

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF GORIGOITÍA V. ARGENTINA**

**JUDGMENT OF SEPTEMBER 2, 2019**

***(Preliminary objection, merits, reparations and costs)***

In the case of *Gorigoitía v. Argentina*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:\*

Eduardo Ferrer Mac-Gregor Poisot, President  
Eduardo Vio Grossi, Vice President  
Humberto Antonio Sierra Porto, Judge  
Elizabeth Odio Benito, Judge;  
L. Patricio Pazmiño Freire, Judge, and  
Ricardo Pérez Manrique, Judge,

also present,

Pablo Saavedra Alessandri, Registrar,

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, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this judgment which is structured as follows:

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\* Judge Eugenio Raúl Zaffaroni, an Argentine national, did not take part in the processing, deliberation, or signature of this judgment, in accordance with the provisions of Article 19(1) and (2) of the Court's Rules of Procedure.

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## I INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On March 16, 2018, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Court the case of *Gorigoitia v. the Argentine Republic* (hereinafter “the State of Argentina,” “the state,” or “Argentina”). According to the Commission, the case involves the lack of an ordinary remedy that would allow for comprehensive review of the conviction of Oscar Raúl Gorigoitia for the crime of murder in the framework of a criminal proceeding in the Province of Mendoza, Argentina, in 1997. The Commission argued that Mr. Gorigoitia was not able to appeal to a higher authority for comprehensive review of the judgment, including issues of fact and review of evidence put forward by the defense through the appeal. In this regard, the Commission found that the state had violated, to his detriment, the right to appeal a judgment established in Article 8(2)(h) of the Convention, read in conjunction with the obligations established in articles 1(1) and 2 of the Convention. Likewise, the Commission concluded that as a consequence of the limited nature of the cassation appeal, and the even more limited nature of the extraordinary appeal, Mr. Gorigoitia did not have simple and effective judicial remedies available to him within the framework of the criminal proceeding that culminated in his conviction, in violation also of the right established in Article 25(1) of the Convention, read in conjunction with the obligations set forth in articles 1(1) and 2 of the same instrument.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

- a) *Petition.* In a communication dated January 19, 1999, the representatives (hereinafter “the petitioners”) filed the initial petition with the Commission.
- b) *Admissibility Report.* On July 11, 2013, the Commission approved Admissibility Report No. 35/13.<sup>1</sup>
- c) *Report on the Merits.* On September 5, 2017, the Commission approved Report on the Merits No. 98/17, in accordance with Article 50 of the Convention (hereinafter also “the Report on the Merits” or “Report No. 98/17”), in which it reached a series of conclusions and made several recommendations to the state.<sup>2</sup>
- d) *Notification to the state.* On October 18, 2017, the state was notified of Report No. 98/17, giving it a period of two months to report on compliance with the recommendations.
- e) *Follow-up of the recommendations of the Commission.* The state did not respond to the Commission's Report on the Merits.
- f) *Submission to the Court.* On March 16, 2018, the Commission submitted all the facts and human rights violations described in the Merits Report to the jurisdiction of the Inter-

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<sup>1</sup> It was notified to the parties on September 6, 2013.

<sup>2</sup> *Conclusions.* The Commission concluded that the state was responsible for the violation of the rights to appeal a ruling and to judicial protection established in articles 8(2)(h) and 25(1) of the American Convention, read in conjunction with the obligations established in articles 1(1) and 2 of the same instrument, to the detriment of Oscar Raúl Gorigoitia. *Recommendations.* Consequently, the Commission made a series of recommendations to the state: (i) order the necessary measures so that, should he wish to, Mr. Gorigoitia could file an appeal for a comprehensive review of the conviction; (ii) provide full reparations for the violations declared in the report, including pecuniary and nonpecuniary damages; and (iii) order the legislative measures necessary to adapt the domestic legislation on cassation appeals to the standards established in the Report on the right enshrined in Article 8(2)(h) of the American Convention. Likewise, and independent of amendments to legal provisions, ensure the judicial authorities conduct review of compliance with human rights conventions when resolving appeals of convictions in a manner consistent with the standards established in the Report on the Merits.

American Court.<sup>3</sup>

3. *Requests of the Inter-American Commission.* The Commission asked the Court to find and declare the international responsibility of the state for the violations contained in the Report on the Merits and to order Argentina, as measures of reparation, to implement the recommendations included therein (*supra* para. 2.c).

## II PROCEEDINGS BEFORE THE COURT

4. *Notification to the representative and the state.* The representatives of the alleged victims (hereinafter "the representatives") were notified by the Court of the submission of the case by the Commission on April 5, 2018, and the state was notified on April 16, 2018.<sup>4</sup>

5. *Brief with pleadings, motions and evidence.* On June 12, 2018, the representatives submitted their brief of requests, arguments and evidence (hereinafter "pleadings and motions brief") to the Court. The representatives forwarded and endorsed the Commission's description of the facts. Likewise, they endorsed the Commission's arguments regarding the preliminary objection and the merits of the matter. Lastly, the representatives asked the Court to order the state to adopt different measures of reparation and to reimburse costs and expenses.

6. *Answering brief.* On August 15, 2018, the state<sup>5</sup> submitted to the Court its answering brief (hereinafter the "answering brief") to the submissions of the Report on the Merits of the Commission and the pleadings and motions brief. The state filed a preliminary objection. The parties and the Commission were notified of the brief on September 12, 2018.

7. *Observations on the preliminary objection.* On October 12, 2018, the Commission and the representatives of the alleged victims presented their observations on the preliminary objection filed by the state.

8. *Public hearing.* By order of the President of March 20, 2019,<sup>6</sup> the parties and the Inter-American Commission were summoned to a public hearing to give their final oral observations on the preliminary objection, on the merits, and on the eventual reparations and costs. The hearing was also intended to receive the testimony of Mr. Gorigoitia. The public hearing was held on May 8, 2019, during the 60th Extraordinary Period of Sessions of the Court, held in Montevideo, Uruguay.<sup>7</sup>

9. *Amicus curiae.* The Court received five amicus curiae briefs presented by: (i) the Fundación

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<sup>3</sup> As its delegates before the Court, the Commission chose Registrar Paulo Abrão and Commissioner Luis Ernesto Vargas Silva.

<sup>4</sup> The difference in dates is because the documents were sent via courier.

<sup>5</sup> In a communication dated May 17, 2018, the state appointed Mr. Alberto Javier Salgado, Director of International Litigation on Human Rights Matters of the Ministry of Foreign Affairs and Religion, as agent, and Mr. Ramiro Cristóbal Badía, Director of the National Office of International Affairs on Matters of Human Rights of the Secretariat of Human Rights and Cultural Pluralism of the Nation, as an alternate agent.

<sup>6</sup> Cf. *Case of Gorigoitia v. Argentina. Call to hearing.* Order of the President of the Inter-American Court of Human Rights of March 20, 2019. Available at: [http://www.corteidh.or.cr/docs/asuntos/gorigoitia\\_20\\_03\\_19.pdf](http://www.corteidh.or.cr/docs/asuntos/gorigoitia_20_03_19.pdf)

<sup>7</sup> The following appeared at this hearing: (a) for the Inter-American Commission: advisor Erick Acuña Pereda; (b) for the representatives of the alleged victim: Carlos Varela Álvarez, Alejandro Acosta, and Pablo Donnangelo; and (c) for the State of Argentina: Ramiro Cristóbal Badía, National Director for International Legal Affairs in the Matter of Human Rights of the Secretariat of Human Rights and Cultural Pluralism of the Nation; Gonzalo Bueno, Legal Advisor of the Office of International Litigation in Human Rights Matters of the Ministry of Foreign Affairs and Religion; Alfredo Vitolo, Legal Advisor of the Secretariat of Human Rights and Cultural Pluralism of the Nation of the Ministry of Justice and Human Rights of the Nation; Octavio Sillitti, Legal Advisor of the Secretariat of Human Rights and Cultural Pluralism of the Nation of the Ministry of Justice and Human Rights of the Nation; Gianni Venier, Minister of Security of the Province of Mendoza, and Adriana Bertolatti, Legal Advisor of the Ministry of Security of the Province of Mendoza.

Centro Latinoamericano de Derechos Humanos;<sup>8</sup> (ii) the Universidad Austral of Buenos Aires;<sup>9</sup> (iii) the Círculo de Derechos Humanos of the Universidad Nacional Mayor de San Marcos;<sup>10</sup> (iv) the Asociación de Pensamiento Penal;<sup>11</sup> and (v) the Center for Justice and International Law (CEJIL) and the Office on Criminal Cassation Defense of the Province of Buenos Aires.<sup>12</sup>

10. *Final written arguments and observations.* On June 4 and 6, 2019, the representatives and the state, respectively, submitted final written arguments, together with their annexes. On June 6, 2019, the Commission submitted its final written observations.

11. *Disbursements from the Assistance Fund.* On June 10, 2019, the report on the disbursements made from the Legal Assistance Fund of the Court in this case, together with its annexes, was forwarded to the state. The state did not submit its observations on the report.

12. *Observations on the annexes to the final written arguments.* On June 4 and 6, 2019, respectively, the state and the representatives forwarded their observations on the annexes sent with the final written arguments. The Commission submitted its observations on June 6, 2019.

13. *Deliberation of this case.* The Court began deliberating this judgment on September 2, 2019.

### **III COMPETENCE**

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

### **IV PRELIMINARY OBJECTION**

15. The state filed a preliminary objection questioning the Court's competence to conduct a review of compliance with human rights conventions of provincial law No. 6730 and its amendments. The Court will analyze the challenge as a preliminary objection in view of the subject matter.

#### ***A. The Inter-American Court's lack of competence to conduct a "review of compliance with human rights conventions" of provincial law No. 6730 and its amendments.***

##### **A.1 Arguments of the parties and observations of the Commission**

16. The state argued that the representatives want the Inter-American Court of Human Rights to rule in the abstract on the compatibility of internal law with the American Convention, law that has no causal relationship with the case in question because it was not in force during the time at

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<sup>8</sup> The brief signed by María Fabiola Cantú deals with the failure of the province of Mendoza, Argentina, to adapt procedural legislation to international guidelines on the right to appeal.

<sup>9</sup> The brief signed by C. Ignacio de Casas deals with the standards of the inter-American system on the right to appeal.

<sup>10</sup> The brief signed by Paola Karelin Cahuana Quincho in her capacity as representative of that institution deals with the guarantee of the right to appeal in the Court's case law.

<sup>11</sup> The brief signed by Indiana Guerrero, in her capacity as president of that association, deals with the adequacy of Argentine legislation in light of the American Convention.

<sup>12</sup> The brief signed by Gisela de León, Legal Director of CEJIL; María Noel Leoni, Director of CEJIL's Program for the Southern Cone and Bolivia; Juan Pablo Gomara, Secretary of Foreign Affairs for the SCJN and International Organizations Area and the Office of Criminal Cassation Public Defense of the Province of Buenos Aires, and Mario Luis Coriolano, Public Defender before the Court of Criminal Cassation of the Province of Buenos Aires, addressing the status of protection of the right to appeal rulings to a higher court in Argentina.

which the facts took place. The state also argued that the pleading of the representatives of the alleged victims amounts to the raising of new facts that were not addressed by the Commission in its Report on the Merits. In this sense, they argued that the Court would only be competent to evaluate arguments related to local laws' incompatibility with international human rights conventions as long as they had been dealt with by the local courts and when, in addition, the procedure provided for in articles 48 to 50 of the American Convention had concluded, something that had not happened in this case. Consequently, the state asked that the Court refrain from reviewing the compliance with human rights conventions of provincial law 6730, amended by provincial law 9040.

17. The **Commission** argued that the state's pleading does not amount to a preliminary objection. Specifically, it noted that the pleading is not aimed at preventing the Court from hearing the case, since its arguments refer to a presumed lack of competence to rule on the conventionality of domestic legal provisions. This aspect corresponds to the merits of the matter, specifically to the duty to adopt domestic legal effects. Notwithstanding the foregoing, in conducting its factual analysis of the case, the Commission argued that the legislation in force at the time of the facts violated the American Convention. It therefore explained that one of the recommendations for the case was to "order the legislative measures necessary to adapt the domestic legislation on cassation appeals to the standards established in this report on the right enshrined in Article 8(2)(h) of the American Convention." Consequently, it asked that the preliminary objection raised by the state be dismissed.

18. The **representatives** argued that the objection was formally inadmissible due to conceptual and contextual errors, since the request is not positioned to result in the termination, freezing, or diversion of the content of the case. They argued that Mendoza provincial law 6730 and its amendments cannot be excluded from analysis of the case because they are the provisions that succeed the legal provisions challenged in the Gorigoitia case. They added that admission of the preliminary objection would make it necessary to decide on the merits of the petition, since the consequences of that law and its amendments require that the case be resolved fully. They argued that Law 6730 is not a supervening fact in this case, having been in force almost since the case was submitted to the Commission. They maintained that the amendments to the law have not changed the grounds for the violations, since the new legal provisions continue to suffer from the defects of the previous ones. Lastly, they argued that the application of the principles *pro homine*, *iura novit curia*, and subsequent anti-conventional law require the rejection of the preliminary objection raised by the state.

## A.2 Considerations of the Court

19. The Court recalls that, pursuant to its case law, it will only consider as preliminary objections pleadings that are or could be such based exclusively on their content and purpose—that is, if sustained, they would prevent the continuation of the proceeding or a ruling on the merits.<sup>13</sup> The Court has repeatedly found that preliminary objections raise issues related to a case's admissibility or the Court's jurisdiction to hear a specific case or aspect of it, based on the person in question, the subject matter, the time, or the place.<sup>14</sup> Therefore, regardless of whether the state calls a pleading a "preliminary objection," if analysis of such proposals requires prior consideration of the merits of a case, the pleading is no longer preliminary and cannot be analyzed as a preliminary

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<sup>13</sup> Cf. *Case of Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment dated May 26, 2010. Series C No. 213, para. 35, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 5, 2018. Series C No. 346, para. 20.

<sup>14</sup> Cf. *Case of Las Palmeras v. Colombia. Preliminary Objections*. Judgment dated February 4, 2000. Series C No. 67, para. 32, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 5, 2018. Series C No. 346, para. 20.

objection.<sup>15</sup>

20. The pleading of the representatives, whereby the state called into question the competence of this Court, was to ask the Court to assess whether the laws adopted subsequent to the time of the fact and not applied in the proceeding brought against Mr. Gorigoitia were compatible with the Convention. In this regard, the Court notes that the judgment whereby Mr. Gorigoitia was sentenced was adopted on September 12, 1997, by the First Criminal Chamber of Mendoza (hereinafter "the First Chamber") (*infra* para. 30), and that the cassation appeal filed by his defense was resolved on December 19, 1997 (*infra* para. 35). Likewise, that the criminal procedure legislation in force at the time of the facts was the Code of Criminal Procedure of the Province of Mendoza, Law 1908 of 1950, and the National Criminal Procedure Code, Law 23,984 of 1991. The Court notes that cassation appeals in the province of Mendoza are currently governed by the Code of Criminal Procedure of the Province of Mendoza, Law 6730 of 1999, amended by Law 9040 of 2018, and at the national level, they are governed by the Criminal Procedure Code of the Argentine Nation, Law 27,063 of 2014.

21. In relation to the foregoing, the Court recalls that the contentious jurisdiction of the Court is not intended to review national legislation in the abstract, but is exercised to resolve specific cases in which it is alleged that an act attributable to the state is contrary to Convention.<sup>16</sup> However, the Court notes that one of the aspects of analysis in this case consists of determining whether regulations governing the cassation appeal in the Province of Mendoza at the time of the facts—which was applied to Mr. Gorigoitia—and subsequent actions aimed at ensuring a comprehensive review of cassation appeals are compatible with the American Convention. Analysis of this issue corresponds to the merits of the matter, specifically the duty of the state to adopt domestic legal effects in terms of Article 2 of the Convention. Therefore, the Court dismisses the state's preliminary objection.

## V

### PRELIMINARY CONSIDERATIONS

22. The representatives of Mr. Gorigoitia asked the Court for measures of reparation for his relatives. However, in its Report on the Merits, the Inter-American Commission did not indicate which of Mr. Gorigoitia's relatives were to be included as alleged victims. The Court will therefore classify the representatives' request as a preliminary consideration.

#### A. Determination of the alleged victims

##### A.1 Arguments of the parties and observations of the Commission

23. The **Commission** indicated in Report on the Merits 98/17 that the alleged victim in this case is Oscar Raúl Gorigoitia. The **representatives** stated in their pleadings and motions brief that the family of Mr. Gorigoitia—comprising his wife, Berta Montenegro, and his three children—were impacted by the arbitrary process in the form of "public shame over a crime committed by a member of the Mendoza Police" due to "disappointment with the criminal process, the closure of the procedural channels, the end of his status as a police officer, the economic difficulties" and "facing health problems". In this sense, they asked that they be granted "the retirement benefit corresponding to Oscar Gorigoitia, and his social security benefits for his wife and son"; a "training scholarship for Nicolás Gorigoitia"; and "free family therapy provided to Oscar Gorigoitia and his

<sup>15</sup> 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 Herzog et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of March 15, 2018. Series C No. 353, para. 80.

<sup>16</sup> Cf. *Case of Genie Lacayo v. Nicaragua. Preliminary Objections*. Judgment of January 27, 1995. Series C No. 21, para. 50, and *Case of Terrones Silva et al. v. Peru. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of September 26, 2018. Series C No. 360, para. 219.

family.”

24. The state argued that at no stage of the proceeding before the Commission was Mr. Gorigoitia's next of kin identified as victims, nor were they recognized as such in the Report on the Merits. Likewise, it highlighted that the Commission reviewed violation of articles 8(2)(h) and 25(1), read in conjunction with articles 1(1) and 2 of the Convention, to the detriment of Mr. Gorigoitia, and that no other right was alleged to be violated to the detriment of Mr. Gorigoitia or his next of kin. Therefore, it held that adding new violations would alter the procedural purpose of the case and violate the proper exercise of the state's right to defense. The state thus maintained that any reparation sought for Mr. Gorigoitia's next of kin must be declared inadmissible, along with any evidence intended as demonstrating the alleged damage suffered by them.

## **A.2 Considerations of the Court**

25. Regarding the identification of the alleged victims, the Court recalls that Article 35(1) of the Rules of Procedure of the Court establishes that cases shall be submitted through the presentation of a Report on the Merits, which must identify the alleged victims. It therefore falls to the Commission to identify, precisely and at the proper procedural moment, the alleged victims in a case before the Court,<sup>17</sup> except for in the exceptional circumstances provided for under Article 35(2) of the Rules of Procedure of the Court, according to which, when the justification is that it was not possible to identify them because the cases concern massive or collective violations, the Court shall decide whether to consider individuals as victims in accordance with the nature of the violation.<sup>18</sup>

26. In this case, the Court finds that none of the exceptions provided for in Article 35(2) of the Court's Rules of Procedure apply. Consequently, based on the provisions of Article 35(1) of the Rules of Procedure, and the precedents on which this Court has ruled in this regard, the Court concludes that only Mr. Gorigoitia will be considered as an alleged victim in this case, and his next of kin cannot be admitted as alleged victims.

## **VI EVIDENCE**

### **A. Admissibility of the documentary evidence**

27. The Court received various documents presented as evidence by the Commission, the representatives and the state, as well as those requested by the Court or its President as helpful evidence and, as in other cases, it admits them in the understanding that they were presented at the appropriate procedural moment<sup>19</sup> and their admissibility was not contested or refuted.

### **B. Admission of the testimonial and expert evidence**

28. Likewise, the Court deems it pertinent to admit the statements of the alleged victim,<sup>20</sup> the expert opinions rendered before notary public in the framework of this case,<sup>21</sup> and the expert

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<sup>17</sup> Cf. *Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 18.

<sup>18</sup> Cf. *Case of the Río Negro Massacres v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of September 4, 2012. Series C No. 250, para. 48, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 18.

<sup>19</sup> Article 57(2) of the Rules of Procedure.

<sup>20</sup> During the public hearing, the Court heard the statement of the alleged victim, Oscar Raúl Gorigoitia.

<sup>21</sup> The Court received the expert opinions rendered before notary public of Oscar Dimas, Fernando De La Rúa, and Mario Alberto Juliano.



opinions rendered by Mr. Alberto Bovino<sup>22</sup> in the cases of *Mendoza et al. v. Argentina* and *Amrhein et al. v. Costa Rica* insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

## VII FACTS

### A. *The criminal prosecution of Oscar Raúl Gorigoitia*

#### A.1 Arrest and pretrial detention

29. On August 31, 1996, Oscar Raúl Gorigoitia Guerrero was arrested along with other police officers for the murder of Hugo Alejandro Gómez Romagnoli<sup>23</sup> (hereinafter "Mr. Gómez Romagnoli"). At the time of the facts, Mr. Gorigoitia was an Auxiliary Sergeant of the Mendoza Police and a member of the Motorized Unit.<sup>24</sup> On September 6, 1996, the Investigating Judge issued the judicial order to convert Mr. Gorigoitia's arrest into pretrial detention based on subsection 1 of article 503 of the Criminal Procedural Code of the Province of Mendoza.<sup>25</sup> In the same order, the investigating judge issued a ruling on Mr. Gorigoitia's responsibility as an officer of the police force.<sup>26</sup> Additionally, the investigating judge determined that the evidence obtained did not amount to "sufficient motive" to charge the other police personnel who took part in the chase with a crime, for which reason the only defendant in the case was Mr. Gorigoitia.<sup>27</sup>

#### A.2 Conviction

30. On September 12, 1997, the First Chamber convicted Mr. Gorigoitia of the crime of murder, sentencing him to 14 years in prison and a ban from public service for the same period of time. The Court found that the bullet that caused Mr. Gómez Romagnoli's death was fired by Mr. Gorigoitia's weapon.<sup>28</sup> As far as the classification of the crime as "murder," the court found that Mr. Gorigoitia acted with "gross negligence,"<sup>29</sup> given that "he began his commission of the

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<sup>22</sup> In its brief submitting the case, the Commission requested the transfer of these expert reports "[i]n view of the fact that these issues significantly affect inter-American public order."

<sup>23</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joindered case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folios 14 and 51). Mr. Gómez Romagnoli died during a police chase that took place on August 31, 1996. Mr. Gómez Romagnoli was in his vehicle when a sergeant asked him if everything was OK. Mr. Gómez Romagnoli immediately fled, pursued by a number of police vehicles that increased as the pursuit continued. Shots were fired during the chase. One of those shots, coming from Mr. Gorigoitia's service weapon, hit Mr. Gómez, killing him. All the police officers who took part in the chase were detained and held incommunicado by order of the investigating judge, who was present at the Police Station.

<sup>24</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joindered case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 2). In the order, the judge indicated that "the death of the victim due to the firing of a gun, the collection of the projectile that caused it, the determination that the projectile was fired by the defendant's weapon, the report that shows that the same pistol also fired another shot, and the statements of the police officers who saw Gorigoitia shoot at Gómez's car from an angle that matches the bullet holes found in the vehicle without question constitute a plexus of evidence supporting holding the suspect as the one likely to have caused Gómez's death."

<sup>25</sup> Cf. Judgment of the Judiciary of Mendoza. File 73.872/1 "Prosecutor v. Gorigoitia, Oscar," September 6, 1996 (evidence file, folios 124 and 131). Specifically, it stated that "[...] a 20-year veteran police officer knows the characteristics of this weapon, its range, and the damage it is capable of causing, because of course, he has been instructed and trained in its use." Along the same lines, it added with regard to Mr. Gorigoitia that, "[...] in addition to being familiar with the weapon he was carrying, the Auxiliary Sergeant is a member of the Motorized Unit, which also makes him aware of the dangers involved in shooting from a moving vehicle."

<sup>26</sup> Cf. Judgment of the Judiciary of Mendoza. File 73.872/1 "Prosecutor v. Gorigoitia, Oscar," September 6, 1996 (evidence file, folio 125).

<sup>27</sup> Cf. Judgment of the Judiciary of Mendoza. File 73.872/1 "Prosecutor v. Gorigoitia, Oscar," September 6, 1996 (evidence file, folio 130).

<sup>28</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joindered case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folios 4 and 104).

<sup>29</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joindered case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 101).

homicide [...] with an inexcusable indifference to the possible harmful result. Gorigoitia understood the weapon and knew the consequences of using it during a high-speed chase, what the likely result would be, and despite this, he fired under these conditions."<sup>30</sup>

31. The First Chamber indicated that Mr. Gorigoitia did not act under conditions that would have warranted the use of firearms according to the Police Regulations.<sup>31</sup> It also found that it could not be justified by observation if Mr. Gorigoitia acted negligently but rather it had to be deduced from external conjecture, given that "to affirm the existence of negligence in a court of law, facts, circumstances, and the phenomena representing it must be described."<sup>32</sup> The First Chamber found that "[Mr.] Gorigoitia must answer for the death of Hugo Alejandro Gómez in view of his gross negligence [...]"<sup>33</sup> based on the fact that "the possible outcome (death) was represented and caused by his selfishness when he ignored the order not to use weapons, firing repeatedly with the two weapons provided (Itaka, 9mm)."<sup>34</sup>

32. The First Chamber took into account a psychological examination conducted by the Forensic Medical Corps stating that Mr. Gorigoitia was "immature, self-centered, with a tendency to handle the environment and difficulty adapting to external demands and limits." It also indicated that he "has difficulty handling situations rationally, perceiving interrelationships as competitive, aggressive, unreliable, and out of control. All this leads to insecurity and mistrust."<sup>35</sup> Likewise, it indicated that "considering this personality in light of the facts in question [...], his actions are a true reflection of his personality."<sup>36</sup>

### **A.3 Cassation appeal**

33. On September 29, 1997, Mr. Gorigoitia's public defender filed a cassation appeal requesting the annulment of the conviction.<sup>37</sup> The appeal argued a lack of grounds, stating that: "[...] negligence is a fact and as such must be proven like any other fact. Nowhere in the facts stated in the sentence has the court been able to demonstrate the existence of this element required for guilt. Simply calling something negligence or describing the circumstances surrounding what happened on the night of August 31, 1996, is insufficient. [...] Each legal assertion must be proven by its immediate antecedent and [...] the proof must be supported by facts that amount 'reasonably to legal consequences' and not the mere assertion of it"<sup>38</sup> [...] Negligence is a psychological fact interior to the perpetrator, and hinges on his intentions [...]."<sup>39</sup>

34. Mr. Gorigoitia's defense attorney also asserted the arbitrariness of the lower court conviction, stating that "with the same arguments put forward to convict Mr. Raúl Oscar Gorigoitia of the crime of simple homicide [...] it excludes Sergeant Hugo Felix Sarmiento from any suspicion," who

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<sup>30</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joinder case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 4).

<sup>31</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joinder case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folios 13 and 14).

<sup>32</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joinder case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 86).

<sup>33</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joinder case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 86).

<sup>34</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joinder case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 89).

<sup>35</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joinder case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 86).

<sup>36</sup> Cf. Judgment of the Judiciary of Mendoza, File 16,073 "Prosecutor v. Gorigoitia Oscar Raúl for Murder" and its joinder case, Deliberation Room of the First Criminal Chamber, September 12, 1997 (evidence file, folio 87).

<sup>37</sup> Cf. Criminal Cassation Appeal Judgment, presented before the First Criminal Chamber of Mendoza, September 29, 1997 (evidence file, folios 134 *et seq.*).

<sup>38</sup> Cf. Criminal Cassation Appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on September 29, 1997, before the First Criminal Chamber of Mendoza (evidence file, folio 150).

<sup>39</sup> Cf. Criminal Cassation Appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on September 29, 1997, before the First Criminal Chamber of Mendoza (evidence file, folio 151).

also fired two shots at the vehicle of Mr. Gómez Romagnoli. "The first did not hit the target and the second hit the right rear tire and was the one that caused the car to stop immediately."<sup>40</sup> The defense asked "[...] if Corporal Sarmiento's actions are justified, why not those of Gorigoitia?"<sup>41</sup> Lastly, the defense questioned the legal assertion of gross negligence because "it is based on the personality of the accused, and on the violation of police regulations."<sup>42</sup>

35. The First Chamber granted the appeal and referred the proceedings to the Supreme Court of Justice of Mendoza (hereinafter the "Supreme Court of Mendoza"), which would decide on the merits of the matter.<sup>43</sup> On December 19, 1997, the Second Chamber of the Supreme Court of Mendoza (hereinafter "the Second Chamber") ruled to deny the cassation appeal for lack of justification and no specific definition of claim.<sup>44</sup> In this regard, the Second Chamber stated that the appeal "must be justified and the grounds must be given by the appellant in the same filing brief, specifically determining the claim both in relation to the flaw alleged and the law on which it is based."<sup>45</sup> Specifically, the Second Chamber found as follows:

The remedy cannot be grounded generically; when a judgment is alleged to lack justification, the flaw in question must be identified, with specific reference to a reasonable possibility of evidence that was illegal or omitted from the reasoning of the lower court<sup>46</sup> [...] "the appellant makes a generic reference to the circumstance that the negligence has not been proven in the ruling without questioning any evidence or language of the judgment [...]" "Regarding the substantive grounds alleged, the claim should be dismissed 'in limine' because the arguments for the appeal show, altogether, a discrepancy in judgment on the part of the appellant insofar as the criteria of the Chamber for evidentiary material incorporated legally into the dispute, as the Cassation Court cannot review or judge the grounds for a conviction issued by the a-quo Court [...]"<sup>47</sup>

36. The Second Chamber added that "the Chamber has clearly, completely, and amply justified the finding of gross negligence in the conduct of the accused" for which it quoted verbatim the reasoning of the First Chamber.<sup>48</sup> It likewise indicated that the Chamber reviewed the claim that the accused had acted with an unintentional lack of due diligence, a possibility ruled out given that the "evidence of guilt gathered, [...] shows another reality of what happened, much more burdensome."<sup>49</sup> It indicated that "the disregard for the result of a serious action like targeting a moving vehicle from another that is chasing it, with a large-caliber and long-range weapon, while being aware of the damaging power of its projectiles, rules out any unintentionality [...] and adequately meets the standard typically required for gross negligence [...]"<sup>50</sup> Consequently, it

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<sup>40</sup> Cf. Criminal Cassation Appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on September 29, 1997, before the First Criminal Chamber of Mendoza (evidence file, folio 151).

<sup>41</sup> Cf. Criminal Cassation Appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on September 29, 1997, before the First Criminal Chamber of Mendoza (evidence file, folio 152).

<sup>42</sup> Cf. Criminal Cassation Appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on September 29, 1997, before the First Criminal Chamber of Mendoza (evidence file, folio 154).

<sup>43</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 16,093 and joinder of civil action and Prosecutor v. Gorigoitia Guerrero, Oscar R. regarding Murder," September 29, 1997 (evidence file, folio 903).

<sup>44</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: "Prosecutor v. Gorigoitia Guerrero, Oscar" Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 159).

<sup>45</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: "Prosecutor v. Gorigoitia Guerrero, Oscar" Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 159).

<sup>46</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: "Prosecutor v. Gorigoitia Guerrero, Oscar" Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 159).

<sup>47</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: "Prosecutor v. Gorigoitia Guerrero, Oscar" Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 160).

<sup>48</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: "Prosecutor v. Gorigoitia Guerrero, Oscar" Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 160).

<sup>49</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: "Prosecutor v. Gorigoitia Guerrero, Oscar" Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 161).

<sup>50</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: "Prosecutor v. Gorigoitia Guerrero, Oscar" Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 161).

determined that the remedy sought should be dismissed as “formally inadmissible.”<sup>51</sup>

#### **A.4 Extraordinary Federal Appeal**

37. On February 24, 1998, Mr. Gorigoitia's defense attorney filed an extraordinary federal appeal (hereinafter also “extraordinary appeal” or “REF”) against the decision of the Second Chamber to reject the cassation appeal.<sup>52</sup> The defense requested annulment of the judgment of the Second Chamber rejecting the cassation appeal, asking that a new judgment be issued “in accordance with the law.”<sup>53</sup> Mr. Gorigoitia's defense attorney indicated that the judgments of the Criminal Chamber and the Supreme Court were arbitrary for the following reasons:<sup>54</sup> (a) the gross negligence attributed to the actions of the accused was never proven;<sup>55</sup> (b) the legal situation of Gorigoitia should have been assessed in light of the principle of *in dubio pro reo* when deciding whether the criminal offense to be prosecuted was murder or manslaughter,<sup>56</sup> and (c) the criterion for assessing the evidence used by the Sentencing Court was “based purely and exclusively on the subjectivism of the judges who also deviated [...] from the facts, from good sense, and from the rules of sound judicial discretion,”<sup>57</sup> for which reason it was also not well-founded.<sup>58</sup>

38. On March 11, 1998, the Procurator General of the Supreme Court of Mendoza (hereinafter “Procurator General”) concluded that the extraordinary appeal should be declared admissible. He indicated that “the complaint should be admitted: [...] since] the route used by the defendant was substantially restricted without suitable or sufficient justification, amounting to a violation of due process [...]”<sup>59</sup> Likewise, he invoked Article 8(2)(h) of the American Convention, and Article 14(5) of the International Covenant on Civil and Political Rights, indicating that “the guarantee of appeal has been enshrined very broadly in favor of the accused and cannot be limited or restricted for the sake of preserving excessive formal requirements.”<sup>60</sup>

39. On March 31, 1998, the Supreme Court of Mendoza rejected the extraordinary appeal, stating the following: (a) that the plaintiff is not challenging a judgment but rather an “order” issued by the Second Chamber whereby it formally rejects the appeal because it does not meet the requirements expressly established by the Mendoza criminal procedural law and case law;<sup>61</sup> (b) that the claims on which the extraordinary appeal is based should not refer to the trial court judgment, but to that of the appeals court;<sup>62</sup> (c) that the doctrine of arbitrariness is not intended to correct erroneous judgments in the third instance, or judgments that the appellant considers as such based on their disagreement with the interpretation of the facts and law issued by the

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<sup>51</sup> Cf. Judgment of the Judiciary of Mendoza, File No. 63,145: “Prosecutor v. Gorigoitia Guerrero, Oscar” Supreme Court of Justice of Mendoza, December 19, 1997 (evidence file, folio 161).

<sup>52</sup> Cf. Extraordinary appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on February 24, 1998, before the Supreme Court of Justice of Mendoza (evidence file, folio 176).

<sup>53</sup> Cf. Extraordinary appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on February 24, 1998, before the Supreme Court of Justice of Mendoza (evidence file, folio 176).

<sup>54</sup> Cf. Extraordinary appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on February 24, 1998, before the Supreme Court of Justice of Mendoza (evidence file, folio 185).

<sup>55</sup> Cf. Extraordinary appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on February 24, 1998, before the Supreme Court of Justice of Mendoza (evidence file, folio 185).

<sup>56</sup> Cf. Extraordinary appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on February 24, 1998, before the Supreme Court of Justice of Mendoza (evidence file, folio 187).

<sup>57</sup> Cf. Extraordinary appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on February 24, 1998, before the Supreme Court of Justice of Mendoza (evidence file, folios 189 and 190).

<sup>58</sup> Cf. Extraordinary appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on February 24, 1998, before the Supreme Court of Justice of Mendoza (evidence file, folio 195).

<sup>59</sup> Cf. Office of the Procurator General of the Supreme Court of Justice of Mendoza. Response to the extraordinary appeal filed before the Supreme Court of Justice of the Nation, March 11, 1998 (evidence file, folio 200).

<sup>60</sup> Cf. Office of the Procurator General of the Supreme Court of Justice of Mendoza. Response to the extraordinary appeal filed before the Supreme Court of Justice of the Nation, March 11, 1998 (evidence file, folio 201).

<sup>61</sup> Cf. Judgment of the Supreme Court of Justice of the Province of Mendoza, File No. 62,145: “Civil party and Prosecutor v. Gorigoitia Guerrero, Oscar Raúl,” March 31, 1998 (evidence file, folio 205).

<sup>62</sup> Cf. Judgment of the Supreme Court of Justice of the Province of Mendoza, File No. 62,145: “Civil party and Prosecutor v. Gorigoitia Guerrero, Oscar Raúl,” March 31, 1998 (evidence file, folio 206).

judges, even with respect to legal provisions that are considered clear, and d) that in the *sub lite* case, the contested decision has been duly grounded in Mendoza's procedural law and concordant case law.<sup>63</sup>

### **A.5 Motion for Reconsideration of Dismissal of Appeal**

40. Upon denial of the REF by the Supreme Court of Mendoza, on April 23, 1998, Mr. Gorigoitia's defense filed a motion for reconsideration of dismissal of appeal with the Supreme Court of Justice of the Nation (hereinafter "Supreme Court of the Nation" or "SCJN").<sup>64</sup> On August 6, 1998, the SCJN found the extraordinary appeal inadmissible and consequently dismissed the complaint.<sup>65</sup>

### **A.6 Serving the sentence**

41. Mr. Gorigoitia was sentenced by Judgment 4,035 of September 5, 1997, to 14 years in prison, additional legal sanctions, and payment of costs, and was also dismissed by the Mendoza Police and permanently disqualified from serving again. Of the 14-year sentence, Mr. Gorigoitia served 9 years and 4 months in prison, with the alleged victim detained on August 31, 1996, and released on parole in December 2005.

## **B. Relevant criminal procedural legal framework and the "Casal ruling"**

42. Regarding the criminal procedural legal framework relevant to this case, the Court confirms the following facts: (i) that the criminal procedural law applied in the case of Mr. Gorigoitia—specifically to the cassation appeal—was the Code of Criminal Procedure of the Province of Mendoza, Law 1,908 of 1950,<sup>66</sup> (ii) that it was fully in force until 2004, and with respect to the cassation appeal, until 1999;<sup>67</sup> (iii) that on September 20, 2005, the SCJN issued the judgment known as the "Casal ruling," which included an analysis of the judicial practice of Argentine courts, and especially of the Criminal Cassation Chamber, as regards interpretation of the rules governing cassation appeals;<sup>68</sup> and (iv) that currently, cassation appeals in the province of Mendoza are governed by the Code of Criminal Procedure of the Province of Mendoza, Law 6,730 of 1999 which, in turn, was amended by Law 9,040 of 2018<sup>69</sup> regarding the structure and authorities of the

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<sup>63</sup> Cf. Judgment of the Supreme Court of Justice of the Province of Mendoza, File No. 62,145: "Civil party and Prosecutor v. Gorigoitia Guerrero, Oscar Raúl," March 31, 1998 (evidence file, folio 206).

<sup>64</sup> Cf. Motion for reconsideration of dismissal of appeal, filed by Adolfo V. Moreno, defense attorney of Oscar Raúl Gorigoitia, on April 23, 1998, before the Supreme Court of Justice of the Nation (evidence file, folio 208).

<sup>65</sup> Cf. Judgment of the Supreme Court of Justice of the Nation, F115. XXXIV. Appeal on points of fact, Prosecutor and civil party v. Gorigoitia, Oscar Raúl, August 6, 1998 (evidence file, folio 214).

<sup>66</sup> Cf. Code of Criminal Procedure of the Province of Mendoza Law 1,908 of 1950. Article 503. Admission of the appeal. The cassation appeal may be filed for the following grounds: 1) disregard or erroneous application of the substantive law. 2) disregard for the provisions established by this code regarding inadmissibility, expiration, or nullity, provided that, with the exception of cases of absolute nullity, the appellant has promptly sought rectification of the defect, if possible, or filed a cassation appeal.

<sup>67</sup> The Code of Criminal Procedure of the Province of Mendoza Law 6,730, published on November 30, 1999, regulated the admissibility of cassation appeals in its article 474. With it, article 503 of the Code of Criminal Procedure of the Province of Mendoza, Law 1,908 of 1950, was repealed.

<sup>68</sup> Cf. Judgment of the Supreme Court of Justice of the Nation of September 20, 2005, in the case of "Casal, Matías Eugenio *et al.* regarding attempted simple robbery." The ruling established that "(...) in short, it can be understood that art. 456 of the National Criminal Procedure Code must be understood in the sense that it enables broad review of a sentence, as extensive as possible and with the greatest effort possible by the cassation judges, in accordance with the possibilities and records of each specific case and without expanding on the issues raised other than what emerges inevitably from the oral nature of the proceedings."

<sup>69</sup> Cf. Code of Criminal Procedure of the Province of Mendoza Law 6,730 of 1999. Article 474. Grounds. The cassation appeal may be filed for the following grounds: 1) disregard or erroneous application of the substantive law. 2) disregard for the provisions established by this code regarding inadmissibility, expiration, or nullity, provided that, with the exception of cases of absolute nullity, the appellant has promptly sought rectification of the defect, if possible, or filed a cassation appeal.

Collegiate Criminal Jurisdiction of the Province of Mendoza.<sup>70</sup> The Court, as pertinent, will refer to the aspects related to these legal provisions in matters of cassation.

## **VIII MERITS**

### **RIGHT TO APPEAL A JUDGMENT BEFORE A HIGHER JUDGE OR COURT AND RIGHT TO JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS, THE DUTY TO ADOPT DOMESTIC LEGAL EFFECTS, AND THE FEDERAL CLAUSE<sup>71</sup>**

#### ***A. Arguments of the parties and observations of the Commission***

43. The **Commission** argued that at the time of the facts, there was a serious limitation in judicial practice and in article 503 of the Code of Criminal Procedure of the Province of Mendoza in terms of the potential effectiveness of any pleading that was not framed within what historically had been considered "reviewable" through a cassation appeal. In this regard, the Commission argued that Mr. Gorigoitia was not able to appeal to a higher authority for comprehensive review of his conviction, including the questions of fact and review of evidence put forward by the defense through the appeal. The Commission concluded that the Argentine State had violated, to his detriment, the right to appeal a judgment established in Article 8(2)(h) of the Convention, read in conjunction with the obligations established in articles 1(1) and 2 of the Convention. The Commission also concluded that as a consequence of the limited nature of the cassation appeal, and the even more limited nature of the extraordinary appeal, the victim did not have simple and effective judicial remedies available to him in the framework of the criminal process culminating in his conviction, in violation also of the right established in Article 25(1) of the Convention. The Commission argued that these violations occurred in the context of legislation and practice that excluded review of the facts and assessment and receipt of evidence, and therefore the state had failed to comply with the obligation to adopt domestic legal effects established in Article 2 of Convention.

44. The **representatives** argued that Mr. Gorigoitia was not able to appeal to a higher authority for comprehensive review of his conviction, including the questions of fact and review of evidence put forward through the appeal. They argued that as a consequence of the limited nature of the cassation appeal, and the even more limited nature of the extraordinary appeal, the alleged victim did not have simple and effective judicial remedies available to him in the framework of the criminal process culminating in his conviction and sentencing to 14 years in prison, ban from public service, and permanent dismissal from the police force. They also argued that the national courts were not prepared to fully comply with the right to appeal, since the review procedure is so brief and formal that opportunities for remedy are limited. Consequently, they argued that the state had violated the right to appeal a judgment established in Article 8(2)(h) of the Convention, read in conjunction with articles 1(1) and 2 of the Convention. Additionally, they argued that the decision of the Supreme Court of Mendoza regarding the extraordinary appeal was arbitrary, thus constituting a violation of Article 25(1) of the Convention. Lastly, they argued that the state had violated Article 28(2) of the Convention on having failed to adopt the measures necessary for the Province of Mendoza to adapt its provisions to the Convention in terms of the right to an appeal.

45. The state argued that Mr. Gorigoitia did not raise questions of fact and evidence during the cassation appeal, for which reason the Supreme Court of Justice of Mendoza did not have the

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<sup>70</sup> Law 9,040 establishes the Collegiate Criminal Jurisdiction in the Judiciary of the Province of Mendoza. It was published on February 1, 2018. It transformed the Criminal Chambers, such as the First Chamber, and the courts, such as the Court of Preliminary Investigation, into collegiate criminal tribunals and courts, respectively, and reformulated their powers.

<sup>71</sup> Articles 8(2)(h), 25, 1(1), 2, and 28 of the Convention.

opportunity to rule on the matter. In the same sense, it argued that the rejection of the cassation appeal was due to the failure to provide grounds for the appeal, which disputed no evidence or matters of fact, making it procedurally impossible for the Court to rule in view of the principle of confinement to the proceedings. Likewise, it alleged that Mr. Gorigoitia did not raise, in a timely manner before the domestic jurisdictional authorities, the claim regarding the violation of the right to a comprehensive review of the conviction, since the complainant alleged a violation of Article 8(2)(h) of the American Convention in his motion for reconsideration of dismissal of appeal for denial of the extraordinary federal appeal before the Supreme Court of Justice of the Nation. The state argued that the courts must apply the doctrine established by the Supreme Court of the Nation in the "Casal ruling" in matters of review of a conviction, should they fail to do so, there is the immediate option of invoking federal jurisdiction. Likewise, it indicated that the state had never argued that the federal clause justified non-compliance with its international obligations, and therefore there is no violation of Article 28(2) of the Convention.

## **B. Considerations of the Court**

46. The Court notes that the dispute in this case surrounds whether the state is responsible for violating the right to appeal the ruling before a higher judge or court and the right to an effective judicial remedy as a result of the response of the domestic courts to the appeals filed by Mr. Gorigoitia's defense attorney after his conviction for the crime of murder. Additionally, the Court is to rule on whether the legislation and practices in the province of Mendoza regarding cassation constituted a violation of articles 2 and 28(2) of the Convention. Based on the foregoing, the Court will evaluate the dispute in the following order: i) whether the response of the domestic courts to the remedies filed by Mr. Gorigoitia's defense team complied with the state's obligations set forth in articles 8(2)(h) and 25(1) of the Convention read in conjunction with Article 1(1) of the same instrument, and ii) if the legal framework that regulated cassation appeals at the time of the facts constitutes a breach of the state's duty to adopt provisions of domestic law in the terms of Article 2 of the Convention and the federal clause provided for in Article 28 of the same instrument.

### **B.1 The right to appeal a conviction and the right to judicial protection of Mr. Gorigoitia**

47. The Court has referred in its settled caselaw to the scope and content of Article 8(2)(h) of the Convention, as well as to the standards that must be met to ensure that the right to appeal a ruling before a higher judge or court is guaranteed. The Court has understood this right to consist of a minimum and fundamental guarantee that "must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party's interests [...]." <sup>72</sup> Taking into account that the intention of judicial guarantees is to ensure that those involved in legal proceedings are not subjected to arbitrary decisions, the Court has interpreted it to mean that the right to appeal a judgment cannot be effective if it is not guaranteed with respect to everyone who is convicted, <sup>73</sup> since the conviction is the manifestation of the exercise of the state's punitive power. <sup>74</sup> The Court has found the right to appeal a ruling to be one of the minimum guarantees that every person subjected to a criminal investigation and legal procedure has. <sup>75</sup>

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<sup>72</sup> Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 158, and *Case of Amrheim et al. v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 255.

<sup>73</sup> Cf. *Case of Mohamed vs. Argentina. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 23, 2012. Series C No. 255. paras. 92 and 93; and *Case of Amrheim et al. v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 255.

<sup>74</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, Reparations, and Costs*. Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Amrheim et al. v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 255.

<sup>75</sup> Cf. *Case of Zegarra Marín v. Peru. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 15, 2017. Series C No. 331, para. 171, and *Case of Amrheim et al. v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 256.

48. The Court has also held that Article 8(2)(h) of the Convention refers to an ordinary, accessible, and effective remedy—that is, it should not require greater complexity that makes this right illusory. In this sense, the formalities required for the appeal to be admitted must be minimal and must not constitute an obstacle for it to fulfill its purpose of reviewing and resolving the claims put forward by the appellant—that is, it must provide results or answers for the purposes for which it was conceived. It must be understood that, regardless of the appeals regime or system adopted by States Parties and what they call the measures provided for challenging a conviction, in order for it to be effective, it must constitute an adequate means for seeking correction of an erroneous conviction. The remedy, therefore, must be capable of analyzing the factual, evidentiary, and legal basis for the judgment being challenged, given that court judgments entail an interplay between factual determinations and application of the law, such that an erroneous determination of facts would mean an erroneous or undue application of the law. Consequently, the grounds for admitting the remedy must make it possible to review broadly the aspects of the guilty verdict being challenged.<sup>76</sup>

49. The Court recalls that Mr. Gorigoitia was convicted on September 12, 1997, by the First Criminal Chamber of Mendoza for the crime of simple homicide (*supra* para. 30). On September 29, 1997, Mr. Gorigoitia's defense attorney filed a cassation appeal requesting the annulment of the conviction, which was sent before the Supreme Court of Mendoza (*supra* para. 33 and 35). There is no dispute that, under Argentine law, the cassation appeal is the appropriate remedy for challenging a criminal conviction of a person pursuant to the provisions of article 503 of the Code of Criminal Procedure of the Province of Mendoza, in force at the time of the facts (*supra* para. 42). However, the state argued that no broader review could take place without an appeal that is properly formulated. In this regard, it argued that the appeal was rejected by the Supreme Court of Mendoza because Mr. Gorigoitia's defense attorney did not formulate it properly, something that cannot be attributed to the state. The state maintained that it was for this reason that the Court was unable to rule on matters of fact and evidence, and therefore, the state could not be found internationally responsible for the violation of Article 8.2.h) of the Convention.

50. The Court observes that Mr. Gorigoitia's defense raised two central arguments in its cassation appeal requesting annulment of the conviction handed down by the First Chamber on the basis of Article 503 of the Code of Criminal Procedure of the Province of Mendoza. In relation to the first pleading, the defense argued that: i) the duty to provide justification for the proceedings and judgments is a fundamental guarantee of the process; ii) the lack of justification means a judgment should be annulled; (iii) the duty to provide justification requires a decision that is based on the elements of evidence legally incorporated, evidence that must be assessed in accordance with logic, psychology, and common experience; (iv) negligence is a fact and as such must be proven, and v) the facts admitted by the First Chamber in its judgment never demonstrated the existence of the constitutive element of Mr. Gorigoitia's guilt. Therefore, the defense stated that the decision of the First Chamber lacked adequate reasoning, as the facts were never adequately evaluated, constituting a procedural defect. As regards the second pleading, Mr. Gorigoitia's defense argued that the assessment made by the First Chamber in establishing the judgment's justification was unrelated to the legal provision applied, and therefore that the punishment applied was not applicable to the case.

51. The Court observes that Mr. Gorigoitia's defense did not raise arguments aimed formally at having the Supreme Court of Mendoza decide on questions of fact or assessment of the evidence. Instead, the claims were formulated to allege flaws in the procedure and argue that the First Chamber had failed to substantively apply the law. However, the Court notes that, based on the regulations set forth in article 503 of the Code of Criminal Procedure of the Province of Mendoza,

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<sup>76</sup> Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 2, 2004. Series C No. 107, paras. 161, 164, and 165, and *Case of Zegarra Marin v. Peru. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 15, 2017. Series C No. 331, para. 172.



the nature and scope of the claims filed by Mr. Gorigoitia's defense attorney were conditioned by the grounds for admission of the appeal. The article established that an appeal could be filed for two reasons: non-observance or erroneous application of the substantive law; and non-observance of the rules established by the Code under penalty of inadmissibility, expiration, or nullity. The Court observes, as it has done in other cases,<sup>77</sup> that according to the rules established for the cassation appeal, matters of fact and/or evidence could not be specifically reviewed by a higher court.<sup>78</sup> The Court finds that Mr. Gorigoitia's defense team framed its arguments for admissibility under one of the grounds established in the law itself for the admissibility of the appeal and in accordance the practice of interpretation of these regulations at the domestic level. The Court takes note of the opinion given by expert witness Diego Camaño before the Court, that:

The judgments handed down by the correctional judges and the Criminal Chambers—whether acquittals or convictions—could only be challenged through an extraordinary appeal, subject to rigid ritual formalities; with severe procedural limitations; and limitations as to the nature of the grounds for the claim that, according to a rigorous interpretation by the higher court (the SCJM), left no room for any possible review of issues of fact or evidence.

52. The Court notes that although the appeal filed formally argued a lack of adequate grounds, central to Mr. Gorigoitia's defense was a series of arguments aimed at questioning the assessment that the First Chamber had made of the facts of the case and of how they fit or not the negligent nature of the crime of homicide. According to the defense's arguments, it was this inadequate evaluation of the facts that led to Mr. Gorigoitia's conviction, and the conviction should therefore be reevaluated via cassation appeal. This Court observes that it was precisely because of this central aspect of the claim that the Supreme Court of Mendoza decided to reject the appeal, since it was dismissed "in limine" because the arguments for the appeal show, altogether, a discrepancy in judgment on the part of the appellant insofar as the criteria of the Chamber for evidentiary material incorporated legally into the dispute, as the Cassation Court cannot review or judge the grounds for a conviction issued by the a-quo Court." The Supreme Court of Mendoza limited itself to reiterating some of the reasoning on which the First Chamber relied to find Mr. Gorigoitia guilty, but without making any assessment as to whether the evaluation had been carried out adequately in accordance with domestic law.

53. The Court reiterates that Article 8(2)(h) refers to the right to an ordinary, accessible, and effective remedy that does not make illusory the right to appeal a ruling to a higher court. In this sense, the Court has established that the required formalities should not constitute an obstacle to the appeal enabling a review of the factual, evidentiary, and legal issues that could have led to an error in the judgment. The importance of complying with this obligation is due to the fact of a relationship between an erroneous determination of the facts and an improper application of the law, for which reason the review that must be conducted in compliance with the right to appeal should permit the judge to review the judgment broadly. This is the pleading that Mr. Gorigoitia's defense team made in its writ of cassation appeal, which was rejected "in limine" for requesting a reevaluation of the criteria of the First Chamber in matters of facts and assessment of evidence. Consequently, the Court finds that the refusal on the part of the Supreme Court of Mendoza to review the merits of the issue raised by Mr. Gorigoitia's defense counsel constituted an international illegal act insofar as it resulted in a breach of the duty to comprehensively review the ruling established in Article 8(2)(h) of the Convention.

54. The Court will not rule on the alleged violations of Article 25(1) of the American Convention, raised by the Commission in its Report on the Merits and the representatives in the pleadings and

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<sup>77</sup> Cf. *Case of Mendoza et al. v. Argentina*. Preliminary Objections, Merits, and Reparations. Judgment of May 14, 2013. Series C No. 26, para. 253, and *Case of Mohamed v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2012. Series C No. 255, para. 159.

<sup>78</sup> Cf. Expert opinion of Alberto Bovino (transferred from the case of *Mendoza et al. Argentina*. Preliminary Objections, Merits, and Reparations. Judgment of May 14, 2013. Series C No. 26, para. 253).

motions brief, since it has verified that no legal arguments were presented that would make it possible to specifically establish the lack of suitability and effectiveness of the extraordinary federal appeal or of the motion for reconsideration of dismissal of appeal filed by Mr. Gorigoitia's defense counsel.

## **B.2 Duty to adopt domestic legal effects and the federal clause**

55. The Court has found that Article 2<sup>79</sup> of the Convention establishes the general duty of the States Parties to adapt their domestic laws to its provisions in order to ensure the rights that it recognizes. This duty involves the adoption of two types of measures. On the one hand, the elimination of norms and practices of any nature that entail a violation of the guarantees established in the Convention; on the other hand, the enactment of laws and the implementation of practices leading to the effective observance of such guarantees.<sup>80</sup> It is precisely with regard to the adoption of these measures that the Court has recognized that all the authorities of a State Party to the Convention have the obligation to exercise review of compliance with human rights conventions,<sup>81</sup> so that the application and interpretation of domestic law is consistent with the state's international obligations in the area of human rights.<sup>82</sup> As regards Article 28, the Court has established that "case law, which has stood unchanged for more than a century, holds that a state cannot plead its federal structure to avoid complying with an international obligation."<sup>83</sup>

56. In this case, the Court ruled that the literal meaning of the pertinent rules in the Code of Criminal Procedure of the Province of Mendoza, applicable at the time of the events, through cassation appeal, made it impossible for a higher court to review matters of fact and/or evidence in the case of Mr. Gorigoitia (*supra* paras. 51 and 53). The Court therefore concluded that the state failed to comply with the obligation to comprehensively review the judgment, as required by Article 8(2)(h) of the Convention, read in conjunction with Article 1(1) of the same instrument. For the same reasons, the Court concludes that the state failed to comply with its obligations under Article 2 of the Convention. The Court observes that the state did not dispute that the Code of Criminal Procedure of the Province of Mendoza applied at the time of the facts places very strict requirements on cassation appeals, contrary to the provisions of Article 8(2)(h) of the Convention. What it argued is that the courts must apply the doctrine set forth in the "Casal ruling" in terms of review of a conviction, and that there were subsequent state acts aimed at ensuring comprehensive review in matters of cassation appeals. In this regard, while recognizing the importance of the "Casal ruling," the Court concludes that the state failed to comply with the obligation set forth in Article 2 of the American Convention, read in conjunction with Article 8(2)(h) of the same instrument.

57. Regarding the representatives' argument related to the alleged violation of Article 28 of the Convention, the Court recalls that an argument regarding the possible non-observance of obligations arising from Article 28 of the Convention must refer to a fact with sufficient importance

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<sup>79</sup> Article 2 of the Convention establishes that: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

<sup>80</sup> *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations, and Costs.* Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits, and Reparations.* Judgment of May 14, 2013. Series C No. 26, para. 293.

<sup>81</sup> *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 26, 2006. Series C No. 154, para. 124, and *Case of Ordenes Guerra et al. v. Chile. Merits, Reparations, and Costs.* Judgment of November 29, 2018. Series C No. 372, para. 135.

<sup>82</sup> *Cf. Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 23, 2009. Series C No. 209, para. 340, and *Case of Andrade Salmón v. Bolivia. Merits, Reparations, and Costs.* Judgment of December 1, 2016. Series C No. 330, para. 93.

<sup>83</sup> *Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C No. 39, para. 46.

to be considered a true breach.<sup>84</sup> In this case, the Court notes that the state did not plead its federal structure as an excuse to fail to comply with its international obligations, and therefore, the Court does not find that the state has failed to comply with its obligations arising from Article 28 of the Convention.

### B.3 Conclusion

58. In accordance with the foregoing, the Court concludes that the state is responsible for the violation of Article 8(2)(h) of the Convention, read in conjunction with Article 1(1) of the same instrument, due to a failure by the Supreme Court of Mendoza to provide a comprehensive review of the appeal filed by Mr. Gorigoitia's defense counsel against the conviction of the First Criminal Chamber of Mendoza. Likewise, it concludes that the state is responsible for the violation of Article 2 of the Convention as a result of the cassation appeal regulations set forth in Article 503 of Law 1908 that are contrary to the Convention. Additionally, the Court concludes that the state is not responsible for the violation of Article 25 of the Convention, read in conjunction with Article 1(1) of the same instrument, and that it is not responsible for the violation of Article 28 of the Convention.

## IX REPARATIONS<sup>85</sup>

59. Based on Article 63(1) of the American Convention,<sup>86</sup> the Court has indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on state responsibility.

60. Reparation of the harm caused by the violation of an international obligation requires, insofar as possible, full restitution (*restitutio in integrum*), which consists in the restoration of the previous situation.<sup>87</sup> If this is not feasible, as in most cases of human rights violations, the Court will determine measures to ensure the rights that have been infringed, and to redress the consequences of the resulting harm.<sup>88</sup> Therefore, the Court has found it necessary to grant different measures of reparation in order to redress the harm integrally so that, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction and guarantees of non-repetition have special relevance for the harm caused.<sup>89</sup>

61. The Court has established that reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm proved, and also the measures requested to redress the respective damage. Therefore, the Court must observe this concurrence in order to rule appropriately and in accordance with the law.<sup>90</sup>

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<sup>84</sup> Cf. *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 6, 2009. Series C No. 200, para. 220.

<sup>85</sup> Application of Article 63(1) of the Convention.

<sup>86</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 90.

<sup>87</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 91.

<sup>88</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 91.

<sup>89</sup> Cf. *Case of the "Las Dos Erres" Massacre v. Guatemala, Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 91.

<sup>90</sup> 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 Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 92.

62. Based on the violations declared in the preceding chapter, this Court will proceed to examine the claims presented by the Commission and the representatives, as well as the arguments of the state, in light of the criteria established in the case law of the Court as regards the nature and scope of the obligation to make reparation, in order to establish measures to redress the harm caused to the victims.<sup>91</sup>

63. International case law, in particular that of the Court, has repeatedly establish that the judgment constitutes, per se, a form of reparation.<sup>92</sup> However, in view of the circumstances of this case and the suffering caused to the victim by the violations committed, the Court deems it pertinent to establish other measures.

### **A. Injured party**

64. The Court reiterates that, pursuant to Article 63(1) of the Convention, the injured party is considered those declared the victims of the violation of any right recognized therein. Therefore, this Court considers Oscar Gorigoitia as the "injured party" and, as victim of the violations declared in Chapter VIII of this judgment, he will be considered the beneficiary of the reparations ordered by the Court.

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

#### **B.1 Measures of restitution**

65. The **Commission** asked that the state order the necessary measures so that, should he wish to, Mr. Gorigoitia can file an appeal for a comprehensive review of the conviction, in compliance with Article 8(2)(h) of the Convention. The **representatives** asked that Mr. Gorigoitia's conviction be annulled. They also requested that his dismissal from the police force be annulled and, therefore, that he be granted the corresponding retirement benefits and social security for his wife and son. In addition to this, they asked that the sentence handed down against Mr. Gorigoitia be removed from his record. The state did not explicitly address these measures of reparation, but reported that under the provisions of "Settlement 28,677" of March 15, 2018, the Supreme Court of Justice of Mendoza had offered Mr. Gorigoitia the opportunity to file an appeal with the purpose of challenging the conviction and obtaining a broad review of it.

66. The Court reiterates its case law in that it does not act as a criminal appeals court<sup>93</sup> and therefore is not competent to decide on the guilt or innocence of Mr. Gorigoitia. Instead, it has limited itself to determining whether criminal proceedings and the judicial remedies to which they are subjected are compatible with the American Convention.<sup>94</sup> In this sense, the Court found that the Mendoza Supreme Court's failure to conduct a comprehensive review of Mr. Gorigoitia's conviction amounted to a violation of Article 8.2.h) of the Convention (*supra* paras. 47 to 53). Likewise, the Court takes note that the state offered Mr. Gorigoitia the opportunity to seek an appeal for broad review of the conviction by means of Settlement No. 28,677 of March 15, 2018 (*supra* para. 65). Based on the foregoing, the Court orders the state to:

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<sup>91</sup> Cf. *Case of Andrade Salmón v. Bolivia. Merits, Reparations, and Costs*. Judgment of December 1, 2016. Series C No. 330, para. 189, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 93.

<sup>92</sup> 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 Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 94.

<sup>93</sup> Cf. *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 Zegarra Marín v. Peru. Interpretation of Judgment of Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 8, 2018. Series C No. 347, para. 17.

<sup>94</sup> 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 Mohamed v. Argentina. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 23, 2012. Series C No. 255, para. 151.

- a) adopt the measures necessary to guarantee Mr. Gorigoitia the right to appeal the conviction issued by the First Criminal Chamber of Mendoza on September 12, 1997, in accordance with the parameters set forth in Article 8(2)(h) of the American Convention (*supra* paras. 47 to 53). The state must comply with this measure within six months, counting from the notification of this judgment, and
- b) adopt the measures necessary to suspend the legal effects of the aforementioned conviction—especially those related to retirement benefits and criminal record—until a substantive decision is issued once the right to appeal has been guaranteed, as indicated in the previous paragraph.

## B.2 Measures of satisfaction

67. The **representatives** requested that the judicial ruling be disseminated broadly. Neither the state nor the Commission referred to this measure of reparation.

68. The Court deems it pertinent to order, as it has in other cases,<sup>95</sup> that within six months of notification of this judgment, the state must make the following publications: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette, in a widely-circulated national newspaper, and in a newspaper widely circulated in the Province of Mendoza; and (b) this judgment in its entirety, available for at least one year, on the official websites of the Judiciary of the Province of Mendoza in a way that is accessible to the public.

69. The state must advise this Court immediately when it has issued each of the publications ordered, regardless of the one-year time frame for presentation of its first report, as established in the operative paragraphs of this judgment.

## B.3 Guarantees of non-repetition

70. The **Commission** asked the Court to order the legislative measures necessary to adapt the domestic legislation on cassation appeals to the standards enshrined in Article 8(2)(h) of the Convention. Likewise, it asked the Court to ensure that the judicial authorities conduct review of compliance with human rights conventions when resolving appeals of convictions in a manner consistent with the standards established in the Report on the Merits. The **representatives** asked that profound procedural reforms be ordered to both Mendoza and national legislation. Likewise, they requested the application of review of compliance with human rights conventions with regard to Provincial Law 6,730 amended by Law 9,040, and the Settlement of the Supreme Court of Mendoza on matters of extraordinary appeal, as well as the national regulations governing complaints.

71. The state maintained that the guarantees of non-repetition requested would amount to a judgment vitiated by arbitrariness, in which all its effects must be eliminated. It argued that this situation is unrelated to the case, since the dispute is not over the content of the judgment but establishing whether it has been properly reviewed. It therefore reiterated that the measures sought are not consistent with the case's factual and legal records, and the measures must therefore be ordered by the competent domestic courts should the alleged judicial error be found. In particular, it argued that the alleged need to tackle procedural reforms as part of the obligation

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<sup>95</sup> Cfr., *inter alia*, *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 79; *Case of Mémoli v. Argentina. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 22, 2013. Series C No. 265, para. 207; *Case of Andrade Salmón v. Bolivia. Merits, Reparations, and Costs*. Judgment of December 1, 2016. Series C No. 330, para. 197; *Case of the Nova Brasília favela v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 16, 2017. Series C No. 333, para. 300; *Case of Lopez Soto et al v. Venezuela. Merits, Reparations, and Costs*. Judgment of September 26, 2018. Series C No. 362, para. 299, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 98.

set forth in Article 28(2) of the Convention falls outside the purpose of the case.

72. In this judgment, this Court found that the regulation established in Law 1908 constituted a breach of Article 2 of the American Convention (*supra* para. 56). The Court therefore finds that, within a reasonable period of time, the state must adapt its domestic legal system in accordance with the parameters established in this judgment. In this regard, the Court notes that the criminal procedural legislation in force in the Province of Mendoza at the time of the facts was repealed by Law 6,730 of 1999, amended by Law 9,040 published in 2018<sup>96</sup> (*supra* para. 42). Likewise, the Court notes that article 503 of Law 1,908, which established the grounds for admissibility of a cassation appeal at the time of the facts<sup>97</sup> and which would have been the legal provision preventing a comprehensive review of the judgment convicting Mr. Gorigoitia, is substantially identical to Article 474<sup>98</sup> of Law 6,730 of 1999, amended by Law 9,040 published in 2018, which regulates the same issue and is in force.<sup>99</sup>

73. As regards the foregoing, the Court notes that in the case of *Mendoza et al. v. Argentina*, it concluded that the State of Argentina failed to comply with its obligation contained in Article 2 of the American Convention, read in conjunction with articles 8(2)(h) and 19 of the Convention, to the detriment of the victims of the case by virtue of the fact that articles 474 of the Code of Criminal Procedure of the Province of Mendoza and 456 of the Code of Criminal Procedure of the Nation, respectively, did not allow for review of matters of fact and/or evidence by a higher court.<sup>100</sup> Consequently, in that case, the state was ordered to ensure that the judges conduct review of compliance with human rights conventions in order to guarantee the right to appeal a ruling in accordance with Article 8(2)(h) of the American Convention and the case law of this Court. The Court likewise ordered that, within a reasonable period of time, the state must adapt its domestic legal system in accordance with the parameters established in the judgment.<sup>101</sup>

74. Taking into account the foregoing, in view of the similarity between the present case and the case of *Mendoza et al. v. Argentina*, with regard to this guarantee of non-repetition, its compliance will be supervised by the Court jointly with the supervision corresponding to compliance with the judgment in the case of *Mendoza et al. v. Argentina*.

### **C. Other measures requested**

75. The **representatives** asked that Argentina be ordered to: (i) provide free family therapy services to Mr. Gorigoitia and his family; (ii) issue a public apology from the state, the text of which would be delivered in a ceremony attended by the family of Mr. Gorigoitia, and (iii) provide Nicolás Gorigoitia with a scholarship for training in an institution suitable to his conditions and subject to his acceptance of its execution.

76. The **state** reiterated that the measures sought are not consistent with the case's factual and legal records, and the measures must therefore be ordered by the competent domestic courts

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<sup>96</sup> This law transformed the Criminal Chambers and criminal courts in criminal into collegiate criminal tribunals and courts, respectively, and their authorities were reformulated.

<sup>97</sup> Article 503 – The cassation appeal may be filed for the following grounds: 1) Disregard or erroneous application of the substantive law. 2) Disregard for the provisions established by this code regarding inadmissibility, expiration, or nullity, provided that, with the exception of cases of absolute nullity, the appellant has promptly sought rectification of the defect, if possible, or filed a cassation appeal.

<sup>98</sup> Article. 474 – Grounds. The cassation appeal may be filed for the following grounds: 1) Disregard or erroneous application of the substantive law. 2) Disregard for the provisions established by this code regarding inadmissibility, expiration, or nullity, provided that, with the exception of cases of absolute nullity, the appellant has promptly sought rectification of the defect, if possible, or filed a cassation appeal.

<sup>99</sup> Whose content is still regulated in article 474 of Law 6,730.

<sup>100</sup> Cf. *Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits, and Reparations*. Judgment of May 14, 2013. Series C No. 260, Operative Paragraph 22 and paras. 301-303.

<sup>101</sup> Cf. *Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits, and Reparations*. Judgment of May 14, 2013. Series C No. 260, Operative Paragraph 22 and para. 332.

should the alleged judicial error be found. Likewise, regarding the family therapy service, it indicated that it is inadmissible, since Mr. Gorigoitia's next of kin are not named as victims in the international proceeding. Similarly, regarding the request for a scholarship for Nicolás Gorigoitia, it argued the request was inadmissible because he is not named as a victim in the international proceeding.

77. The Court reiterates that it will not consider Mr. Gorigoitia's wife and three children as injured parties in this case because they were not included as alleged victims in the Report on the Merits (*supra* para. 22). Likewise, this Court finds that, regarding the aforementioned measures of reparation, the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victim. Therefore, it does not consider it necessary to order these additional measures, without prejudice to whether the state may decide to adopt and grant them domestically.

## **D. Compensation**

### **D.1 Pecuniary damage**

78. The **Commission** asked that full reparations be provided for the pecuniary damage caused. The **representatives** asked that the economic difficulties suffered by Mr. Gorigoitia and his family be taken into account. In this sense, they noted that the criminal process and the circumstances of the case forever changed the lives of all the members of the family. They highlighted that their relatives had to help them financially and even ask for food from the Municipality. They also indicated that one daughter dropped out of school to help the family. In addition to this, the representatives requested that the salaries not received from the moment of his detention to the age of retirement be taken into account, in accordance with the legislation in force on that date, as well as the amounts he would have received if he had retired. Therefore, they asked the Court to set pecuniary damages at USD 70,000.00 (seventy thousand dollars of the United States of America).

79. The **state** argued that the request for pecuniary reparations based on loss of earnings, comprised of the salary that he should have received as a police officer and similar claims, is inadmissible, since the alleged lack of access to a broad appeal could never have had the legal result of the overturning of the criminal conviction, as it was not arbitrary and its content was not in dispute. In this regard, it stated that it is inadmissible to establish compensation based on wages not received, and that rather it should be determined in equity based on lost opportunity that made it impossible for Mr. Gorigoitia to exercise his right to appeal. It also reiterated that compensation on the premise that the alleged victim should have been acquitted would not be in accordance with the law, since jurisdiction to decide on this matter falls exclusively to domestic courts. In addition to the foregoing, the state maintained that the representatives did not provide documentary support to justify the figures indicated.

80. In its case law, this Court has developed the concept that pecuniary damage supposes the loss of, or detriment to, the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.<sup>102</sup> In the instant case, the Court has determined that Mr. Gorigoitia's right to appeal the conviction, pursuant to Article 8(2)(h) of the Convention, was violated (*supra* paras. 47 to 53). The result was that he was given a sentence of a lifetime ban from public service, a sentence that he was not able to appeal. However, in this case, it is impossible to establish with certainty how the violation of Article 8(2)(h) of the American Convention resulted in indirect damage or loss of future earnings to the detriment of Mr. Gorigoitia. Therefore, the Court does not find it appropriate to

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<sup>102</sup> Cfr. *Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 92.

order material compensation to the benefit of Mr. Gorigoitia.

## D.2 Non-pecuniary damages

81. The **Commission** asked that full reparations be provided for the nonpecuniary damage caused. The **representatives** asked that the damage be considered in its entirety. In this regard, they indicated that Mr. Gorigoitia's family—comprised of his wife and three children—experienced the impact of the arbitrary process, in particular because of: i) the public shame of a crime committed by a member of the Mendoza Police, ii) transfer to the same place of detention intended for common prisoners, where he was visited for years, iii) disappointment with the criminal process, (iv) the end of his status as a police officer, and (v) the health problems as a result of a stroke suffered in January 2017. Therefore, they asked the Court to set nonpecuniary damages at USD 40,000.00 (seventy thousand dollars of the United States of America). The **state** objected to all the pecuniary reparations requested, arguing that they did not follow the criterion of reasonableness, were exorbitant, and were not supported by reliable evidence.

82. The Court has established in its case law that nonpecuniary damage "may include both the suffering and distress caused to victims and the impairment of values that are highly significant to them, as well as suffering of a nonpecuniary nature that affects their living conditions." Furthermore, since it is not possible to assign a precise monetary value to nonpecuniary damage, for the purposes of making integral reparation to the victims, compensation may only be provided through the payment of a sum of money or through the delivery of goods and services that can be assessed monetarily, as prudently determined by the Court, applying judicial discretion and the principle of equity.<sup>103</sup> Taking into account the statements made by the representatives, as well as what was stated by Mr. Gorigoitia at the public hearing, who is the only victim in this case, the Court deems it pertinent to order, in equity, the payment of USD 30,000.00 (thirty thousand United States dollars) to Mr. Gorigoitia as nonpecuniary damages.

## E. Costs and Expenses

83. The **representatives** requested the payment of USD 5,000.00 (five thousand dollars of the United States of America) for expenses, taking into account the travel, lodging, and litigation expenses incurred over 20 years. In this regard, they stated that they lacked the documentation to justify these expenses. Additionally, they asked the state for the payment of USD 25,000.00 (twenty-five thousand dollars of the United States of America) for the professional fees of the attorneys Carlos Varela Álvarez, Pablo Donnangelo, and Alejandro Acosta. The **state** objected to the amounts sought, calling them disproportionate, exorbitant, and unjustified. The state also highlighted that no justification of them was provided.

84. The Court reiterates that, based on its case law,<sup>104</sup> costs and expenses form part of the concept of reparation, because the efforts made by the victims to obtain justice, both at the national and international level, entail disbursements that must be compensated when the state's international responsibility has been declared in a condemnatory judgment. Regarding the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, which includes expenses incurred before the authorities of the domestic courts and those generated 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 may be made based on the principle of equity and taking into account the

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<sup>103</sup> 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 Martínez Coronado v. Guatemala. Merits, Reparations, and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 114.

<sup>104</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations, and Costs*. Judgment of November 21, 2018. Series C No. 368, para. 342.



expenses indicated by the parties, provided their quantum is reasonable.<sup>105</sup>

85. This Court has found that “the claims of the victims or their representatives with regard to costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural opportunity granted to them; that is, in the pleadings and motions brief, without prejudice to these claims being updated subsequently, in keeping with the new costs and expenses incurred during the proceedings before this Court.”<sup>106</sup> The Court also reiterates that “it is not sufficient merely to forward probative documents; rather, the parties are required to include arguments that relate the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, ensure that the items and their justification are clearly described.”<sup>107</sup>

86. In this case, the Court observes that there is no precise evidentiary support in the case file with regard to the costs and expenses incurred by Mr. Gorigoitia or his representatives regarding the processing of the cases before the Commission and the Court. However, the Court finds that the procedures necessarily entailed financial expenses, for which it determines that the state must deliver to the representatives USD 15,000.00 (fifteen thousand United States dollars) for costs and expenses, an amount that must be divided among the representatives. This amount shall be delivered directly to the representatives. At the stage of monitoring compliance with this judgment, the Court may order the state to reimburse the victims or their representatives for any reasonable expenses incurred during that procedural stage.<sup>108</sup>

#### **F. Reimbursement to the Victims’ Legal Assistance Fund**

87. In this case, by means of a note from the Secretariat dated February 11, 2019, the Court ordered to declare admissible the request made by the alleged victim to avail himself of the Victims’ Legal Assistance Fund. Likewise, in the order calling a hearing of March 20, 2019, the President indicated that financial assistance would be allocated to cover the travel and accommodation expenses necessary for Oscar Gorigoitia to appear before the Court to give his statement at the public hearing held in this case. Likewise, in that order, the President determined that the reasonable expenses incurred to formalize and send the affidavits for two statements given by the representatives, as determined by them, could be covered with funding from the Victims’ Legal Assistance Fund.

88. On June 10, 2019, an expenditure report was sent to the state in accordance with the provisions of Article 5 of the Court’s Rules of Procedure on the operation of the aforementioned fund. Thus, the state had the opportunity to present its observations on the disbursements made in the instant case, which amount to USD 987.36 (nine hundred eighty-seven dollars and thirty-six cents of the United States of America). The state did not present observations on these disbursements.

89. Based on the violations declared in this judgment and that the requirements to access the Assistance Fund were met, the Court orders the state to reimburse the Fund in the amount of

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<sup>105</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations, and Costs*. Judgment of November 21, 2018. Series C No. 368, para. 342.

<sup>106</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 275, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 28, 2018. Series C No. 371, para. 379.

<sup>107</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of Isaza Uribe et al. v. Colombia. Merits, Reparations, and Costs*. Judgment of November 20, 2018, para. 211.

<sup>108</sup> Cf. *Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala*. Interpretation of the Judgment on the Merits, Reparations, and Costs. Judgment of August 19, 2013. Series C No. 262, para. 62; and *Case of Duque v. Colombia. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 26, 2016. Series C No. 310, para. 227.

USD 987.36 (nine hundred eighty-seven dollars and thirty-six cents of the United States of America) for the expenses incurred. This sum must be reimbursed within six months of notification of this judgment.

***G. Method of compliance with the payments ordered***

90. The state shall make payment of the compensation for nonpecuniary damage and reimbursement of costs and expenses, as established in this judgment, directly to the persons indicated herein, within one year of notification of this judgment.

91. If the beneficiary has died or dies before he receives the respective compensation, it shall be delivered directly to his heirs, in accordance with applicable domestic law.

92. The state shall comply with its monetary obligations through payment in United States dollars, using the exchange rate in force on the New York Stock Exchange (United States of America), on the day before payment in order to make the respective calculation.

93. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the time frame indicated, the state shall deposit these amounts in an account or certificate of deposit in their favor in a solvent Argentine financial institution, in United States dollars, and on the most favorable financial terms permitted by the state's law and banking practice. If, after 10 years, the compensation has not been claimed, the amounts shall revert to the state with the accrued interest.

94. The amounts assigned in this judgment as compensation for nonpecuniary damage, and to reimburse costs and expenses shall be delivered to the persons indicated integrally, as established in this judgment, without any deductions resulting from possible taxes or charges.

95. If the state should fall into arrears, including with the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in Argentina.

**X  
OPERATIVE PARAGRAPHS**

Therefore,

**THE COURT**

**DECIDES,**

Unanimously,

1. To dismiss the preliminary objection filed by the state regarding the Court's lack of jurisdiction to carry out the requested review of compliance with human rights conventions, in the terms of paragraphs 19 to 21 of this judgment.

**DECLARES,**

Unanimously, that:

2. The state is responsible for the violation of the right to appeal a ruling, as set forth in Article 8(2)(h) of the American Convention, read in conjunction with Article 1(1) of the same

instrument, to the detriment of Oscar Raúl Gorigoitia, in the terms of paragraphs 47 to 53 of this judgment.

3. The state is responsible for the violation of the duty to adopt domestic legal effects, established in Article 2 of the American Convention, read in conjunction with Article 8(2)(h), in the terms of paragraphs 55 and 56 of this judgment.

4. The state is not responsible for the violation of the right to judicial protection in the terms of Article 25 of the American Convention, read in conjunction with Article 1(1), in the terms of paragraph 54 of this judgment.

5. The state is not responsible for the violation of the federal clause established in Article 28 of the American Convention, in the terms of paragraph 57 of this judgment.

**AND ORDERS:**

Unanimously, that:

6. The state shall, within a period of six months from the notification of this judgment, adopt the measures necessary to guarantee Oscar Raúl Gorigoitia the right to appeal the conviction issued by the First Criminal Chamber of Mendoza on September 12, 1997, in the terms of the provisions of paragraph 66 of this judgment.

7. The state shall adopt the measures necessary to suspend the legal effects of the aforementioned conviction until a decision on the merits is issued, in terms of the provisions of paragraph 66 of this judgment.

8. The state must make the publications indicated in paragraph 68 of this judgment, pursuant to the terms indicated therein.

9. The state shall, within a reasonable period of time, adapt its domestic legal system to the parameters established in this judgment on the right to appeal a ruling to a superior judge or court, in the terms of the provisions of paragraph 72 of this judgment.

10. The state shall pay the amounts established in paragraphs 82 and 86 of this judgment, as compensation for pecuniary damage and reimbursement of costs and expenses, respectively.

11. The state shall, within six months of notification of this judgment, reimburse the Victims' Legal Assistance Fund the amount established in paragraph 89 of this judgment.

12. The state must, within one year of notification of this judgment, provide the Court with a report on the measures taken to comply with it.

13. The Court will monitor complete compliance with this judgment, in exercise of its authority and in fulfillment of its duties under the American Convention on Human Rights, and will consider this case closed when the state has complied fully with all its provisions.

Drafted in Barranquilla, Republic of Colombia on September 2, 2019.

I/A Court H.R. *Case of Gorigoitia v. Argentina. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 2, 2019.

Eduardo Ferrer Mac-Gregor Poisot

President

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

L. Patricio Pazmiño Freire

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri

Registrar

So ordered,

Eduardo Ferrer Mac-Gregor Poisot

President

Pablo Saavedra Alessandri

Registrar