violation of Article 9 of the American Convention (*supra* para. 57).

136. In this case, Mr. Mohamed was convicted for the crime of manslaughter defined in Article 84 of the Criminal Code in force at the time of the facts (traffic accident). However, the Commission and the representatives argue that what constituted a violation of the principle of non-retroactivity (freedom from *ex post facto* laws) was that the court integrated the criminal offense with the rules of Decree No. 692/92, which regulates motor vehicle traffic and which came into force after the facts of the case. It is not disputed that the aforementioned traffic regulation¹⁰⁹ was not in effect at the time of the incident that led to the criminal proceedings against Mr. Mohamed.

137. The Court advises that, being an offense of negligence, whose criminal definition is open and must be completed by the judge upon analyzing the legal definition of the crime, what is important is that the judgment identify the corresponding duty of care infringed by the defendant's active behavior (imprudence) or omission (negligence), as a determining factor in bringing about the harmful result of the juridical right protected. In addition to referring to recklessness and negligence, Article 84 of the Argentine Criminal Code states that said behavior could imply incompetence or failure to observe regulations or duties, behaviors that this Court understands are also included in the general concepts of recklessness and negligence. The Court considers that, contrary to the arguments of the representatives (*supra* para. 128), in determining which objective duty of care was violated in each case, given that this matter involved a traffic accident, the judge is not limited to applying a formal rule such as traffic regulations. It is important to point out that the expert Julio B. J. Maier stated at the public hearing that, even when dealing with regulated activities, it is possible to define recklessness or negligence using sources other than the regulations, but the judgment must clearly state the grounds for the recklessness and the facts that resulted in said recklessness or negligence.

138. Among the grounds for the conviction, the Chamber indicated that it had not limited itself to analyzing whether the traffic light gave the defendant the right of way, but instead it had to consider whether he had engaged in "any reckless action" or behavior contrary to "the objective duty of care." (*supra* para. 49). In this regard, the Chamber held that Mr. Mohamed "failed to comply with the regulation that prohibits a vehicle from overtaking another at an intersection, precisely to ensure that drivers have the necessary visibility at all times and are therefore in control of their action." Likewise, the Chamber referred to "[t]he rules of care" and, upon citing the aforementioned traffic regulations, did so in the following terms:

¹⁰⁹ *Supra* note 54.

Among the rules applicable to this case, which, as stated, are international standards of practice, one establishes the duty for one who creates a risk for third parties to act with full control of that risk at all times, in order to prevent any damage to others, which could result from possible and foreseeable circumstances; a related obligation is for one who passes another vehicle to maintain sufficient visibility, and not to start passing at an intersection, curve bridge or other dangerous place; duty is to yield to pedestrians on a pedestrian crossing, at all times in areas where there are no traffic lights, and as indicated where there are traffic lights. In our legislation, such principles are established in Articles 37, 39, and 40 of Decree Law N° 692/92, which regulates automobile traffic.

139. The Court finds that among the grounds for the conviction that specifies the “duty of care” required of the defendant, the judgment refers to, on one hand, “[t]he rules of care” applicable to the case as “international standards of practice” and, on the other, to the “principles” of such practices contained in traffic regulations (Decree Law N° 692/92) which had still not entered into force at the time of the events.

140. The Court, considering that the above matters deal with criminal issues that must be examined by a higher court, which must hear the appeal against the conviction, as required as a consequence of having declared a violation of Article 8(2)(h) of the American Convention to the detriment of Mr. Mohamed (*supra* para. 117 and *infra* para. 152), does not deem it appropriate to determine whether or not the considerations in the preceding paragraphs imply a violation of Article 9 of the Convention.

IX

REPARATIONS

(Application of Article 63(1) of the American Convention)

141. Based on the provisions of Article 63 (1) of the American Convention¹¹⁰, the Court has indicated that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation¹¹¹ and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary International Law on State responsibility.¹¹²

142. Reparation for the damage caused by a breach of an international obligation requires, wherever possible, full restitution (*restitutio in integrum*), which consists of reinstating the situation that existed prior to the violation. Where this is not possible, as happens in the majority of cases involving human rights violations, the Court will order measures to guarantee respect for the infringed rights and ensure that the damage caused by the violations is repaired.¹¹³ Therefore, in this case, the Court has considered

¹¹⁰ Article 63(1) of the American Convention establishes that “[i]f 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.”

¹¹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 239.

¹¹² Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, para. 40, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 239.

¹¹³ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, para. 26; *Case of Cesti Hurtado V. Peru. Reparations and Costs*. Judgment of May 31, 2001. Series C No. 78, para. 33, and *Case of Massacres of Río Negro v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*, para. 248.

the need to order several measures of reparation in order to guarantee the infringed right and fully redress the damage caused.¹¹⁴

143. This Court has established that the reparations must have a causal connection with the facts of the case, the violations declared, the harm proven, as well as with the measures requested to repair the damage. Consequently, the Court must adhere to this consensus in order to rule properly and according to law.¹¹⁵

144. In accordance with the foregoing considerations on the merits and the violation of the American Convention declared in chapter VII.D, the Court will proceed to examine the claims submitted by the Commission and the representatives, as well as the State's arguments in light of the criteria established in the Court's jurisprudence regarding the nature and extent of the obligation to provide reparation, in order to provide measures aimed at repairing the damage caused to the victim.¹¹⁶

A) Injured party

145. The Court reiterates that it considers an injured party under the terms of Article 63(1) of the Convention, one who has been declared a victim of a violation of any right therein. Therefore, this Court considers as "injured party" Oscar Alberto Mohamed, who in his capacity as a victim of the violation declared in chapter VII.D of this Judgment, shall be considered the beneficiary of the reparations ordered by the Court.

146. In the section concerning reparations in the brief of pleadings and motions, the representatives asked that certain family members of Mr. Mohamed¹¹⁷, who were not included as victims by the Inter-American Commission in its Report on the Merits, be included as beneficiaries. The representatives stated that such persons "have been duly identified by the Commission [and that,] although they were not identified as alleged victims, they were mentioned as the wife and children of [Mr.] Mohamed, who, as a result of the rulings issued by the Argentine Justice system, directly suffered violations of their fundamental rights."

147. The State argued that "the Inter-American Commission recommended that reparation be granted only to Mr. [...] Mohamed without making reference [to] his family." It said the only circumstance that the Court should consider "in assessing the possibility of awarding pecuniary compensation" is the fact that Mr. Mohamed was the only one who "was supposedly denied access to a review of his judgment." Therefore, "if compensation were to be granted, only [Mr.] Mohamed could be the beneficiary."

148. The Court emphasizes that, pursuant to Article 35(1) of its Rules of Procedure, the report referred to in Article 50 of the Convention should contain "all the facts that allegedly give rise to a violation and identify the alleged victims." In this regard, it is up

¹¹⁴ Cf. *Case of the Massacre of Dos Erres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 243.

¹¹⁵ Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 241.

¹¹⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, paras. 25 to 26, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 240.

¹¹⁷ They argued that Mrs. Julia Potenza, wife of Mr. Mohamed, and his children, Javier Oscar, Ariel Alberto, Damián Darío and Daniel Alexis, all with the surname Mohamed, should be considered as injured party since, according to the representatives, they had suffered violations of: "the right to protection of the victim's family (Articles 17 and 32(1) of the American Convention); the rights of the child (Article 19 [...]); the right to private property (Article 21.1 and 21.2 [...]), and [...] the right to be compensated in the event of a legal error (Article 10 [...])."

to the Commission and not up to this Court, to identify the alleged victims with precision and at the appropriate procedural moment in a case before the Court.¹¹⁸ Accordingly, the Court will not consider as injured party in this case, Julia Potenza and Javier Oscar, Ariel Alberto, Damián Darío and Daniel Alexis Mohamed Potenza, the relatives of Mr. Mohamed named by the representatives as beneficiaries of the reparations, because they were not considered as such in the Report on the Merits referred to in Article 50 of the American Convention and therefore the allegations of violations¹¹⁹ against them or reparations in their favor are not admissible.

B) Guarantee Mr. Mohamed the right to enjoy the right protected under Article 8(2) (h) of the Convention

149. The Commission requested that the State be ordered to “provide the necessary measures for Oscar Alberto Mohamed to file, as soon as possible, an appeal through which he may obtain a comprehensive review of the conviction in compliance with Article 8(2)(h) of the American Convention.”

150. In the brief of pleadings and motions, the representatives of the victim asked that the conviction in second instance that overturned the acquittal in the criminal proceedings, which were conducted in accordance with the procedural law of Argentina, be declared “null and void”, and affirmed that “unless the judicial decisions that rejected the special appeal, the motion for review and revocation [sic] are declared ‘null and void’, the conviction imposed on [Mr.] Mohamed would continue to exist in the records [...] without any chance of obtaining a review by a higher court.” They further indicated that Mr. Mohamed must be provided with a new opportunity to file the appeals that were rejected, so that his conviction may be reviewed and “ [thereby] ensure that the Argentine State rules on the legality and conventionality of the conviction.”

151. The State requested that the Court, upon considering “possible reparations”, limit its ruling to the “damages and detriment that [Mr. Mohamed] may have suffered by being unable to have his conviction reviewed.” It also held that “if the case [were] not dismissed”, “the compensation be set [in a subsidiary] manner based on the principle of equity.”

Considerations of the Court

152. The Court reiterates its case law regarding the fact that it does not act as a criminal court that decides on Mr. Mohamed’s guilt or innocence¹²⁰, but rather has limited itself to determining the compatibility of the criminal proceeding and legal remedies to which he was subject with the American Convention.¹²¹

¹¹⁸ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2009 Series C No. 198, para. 112, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 29.

¹¹⁹ In the chapter on Reparations in their pleadings and motions brief, the representatives asserted that Articles 10, 17, 19, 21.1, 21(2) and 32(1) of the American Convention were violated, but did not present legal arguments in that regard.

¹²⁰ Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs*, para. 90 and *Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 133, para. 55.

¹²¹ Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 7, 2003. Series C No. 99, para. 120, and *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*, para. 62.

153. The Court has found that Mr. Mohamed did not have access to a remedy which, in line with Article 8(2)(h) of the American Convention, would have allowed for a review of the judgment that declared him guilty and convicted him for the first time in a second instance criminal proceeding for the crime of manslaughter (*supra* paras. 90 to 117). Therefore, according to Article 63(1) of the Convention, which provides that “[w]hen the Court finds that there has been a violation of a right or freedom protected by [the] Convention, the Court shall rule that the injured party be guaranteed the enjoyment of his right or freedom that was violated,” the Court orders the State to:

a) adopt the measures necessary to guarantee Mr. Oscar Alberto Mohamed the right to appeal the conviction handed down by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters on February 22, 1995, in accordance with the conventional parameters established in Article 8(2)(h) of the American Convention (*supra* paras. 90 to 117). This measure must be complied with within six months from the date of notification of this judgment, and

b) adopt the necessary measures to ensure that the legal effects of the aforesaid conviction, and especially his criminal record, remain suspended until a decision on the merits has been issued once the right to appeal is guaranteed, pursuant to the preceding paragraph.

C) Measure of satisfaction: publication and dissemination of the Judgment

154. The representatives asked the Court to order the State to publish this judgment “in, at least, two national daily newspapers with wide circulation.”.

155. The State did not refer to this measure of reparation.

156. International jurisprudence, and in particular the jurisprudence of this Court, has repeatedly established that a judgment is *per se* a form of reparation.¹²² Nevertheless, considering the circumstances *sub judice*, and having regard to the harm caused to Mr. Oscar Alberto Mohamed, as well as the non-pecuniary consequences derived from the violations of the Convention to his detriment, the Court considers, as it has in other cases,¹²³ that the State must publish, within six-months as from notification of this Judgment: a) the official summary of this Judgment issued by the Court, once only, in the Official Gazette; b) the official summary of this Judgment issued by the Court, once only, in a newspaper with wide national circulation; and c) this Judgment, in its entirety, to be posted on an official website for a period of one year.

D) Other measures requested

157. Furthermore, both the Commission and the representatives made requests regarding the adoption of legal measures or of another nature.

158. In this regard, the Commission asked the Court to order Argentina to “provide legislative and other measures to ensure the effective implementation of the right

¹²² Cf. *Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 254.

¹²³ Cf. *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 254.

enshrined in Article 8(2)(h) of the American Convention in accordance with the standards outlined in the report on the merits." In its final oral and written observations, the Commission added that at present in Argentina, a person convicted in a second instance proceeding for the first time "in the so-called national system and in many of the provincial systems" would only have recourse to "the special federal appeal, a remedy that does not satisfy the requirements of the American Convention." Therefore, it requested that, "in addition to the measures of reparation in favor of Mr. Mohamed [,] the Court order measures of non-repetition so that the State [...] adapts its domestic legislation which continues to prevent those convicted for the first time in a second instance proceeding from having the right to a comprehensive review, as granted by the American Convention." Similarly, in its final observations, the Commission stated that "the legal precedents cited by the State in its answer brief are not relevant, since they refer to the amplitude of the cassation appeal and not to the special federal appeal, which remains the only means of challenging convictions issued at the second instance."

159. The representatives requested that, as a measure of non-repetition related to the right to appeal the judgment protected in Article 8(2)(h) of the Convention, the Court order the State to introduce "a legal amendment that ensures a timely, effective, and accessible recourse against a conviction issued by any court" and argued that "this measure alone would not be [...] enough for [Mr. Mohamed], as he would not see the benefits of the measure since they would be reflected in future cases." Furthermore, the representatives also requested that, "in order to avoid multiple criminal prosecutions, which may lead a person to be subjected to the risk of being tried and convicted more than once for the same act," to order a "legal amendment that prevents appeals by the accusers against an acquittal rendered in a regular proceeding." They further requested the "legal amendment of Article 280 of the Code of Civil and Commercial Procedure of Argentina [...] so as to prevent the groundless denial of special appeals in which constitutional matters are discussed or in which clauses of Declarations or Conventions on Human Rights are brought into play."

160. The State argued that regarding the demand for the "adaptation of domestic law, it is appropriate to [...] describe the development that has occurred in Argentina in relation to criminal procedure in the fourteen years it took to process this case before the Inter-American Commission." Argentina referred to decisions of the Supreme Court, such as: the case of "Giroldi" (1995), in which it recognized that the guarantee of the "right of appeal" is a constitutional principle; the case of "Jauregui" (1998), wherein the Supreme Court "alluded explicitly to the possibility of applying the American Convention [...] to its domestic law and therefore guaranteeing the right to a second hearing" and the case of "Casal" (2005), in which the Attorney General's Office rendered an opinion stating that "[t]he Inter-American Court [...] in the case of Herrera Ulloa established the compulsory nature of the second hearing to ensure a comprehensive review of judgments," and in which ruling the Supreme Court had determined the need to "pave the way for the interpretation required by the Constitution on the issue of judicial review." Likewise, the State held that the ruling [in the case of] "Casal" refers not only to the American Convention and the Covenant on Civil and Political Rights but also alludes to the decisions of international bodies such as the Human Rights Committee and the judgment of the Inter-American Court in the case of Herrera Ulloa, and that "in said ruling, the country's highest court said that Art. 456 [of the national Code of Criminal Procedure] should be interpreted to mean that it allows for a comprehensive review of the judgment, as extensive as possible with the maximum effort of review by the cassation judges, according to the scope and records of each particular case." According to Argentina, these decisions of the Supreme Court led to the establishment of the "doctrine of the right to a comprehensive review", as contained in "[the] guarantee of the right to appeal, which includes the possibility of challenging both the law and [...] also in relation to the evidence." The State affirmed that "no legislative change is necessary to ensure compliance with Art. 8(2)(h) of the Convention in the local jurisdiction, since Article 456 [of the Code of Criminal Procedure], in the interpretation

given by the Supreme Court of Justice in the case of Casal is sufficient to ensure that guarantee." According to the State, "local law and its jurisprudential interpretation are more than sufficient to ensure compliance in the local jurisdiction with the guarantees of [Article] 8(2)(h), and therefore with Article 2 of the Convention."

161. The Court notes that in their brief of final arguments, the representatives alluded to measure of reparation that had not been requested in their brief containing pleadings and motions.¹²⁴ In this regard, the Court reiterates that, according to Article 40(2)(d) of the Court's Rules of Procedure, the claims of the representatives, including those relating to reparations, must be included in the initial pleadings and motions brief. Consequently, this request is time-barred and it is not appropriate to admit it or include any additional considerations in this regard.¹²⁵

162. As to the measures requested by the Commission and by the representatives regarding the adoption of legislation or other measures, the Court considers that the issuance of this Judgment and the reparations ordered in this chapter are sufficient and adequate to remedy the violations suffered by the victims and does not find it necessary to order additional measures.¹²⁶

163. Also, regarding the measures requested in relation to the protection of the right to appeal a judgment, the Court emphasizes that the purpose of its contentious jurisdiction is not to review national legislation and case law in the abstract.¹²⁷ Consequently, and taking into account that the measures requested involve the analysis of legal norms and alleged legal and jurisprudential developments that were not applied in the case of Mr. Mohamed¹²⁸, such as the regulation and judicial enforcement of the appeal in Argentina, the Court considers that it is not appropriate to issue a ruling on such requests in ordering reparations in this case. Nevertheless, the Court recalls that Argentina must comply with its general obligations to respect and ensure that the right to appeal the decision in accordance with Articles 8(2)(h), 1(1) and 2 of the American Convention and the parameters indicated by this Court on the matter, both in relation to the norms governing the system of review and the manner in which it is applied by the judicial bodies.

E) Compensation for pecuniary and non-pecuniary damages

Arguments of the Commission and of the parties

164. The Commission asked the Court to order the State to "adopt the necessary measures to ensure that Oscar Alberto Mohamed receives adequate and timely reparation for the human rights violations set forth in the merits report."

¹²⁴ In their final arguments, the representatives requested the following measures that are not included in their pleadings and motions brief: "[l]egal provision for the formal admissibility of an appeal, by judicial bodies different from those that issued the appealed judgment", and, although they had already called for the amendment of Article 280, they extended their request to have it "annulled" and in addition requested that "its application be conditioned to cases in which constitutional matters are not discuss[ed] or where the right to appeal had not been violated".

¹²⁵ Cf. *Case of Forneron and daughter v. Argentina. Merits, Reparations and Costs*. Judgment of April 27, 2012 Series C No. 242, para. 186.

¹²⁶ Cf. *Case of Radilla Pacheco v. Mexico, Preliminary Objections, Merits, Reparations and Costs*. Judgment of 23 de November 2009. Series C No. 209, para. 359, and *Case of Uzcátegui et al. v. Venezuela. Merits and Reparations*. Judgment of September 3, 2012 Series C No. 249, para. 260.

¹²⁷ Cf. *Case of Genie Lacayo v. Nicaragua. Preliminary Objections*. Judgment of January 27, 1995. Series C No. 21, para. 50, and *Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of August 31, 2011 Series C No. 232, para. 172.

¹²⁸ The criminal procedural regimen applied to Mr. Mohamed, which therefore regulated the criminal trial, was the Code of Criminal Procedure of 1888 (Law 2372) (*supra* para. 40).

165. The representatives stated that "it would be impossible for [Mr.] Mohamed to recover the status he had at the time of the conventional violation," but argued that he could be compensated "through just compensation." Therefore, the representatives requested that the Court order the sum of U.S.\$ 136,500 (one hundred thirty six thousand five hundred dollars of the United States of America)¹²⁹ in favor of Mr. Mohamed in payment for loss of earnings, given that as a consequence of the penalty of disqualification from driving any type of vehicle for eight years, "his driving license [was] withdrawn" and the company only "paid him a month's salary and the proportional amount of the annual supplemental salary." The representatives also requested that the Court order the sum of U.S.\$ 8,000 (eight thousand dollars of the United States of America) in favor of Mr. Mohamed as "[c]ompensation for the direct expenditures arising from the violation suffered," considering that "when he lost his job, his income was significantly diminished," he incurred expenses in the purchase of medicines, obtaining loans from neighbors and that Mr. Mohamed's mother had to take charge of the family "during a reasonable time." Finally, as a measure of reparation for the non-pecuniary damage suffered, the representatives asked the Court to order the State to pay: i) US \$54,600 (fifty-four thousand six hundred dollars of the United States of America) to Mr. Mohamed, of which US \$27,300 (twenty-seven thousand, three hundred dollars of the United States of America) was requested for non-pecuniary damages¹³⁰, and US \$27,300 (twenty-seven thousand, three hundred dollars of the United States of America) for the disruption to his life project.¹³¹ The representatives indicated that they calculated the foregoing amounts "based on 20% of the estimated lost earnings for [Mr.] Mohamed."

166. The State argued that any "eventual reparations [...] should be limited to the purpose of this litigation" before the Court, in other words, regarding the "damages that [Mr. Mohamed] may have suffered owing to his inability to have access to a body to review his conviction." Argentina argued that this Court does not have jurisdiction to "analyze the guilt or innocence of the alleged victim, and therefore, cannot order reparations to that effect"; specifically in relation to "the items and amounts of compensation as if to absolve him of the conviction" and with respect to "the damage [caused by] the conviction in the domestic court." Furthermore, the State affirmed that "the amounts of the compensation claimed [...] demonstrate complete ignorance of international standards [of reparations]" and that "the claims for such compensation lack any type of evidentiary support." The State pointed out that the Court "could [...] only analyze whether there were violations of the Convention and, if it considered that there

¹²⁹ To estimate the appropriate compensation for "loss of earnings" the representatives "followed the parameters of the pay scales of the UTA (Unión de Tranviario Automotor), [...] a union that represents bus drivers." To calculate the exchange rate, they stated that at the time "the Convertibility Law 23,928 was in force" according to which one Argentine peso was equivalent to one dollar of the United States of America. The representatives mentioned the change in currency "after December 2001" but "considered it appropriate to establish a uniform standard" with regard to the value of the Argentine peso in order to calculate the compensation requested. To arrive at the sum of US \$136,500 (one hundred and thirty six thousand, five hundred dollars of the United States of America) the representatives made the following calculation: "500 Argentine pesos, multiplied by 13 (twelve monthly salaries plus the annual bonus or *aguinaldo*) is equivalent to 6,500 Argentine pesos. Annual interest of 5%, equals 325 Argentine pesos for each period. 6500 Argentine pesos multiplied by 20 years is equal to 130,000 Argentine pesos and, added to the 20 years, the 325 Argentine pesos in interest (325 x 20= 6500) gives us the sum of 136,500 Argentine pesos in lost earnings, which is equivalent to the sum of 136.500 U.S. dollars."

¹³⁰ The representatives argued that the non-pecuniary damages suffered were due to: i) "financial needs that [...] led to poverty" for the Mohamed Potenza family, placing them in a vulnerable position due to the "lack of effective judicial protection, adequate protection for their health and social security;" "the damage to their personal integrity"; iii) "the impact caused by the unlawful act" on the family's social and working relations and the "anguish, suffering and uncertainty" it produced; iv) "the hardship caused by the loss of his job", and v) "the impotence" caused by his loss of employment and the suffering it caused to his family.

¹³¹ The representatives stated that his life project was affected because of: i) "seeing his life project curtailed" and being forced to change it, and ii) the "extreme" change suffered in his living conditions as a result of being unable to have a job in which he could practice his profession "since his driver's license [had been] withdrawn."

were, it should declare so in the judgment”, leaving it up to the “domestic courts” to determine “the reparations that should be granted [...] Mr. Mohamed”. Argentina held that the pecuniary measures of reparation requested by the representatives “should be rejected” and objected to Mr. Mohamed being granted compensation for lost earnings and for direct expenses incurred, such as the loans requested and assistance from neighbors and the fact that Mr. Mohamed’s mother was forced to take financial responsibility for the Mohamed Potenza family. The State considered that the amount of compensation requested for lost earnings was “exorbitant” and that the amount requested for direct expenses “lack[ed] any justification.” Likewise, the State argued that the “non-pecuniary [measures of reparation] requested by the representatives should be rejected”¹³², and denied that Mr. Mohamed’s life project had been altered.¹³³ The State affirmed that the “exorbitant” amount requested by the representatives as compensation for these damages lacks evidentiary basis. Likewise, it rejected the notion that “non-pecuniary damages can be calculated on the basis of a percentage of the pecuniary damages, and that it could be of the order of 20% of the latter.”

Considerations of the Court

167. In its case law, the Court has developed the concept of pecuniary damages and defined the circumstances in which compensation must be paid. This Court has established that pecuniary damage contemplates “the loss or detriment to the income of the victims, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case.”¹³⁴

168. The Court has also explained, in its case law, the concept of non-pecuniary damage and has established that it “may include both the suffering and difficulties caused to the direct victim and his next of kin, the harm to values that are of great significance to the individual, and also the changes, of a non-pecuniary nature, in the living conditions of the victim or his family.”¹³⁵

169. The Court has determined in this Judgment that Mr. Mohamed’s right to appeal his conviction was violated (*supra* para. 117). This meant that a penalty of disqualification from driving for eight years was imposed on him, in a judgment that could not be appealed.

170. In his statement rendered before a notary public, Mr. Mohamed said that the conviction made him feel “worthless, that he was no good at [his] job.” Regarding the special appeal, Mr. Mohamed said that “the ordeal with the courts continued” because

¹³² The Court notes that the State presented these arguments and those included in the following footnote in an attachment to its answer brief. The Court admits these because they were submitted together with that brief within the appropriate period. The State rejected: i) Mr. Mohamed’s alleged inability to find work as a driver after “his professional license” was withdrawn and that as a result, he had not been able to carry out his professional work; ii) that [Mr. Mohamed’s] “opportunities for growth and social and cultural development were affected”; iii) “that the Mohamed Potenza family had been placed in a vulnerable situation”; iv) that the Mohamed Potenza family “had were now on the fringes of poverty” as a consequence “of the State’s actions”; v) “[t]hat they had not had effective judicial protection, or adequate “protection of health and social security”; vi) “[t]hat the personal integrity of Mr. Mohamed and his family was violated” , and vii) “[t]hat the alleged hardships suffered by Mr. Mohamed due to the loss of his job should be assessed”.

¹³³ As to the possible effects on Mr. Mohamed’s life project the State rejected: i) “[t]hat the life expectations of Mohamed and his family had been changed” and therefore “[t]hat [Mr.] Mohamed had been left without any possibility of working, even in another activity”, and ii) that as a result, “his living conditions changed in such a way as to frustrate the life project of Mohamed’s family”.

¹³⁴ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 281.

¹³⁵ Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 284.

"he was convicted and the trial was still open, without knowing when it would end." When he lost his job, Mr. Mohamed said that "he was desperate" since he did not have the financial means to support his family. He also affirmed that the dismissal involved "being left without social benefits and medical care," and, therefore, he was unable to access or even afford psychological treatment. Mr. Mohamed stated that the situation in which he found himself made him lose the "will to live" and he "was often on the verge of suicide." He said that in his state of desperation, his health deteriorated, "both mentally and physically," which resulted in the onset of diabetes, high blood pressure and heart problems. Mr. Mohamed stated, *inter alia*, that being unable to drive, and being "the sole support for [his] family", led him to seek other sources of income and work as a vendor of "churros [...] plants, socks and t-shirts."

171. Bearing in mind Mr. Mohamed's comments in his statement, and particularly the fact that he worked as a bus driver,¹³⁶ this Court finds that the failure to guarantee him a means to challenge the criminal conviction and the execution of the sentence of disqualification from driving caused a serious detriment to his financial situation and to his access to the social security system, as well as great distress and suffering.

172. For the foregoing reasons, the Court deems it appropriate to order compensation in favor of Mr. Oscar Alberto Mohamed that includes both pecuniary and non-pecuniary damages, for which it determines in equity the sum of US\$ 50,000 (fifty thousand dollars of the United States of America). The State shall pay this amount directly to the beneficiary within one year as of notification of this judgment.

173. The Court notes that the representatives considered as "direct costs arising from the violation suffered" by Mr. Mohamed, the fact that he had to ask for loans from his neighbors, buy medicines at his own expense and even that his mother had to assume financial responsibility for the family for a time. These allegations were not proven to the Court. However, this Court finds that such expenses arose from the situation already examined by the Court regarding the loss of earnings, which was taken into account in setting the amount of compensation that includes both pecuniary and non-pecuniary damages. Therefore, it is not appropriate to grant him another compensation for the same situation.

F) Costs and expenses

174. As the Court has indicated on previous occasions, costs and expenses are included within the concept of reparations as established in Article 63(1) of the American Convention.¹³⁷

175. The representatives asked the Court to order Argentina "to reimburse the costs and expenses incurred by the alleged victims and their representatives as a result of the present case."

¹³⁶ The body of evidence shows that, at the time of the facts, Mr. Mohamed earned a salary of 500.75 Argentine pesos as a bus driver (*supra* para. 61), information not disputed by the State. The Court finds that the calculation made by the representatives in requesting the compensation is based on thirteen salaries per year plus "annual interest of 5%" and an exchange rate of one Argentine peso being equivalent to one dollar of the United States of America. This Court does not have sufficient evidentiary elements to confirm whether the criteria used by the representatives to calculate Mr. Mohamed's lost earnings are appropriate and takes note that the representatives make the calculation for a period of twenty years. The Court will take into account Mr. Mohamed's lost earnings for the period during which he was disqualified, which was eight years according to the terms of the conviction.

¹³⁷ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*, para. 79, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 290.

176. The State requested that “assuming that the present case is not rejected”, “to set the costs and expenses on the basis of equity.”

177. The Court has indicated that the claims of victims or their representatives concerning costs and expenses, and the evidence to support these, must be submitted to the Court at the first procedural opportunity granted them, namely in the pleadings and motions brief, even though these claims may be subsequently updated, in line with any new costs and expenses incurred as a result of the proceedings before this Court.¹³⁸ As to the reimbursement of costs and expenses, the Court must prudently assess their scope, which includes the expenses incurred before the domestic jurisdiction, as well as those arising during the proceedings before the inter-American system, taking into account 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 their *quantum* is reasonable.¹³⁹

178. In this case, the Court notes that it is not clear from the record that there is specific evidentiary support regarding the costs and expenses incurred by Mr. Mohamed or, of his representative at the time, Mr. Mantione, regarding the processing of the case before the Commission. However, the Court considers that such proceedings necessarily involved monetary expenses, and therefore determines, in equity, that the State should pay Mr. Oscar Alberto Mohamed the sum of US\$ 3,000 (three thousand dollars of the United States of America) for expenses related to the processing of the case before the Inter-American Commission. This amount must be paid within one year as of notification of this Judgment.

G) Reimbursement of expenses to the Victims' Legal Assistance Fund

179. In 2008, the General Assembly of the Organization of American States created the Legal Assistance Fund of the Inter-American Human Rights System “in order [to] “facilitate access to the Inter-American human rights system by persons who currently lack access to the resources needed to bring their case before the system.”¹⁴⁰ In the present case, given that two Inter-American defenders were assigned to represent the victim (*supra* paras. 6 and 7)¹⁴¹, the Court granted access to the Legal Assistance Fund to cover reasonable and necessary expenses resulting from such representation.¹⁴² Said expenses consisted of: i) travel and accommodation costs necessary for the two Inter-American defenders to attend the public hearing (*supra* para. 14) to perform their duties as representatives of the alleged victim, ii) the appearance at said hearing of Mr. Julio B.

¹³⁸ Cf. *Case of Molina Theissen v. Guatemala. Reparations and Costs*. Judgment of July 3, 2004. Series C No. 108, para. 22, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 292.

¹³⁹ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*, para. 82, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs*, para. 291.

¹⁴⁰ AG/RES. 2426 (XXXVIII-O/08), Resolution adopted by the General Assembly of the OAS during the hearing of XXXVIII Regular Period of Sessions of the OAS, in the Fourth Plenary Session, held on June 3, 2008, “*Creation of Fund for Legal Assistance of the Inter-American System for Human Rights 2.a*), and CP/RES. 963 (1728/09), Resolution adopted on November 11, 2009 by the Permanent Council of the OAS, “*Rules of Procedure for the Fund for Legal Assistance of the Inter-American System for Human Rights*”, Article 1.1..

¹⁴¹ In application of the provision of Article 37 (Inter-American Defender) of the Rules of Procedure of the Court, which states that “[In cases where alleged victims are acting without duly accredited legal representation, the Court may, on its own motion, appoint an Inter-American defender to represent them during the processing of the case.” As stated in the Preamble to the Rules of Procedure of the Court, regarding the implementation of the Inter-American defender, “it is guaranteed that every alleged victim have an attorney to defend their interests before the Court and avoid that economic reasons prevent an individual from having legal representation.”

¹⁴² Both the Rules of the Fund and the provisions established in the Agreement signed between the Inter-American Court and AIDF were applied.

J. Maier to render expert testimony, and iii) notarization expenses of Mr. Mohamed's statement and the expert report of Alberto Martín Binder, presented via affidavit (*supra* paras. 12 and 31).

180. The State had the opportunity to present its observations on the expenditures made in the present case, which amounted to the sum of US \$7,539.42 (seven thousand five hundred thirty-nine dollars and forty-two cents of the United States of America). However, Argentina indicated "it did not have any observations with regard to expenditures to the Victims' Legal Assistance Fund" (*supra* para. 19). Consequently, it is up to the Court, pursuant to Article 5 of the Rules of the Fund, to assess the appropriateness of ordering the respondent State to reimburse the Legal Assistance Fund for the expenditures incurred.

181. In consideration of the violation declared in this Judgment, the Court orders the State to reimburse the Fund in the amount of US \$7,539.42 (seven thousand five hundred thirty-nine dollars and forty-two cents of the United States of America) for the aforementioned expenses. This amount shall be repaid to the Court within ninety days from notification of the present Judgment.

H) Method of compliance with the payments ordered

182. The State shall pay the amounts established for pecuniary and non-pecuniary damages, as well as reimbursement for legal costs and expenses established in this Judgment directly to Mr. Oscar Alberto Mohamed, within a period of one year, as of notification of this ruling, according to the terms of the following paragraphs. If the victim should die before the respective amounts have been paid, these shall be delivered to his heirs, in accordance with the applicable domestic law.

183. The State shall comply with its pecuniary obligations through payment in United States dollars or the equivalent in Argentine pesos, using the exchange rate in force on the New York currency exchange market on the day before payment to make the respective calculation.

184. If, for reasons attributable to the beneficiary of the compensations or to his heirs, it is not possible to pay the amounts established within the indicated period, the State shall deposit those amounts in an account held in the beneficiary's name or in a certificate of deposit in a reputable Argentine financial institution, in United States dollars and under the most favorable financial terms allowed by law and banking practices. If, after 10 years, the compensation has not been claimed, these amounts shall be returned to the State with the accrued interest.

185. The amounts set aside in this Judgment for pecuniary and non-pecuniary damages and reimbursement of costs and expenses, shall be delivered in full to the person indicated, as established in this Judgment, without any deduction arising from current or future taxes.

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

187. In accordance with its consistent practice, the Court reserves the authority, inherent in its attributes and derived from Article 65 of the American Convention, to monitor full compliance with this Judgment. The case shall be considered closed once the State has fully complied with the provisions of this ruling.

188. Within one year as of notification of this Judgment, the State shall submit to the Court a report on the measures adopted in compliance with it.

X
OPERATIVE PARAGRAPHS

189. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To dismiss the preliminary objection filed by the State regarding the Court's alleged inability to hear the alleged violation of Article 8(4) of the American Convention on Human Rights, under the terms of paragraphs 23 to 28 of this Judgment.

DECLARES,

Unanimously that:

1. It is not appropriate to rule on the alleged violations of Articles 8(2)(c), 8(2)(d), 8(2)(e), 25(2)(a) and 25(2)(b) of the American Convention, under the terms of paragraph 85 of this Judgment.

2. The State is responsible for the violation of the right to appeal the judgment, enshrined in Article 8(2)(h) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, to the detriment of Mr. Oscar Alberto Mohamed, under the terms of paragraphs 86 to 117 of this Judgment.

3. It is not appropriate to rule on the alleged violations of Articles 8(1), 8(2)(c), and 25(1) of the American Convention on Human Rights, under the terms of paragraphs 118 and 119 of this Judgment.

4. The State did not violate the right enshrined in Article 8(4) of the American Convention on Human Rights, under the terms of paragraphs 120 to 126 of this Judgment.

By four votes in favor and two against, that

5. It does not consider it appropriate to determine whether there was a violation of the principle of legality (freedom from *ex post facto* laws), enshrined in Article 9 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Mr. Oscar Alberto Mohamed, under the terms of paragraphs 130 to 139 of this Judgment.

AND ORDERS

Unanimously, that:

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

2. The State shall adopt the measures necessary to guarantee Mr. Oscar Alberto Mohamed the right to appeal the conviction issued by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters on February 22, 1995, pursuant to the conventional parameters established in Article 8(2)(h) of the American Convention, under the terms stated in paragraphs 90 to 117 and 152 of this Judgment.

3. The State shall adopt the measures necessary so that the legal effects of the conviction issued by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters on February 22, 1995, and in particular its criminal records, are suspended until a decision on merits has been issued guaranteeing Mr. Oscar Alberto Mohamed's right to appeal the conviction.

4. The State shall issue the publications indicated in paragraph 155 of this Judgment, within six months of its notification.

5. The State shall pay the amounts set in paragraphs 171 and 177 of this Judgment, as compensation for pecuniary and non-pecuniary damages, and for the reimbursement of costs and expenses, under the terms of the aforesaid paragraphs, and shall reimburse the Victims' Legal Assistance Fund in the amount established in paragraph 180 of this Judgment.

6. The State shall, within one year as of notification of this Judgment, submit to the Court a report on the measures adopted in compliance thereof.

7. The Court shall monitor full compliance with this Judgment, in exercise of its authority and in compliance with its obligations under the American Convention on Human Rights, and shall consider this case concluded when the State has complied fully with its provisions.

Judge Pérez Pérez informed the Court of his Dissenting Opinion, which is attached to this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on November 23, 2012.

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

**PARTIALLY DISSENTING OPINION OF
JUDGE ALBERTO PÉREZ PÉREZ
CASE OF MOHAMED v. ARGENTINA**
Judgment of November 23, 2012
(Preliminary Objection, Merits, Reparations and Costs)

1. *Scope of the partially dissenting opinion.* This dissenting opinion refers only to operative paragraph 5 of the Judgment ("5. It does not consider it appropriate to determine whether there was a violation of the principle of legality (freedom from ex post facto laws), enshrined in Article 9 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Mr. Oscar Alberto Mohamed, under the terms of paragraphs 130 to 139 of this Judgment") and to the relevant legal grounds, particularly paragraphs 136 to 139.

2. *The text of Article 9 of the American Convention*, the provision on which the Court makes no ruling regarding an alleged violation, is the following:

ARTICLE 9

Freedom from Ex Post Facto Laws

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

3. *Relevant part of the judgment challenged.* The relevant part of the judgment issued by the First Chamber of the National Chamber of Appeals of February 22, 1995 (hereinafter "the judgment of the Chamber") states the following:

[Legal basis]

(...) [I] must state here that I endorse the sentence appealed only in that it has proved the responsibility of the accused in striking the victim in this incident and that this collision caused her death. I do not share the trial judge's disqualification of the testimony of the eye-witness to the accident (...) nor do I consider that testimony sufficient to substantiate whether the defendant in this case, did or did not commit an imprudent action which, at the very least, contributed to the socially improper outcome.

Indeed, to assess blame, the trial judge focused exclusively on whether the defendant or the victim had the green light, as if that municipal authorization could absolve the defendant of all responsibility and obviate the need to investigate the behavior that, contrary to the objective duty of care, resulted in the punishable act, because in this case it is also clear that Mohamed failed to observe the law that forbids passing another vehicle at an intersection, precisely to ensure that drivers have the necessary visibility at all times and are therefore in control of their actions.

(...)[T]he defendant's own statements are sufficient evidence of an imprudent action, which was a decisive cause of the reproachable outcome being analyzed.

Mohamed (...) stated that he stopped his bus at the bus stop located on Belgrano, between Tacuarí and Piedras, behind a bus of line N° 103, so that when the defendant started up his bus he turned toward the left lane, into the third lane, because the bus of the 103 line was in the lane to his right and passed half way by him when they arrived at the intersection of Belgrano and Piedras, where the traffic light was green; he saw the 103 bus brake and saw a woman running in front of him, so he also braked, but struck her with his bumper, making her stumble, fall and strike her head on the ground.

I consider that this account suffices to demonstrate the defendant's recklessness in driving the vehicle for which he was responsible. Norms of care, as objective regulations for prevention, are not at the disposal of individuals and therefore are not abrogated by lack of use. Among the internationally accepted norms that apply to this case is the duty of one who creates a risk for third parties to act with full control of that risk at all times, in order to prevent any damage to others, which could result from possible and foreseeable circumstances; a related obligation is for one who passes another vehicle to maintain sufficient visibility, and not to start passing at an intersection, curve bridge or other dangerous place; and a third duty is to yield to pedestrians on a pedestrian crossing, at all times in areas where there are no traffic lights, and as indicated where there are traffic lights. In our legislation, such principles are established in Articles 37, 39, and 40 of Decree Law N° 692/92, which regulates automobile traffic.

This established, we see that Mohamed, failing to exercise reasonable care to guarantee third party assets, started up his bus in order to pass to the left of another bus, so that when he was behind he voluntarily deprived himself of any possibility of preventing a collision with the pedestrian who was still crossing on the crosswalk, unlike the bus of line 103 which, by maintaining the necessary field of view from his position, avoided a collision.

This suffices to demonstrate the criminal liability of the conduct. But there is more (...) [The witness testimony is reasonable and indicates] that the victim started crossing with the green light about to change, arriving at the intersection and passing the other bus, and the defendant at the same time anticipating the yellow light, which explains why the other driver could brake and avoid colliding with the victim, unlike the defendant's vehicle. This shows not only the obstructed vision described by the defendant himself, but also a certain unwarranted speed of his bus to reach the corner and pass the other bus, which is not idle speculation because the fracture of the left clavicle and the fracture of all the ribs on the left side –the side on which the victim was hit – as well as the fracture of the second and seventh ribs on the right side and the open wound in the right occipital area (...) obviously could not have been caused by a simple touch of the front bumper, especially when, as Mohamed claims, he was driving the bus at 10 km/h and applied his breaks before that "touch."

For all the foregoing reasons, I do not agree that in a case such as this one the defendant's guilt is in doubt merely because the testimony of the only witness who spoke of a green light for the victim was discarded. This does not mean that the green light would legitimize the previous imprudence of the defendant. And I do not agree with the conclusion that the evidence has not been able to discard the defendant's version, which I have just shown, is virtually a confession of reckless conduct, even more reprehensible for someone like the defendant who, as a professionally licensed bus driver, had a greater obligation to avoid risks to third parties and preserve the property of others, a responsibility that must be exercised with the utmost caution, prudence and reason.

(...) As a corollary, I feel that Mohamed's characteristic, illegal and punishable conduct, without mitigating grounds of justification, non-prosecution, inculpability or impunity, should be sanctioned with a penalty (...) I propose that points I and II of the verdict be revoked and be applied to the defendant, as author of the crime of manslaughter (...)¹

[Operative section]

(...) II) To revoke operative point I of the appealed judgment (...) and CONVICT OSCAR ALBERTO MOHAMED, of the other personal conditions in the instant case because of his criminal responsibility for the crime of manslaughter, and to sentence him to THREE YEARS IN PRISON, suspended, and to DISQUALIFY HIM FROM DRIVING any type of vehicle for EIGHT YEARS (Articles 26 and 84 of the Criminal Code) (...)

4. *Legal norm applied.* The legal provision applied is Article 84 of the Argentine Criminal Code, in effect since April 30, 1922² (amended by Decree Law 21.338, of 25-VI-1976³), which states the following:

Any person who, through imprudence, negligence or incompetence in his or her art or profession, or failure to observe the regulations or duties under his or her responsibility, causes the death of another, shall be punished with six months to three years in prison and special disqualification, as appropriate, for five to ten years.

Clearly, the application of that law in itself cannot have implied a violation of the principle of legality or non-retroactivity, because the action attributed to Mr. Mohamed took place on March 16, 1992 and the legal provision applied (the modified text regarding the penalty) was in effect since 1976 and (the original text regarding its definition and culpability) was in force since 1922. This law clearly defines the behavior sanctioned, consisting in *causing death to another*, provided that the outcome has been produced *by one or another of the following grounds (or by more than one of them)*:

a) *Imprudence;*

¹ Text from the judgment issued on February 22, 1995 by the First Chamber of the National Chamber of Appeals for Criminal and Correctional Matters (evidence file to facilitate adjudication submitted by the State on July 23 and 30 and August 10, 2012).

² The Argentine Criminal Code was approved on September 30, 1921, promulgated by the Executive Power on October 29, 1921, and came into force on April 30, 1922.

³ The amendment was the following: "In Art. 84 replace the following phrase: "six (6) months to two (2) years", with "six (6) months to three (3) years"."

- b) *Negligence;*
- c) *Incompetence in one's art or profession;*
- d) *Failure to observe the regulations or duties under one's responsibility.*

The judgment in this case analyzed the facts that occurred, both according to the testimony of a witness and, in particular, according to Mr. Mohamed's own statements, and reached the conclusion that "this account suffices to demonstrate the defendant's *recklessness* in driving the vehicle for which he was responsible." More specifically, it states that "Mohamed, ***failing to exercise reasonable care to guarantee the assets of others***, started up his bus in order to pass to the left of another bus, so that when he was behind he voluntarily deprived himself of any possibility of preventing a collision with the pedestrian who was still crossing on the crosswalk, unlike the bus of line 103, which, by maintaining the necessary field of view from his position, avoided a collision" (bold and cursive added). To those facts, a law was applied that was already in effect, so that there could not be any violation of Article 9 of the American Convention on Human Rights ("the American Convention").

5. *Duty of care and regulatory provisions.* Criminal doctrine generally includes the grounds mentioned in Article 84 of the Criminal Code within the overall concept of failure to observe the duty of care. Likewise, the interpretation of said article leads to the conclusion that – as already noted– it is sufficient that a single one of the grounds mentioned is present in order to configure a crime of negligence. This point requires clarification in relation to the failure to observe rules or duties under a person's responsibility. On the one hand, such non-observance in itself is not sufficient to constitute a crime, since the action must have had an impact on causing the outcome (death)⁴. On the other, observance of the rules or duties under a person's responsibility does not exclude the configuration of a crime for any other of the grounds mentioned in Article 84, in other words, imprudence or negligence or incompetence in his art or profession. This last point was made perfectly clear at the hearing by expert witness Julio Maier⁵, when, in response to a question, he said that even in regulated activities it is possible to define recklessness or negligence using sources other than the regulations, but the judgment must clearly state the grounds for the recklessness and the facts that resulted in said recklessness or negligence.⁶ That is precisely what has happened in this case. As is perfectly clear from the transcript of the relevant parts of the Chamber's ruling (*supra*, para. 3) those requirements were fully met– although obviously it will be up to the Argentine courts, in the proceeding to guarantee Mr. Oscar Alberto Mohamed the right to appeal the conviction (Operative Paragraph 2 of the Judgment of this Court), to decide whether the assessment of the evidence, the determination of the proven facts and their legal definition were correct.

6. *Scope of the citation of the National Traffic and Transport Regulations.* The alleged violation of Article 9 of the Convention, then, can only be based on the mention of the National Traffic and Transportation Regulations (Decree N° 692 of 1992), which entered into force some weeks after the action attributed to Mr. Mohamed. According to the Commission, the ruling of the Chamber "integrated the crime of manslaughter established in Article 84 of the [Argentine] Criminal Code, with the provisions of Decree No. 692/92" (cited in para. 127 of the judgment of this Court). According to the representatives, "the conviction was based on a regulation that was not in effect, given that, at the time of the events, Decree No. 12.689, issued in 1945, was in force" (*idem*, para. 128). In my view, those arguments are baseless. The terms of the Chamber's ruling show that the grounds for his conviction are related to principles and norms recognized in international practice and to an interpretation of the concepts of

⁴ For example, the failure to observe a regulatory requirement to carry beacons or other safety equipment in the vehicle in the event of parking on a road has no impact on causing the outcome if the vehicle ran over a pedestrian and caused his or her death.

⁵ The expert witness proposed by the representatives to provide an opinion, in the first place, "on the principle criminal legality" (Order of the President of the Court of 4-VI-2012, operative paragraph 8, A-2).

⁶ Judgment, para. 136 *in fine*.

imprudence, negligence or incompetence in his art or profession, as well as in an analysis of Mr. Mohamed's specific conduct. This alone was sufficient to configure the crime of manslaughter (with the exception indicated at the end of the preceding paragraph). That judgment did not state that Mr. Mohamed had failed to observe certain provisions of the aforesaid decree, but mentioned it as the part of Argentine legislation containing the principles or "standards of care" or "objective standards of prevention" and "of international practice", which "are not at the disposal of individuals and therefore are not abrogated by lack of use." Thus, it cannot be said that the judgment of the Chamber *integrated* the criminal definition retroactively applying a decree not in force, or that it used it as the *basis* for the judgment. Nevertheless, the reference to a decree not in force at the time of the facts is a serious error that must be strictly pointed out.

7. *Conclusion.* As noted previously, the legal norms applied were in force long before the facts of this case; these norms stipulated that the duty of care should be observed and referred to the concepts of imprudence, negligence and incompetence; in its judgment, the Chamber explained the points of fact and of law that in its view demonstrated "the defendant's recklessness in driving the vehicle for which he was responsible" and that Mr. Mohamed had acted "failing to exercise reasonable care to guarantee the assets of others," and that the erroneous citation of a regulation not in force was not used to define the offense nor as a basis for the ruling. Therefore, my conclusion is that the *State of Argentina has not violated Article 9 of the American Convention.*

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary