INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF FERNÁNDEZ PRIETO AND TUMBEIRO *V.* ARGENTINA

JUDGMENT OF SEPTEMBER 1, 2020

(*Merits and reparations*)

In the case of *Fernández Prieto and Tumbeiro v. Argentina,*

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

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

also present,

Pablo Saavedra Alessandri, Secretary,[**]

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 42, 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 deliberation or signature of this judgment, in accordance with the provisions of Article 19(1) and (2) of the Court's Rules of Procedure.

** The Deputy Secretary, Romina I. Sijniensky, did not participate in the processing of this case, or in the deliberation and signature of this judgment.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On November 14, 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 *Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro with regard to the Argentine Republic* (hereinafter "the State," "the State of Argentina," "the Argentine State" or "Argentina"). The Commission indicated that the case related to the illegal and arbitrary detention of Carlos Alberto Fernández Prieto (hereinafter also "Mr. Fernández Prieto") by agents of the Police Force of the Province of Buenos Aires in May 1992, and of Carlos Alejandro Tumbeiro (hereinafter also "Mr. Tumbeiro") by agents of the Argentine Federal Police in January 1998. The Commission considered that both detentions were carried out without a court order or a situation of *flagrante delicto*, and indicated that, in neither case were the objective elements that would have resulted in a reasonable level of suspicion that an offense had been committed detailed in the respective official documentation. Moreover, in the case of Mr. Tumbeiro, it indicated that the explanation, which related to his "nervousness" and the "inconsistency" between his attire and the neighborhood where he was, could reveal a certain discrimination based on appearance and the prejudices about that appearance in relation to the respective neighborhood. The Commission also indicated that the detentions and searches in this case failed to meet the standards of legality and non-arbitrariness. In addition, it underlined that the judicial authorities had not provided effective remedies for this situation, because they not only persisted with the State's failure to require objective reasons for the exercise of the legal authority to detain individuals based on suspicion, but also validated, as lawful, the reasons given by the police officers.

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

a) *Petition.* On July 30, 1999, and March 31, 2003, the National Public Defense Service lodged the respective initial petitions, which were combined because they related to similar facts.

b) *Admissibility Report.* On March 19, 2012, the Commission adopted the Admissibility Report in which it found that the petitions were admissible.[1]

c) *Merits Report*. On October 25, 2017, the Commission adopted Merits Report No. 129/17 in which it reached a series of conclusions[2] and made several recommendations to the State.

3. *Notification to the State.* The Merits Report was notified to the State on December 13, 2017, granting it two months to report on compliance with the recommendations. The Commission awarded the State three extensions to provide the requested information. Argentina advised that it had held a meeting with the petitioners in April 2018 in order to reach agreement on implementation of the recommendations. However, the petitioners reported that, in June 2018, they had submitted a proposal for compliance with the

[1] The Commission declared the case admissible with regard to the rights established in Articles 7, 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, and declared it inadmissible with regard to the right established in Article 11, in relation to Article 1(1) of that instrument.

[2] The Commission concluded that the State was responsible for the violation of the rights established in Articles 7(1), 7(2), 7(3), 7(5), 8(1), 11(2) and 25(1) of the American Convention in relation to Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro.

recommendations, but had not received any response from the State and no measure had been taken to comply with the said recommendations.

4. *Submission to the Court.* On November 14, 2018, the Commission submitted this case to the Court due to "the need to obtain justice for the victims in this case, owing to the failure to comply with the recommendations."[3]

5. *The Commission's requests.* Based on the foregoing, the Inter-American Commission asked the Court to find and declare the international responsibility of the State for the violations contained in its Merits Report and to order the State, as measures of reparation, to adopt those included in the said report. The Court notes with concern that 18 years have passed in the case of Mr. Fernández Prieto and 14 years in the case of Mr. Tumbeiro between the lodging of the initial petition before the Commission and the submission of the case to the Court.

II
PROCEEDINGS BEFORE THE COURT

6. *Notification to the State and the representatives.* The submission of the case was notified to the State and to the representatives of the presumed victims on February 4, 2019.

7. *Brief with pleadings, motions and evidence.* On April 1, 2019, the National Public Defense Service (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") pursuant to Articles 25 and 40 of the Court's Rules of Procedure. The representatives alleged that the State was responsible "for the violation of the rights to personal liberty, to protection of privacy, honor and dignity, and to judicial control, comprehensive review, and effective judicial protection established in Articles 7(1), 7(2), 7(3), 7(5), 8(1), 8(2)(h), 11(1), 11(3) and 25 of the Convention, together with the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro," as well as for the violation of Articles 1(1) and 24 of the Convention to the detriment of Carlos Alejandro Tumbeiro. In addition, they asked that the Court order the State to adopt various measures of reparation.

8. *Answering brief.* On July 3, 2019, the State submitted to the Court its brief answering the Commission's submission of the case, together with its observations on the pleadings and motions brief (hereinafter "answering brief"). In this brief, the State contested the alleged violations and the requests for measures of reparation of the Commission and the representatives.

9. *Public hearing.* On February 12, 2020, the President issued an order calling the parties and the Commission to a public hearing on the merits and eventual reparations and costs.[4] Also, in this order, two expert witnesses proposed by the representatives were summoned to provide their opinions during the public hearing and two witnesses proposed by the representatives and one expert witness proposed by the Commission were required to submit their statements by affidavit, and these were presented on March 5, 2020. The public hearing

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[3] The Commission appointed Commissioner Luis Ernesto Vargas Silva and Executive Secretary Paulo Abrão as its delegates, while Silvia Serrano Guzmán and Erick Acuña Pereda, lawyers of the Commission's Executive Secretariat at the time, acted as legal advisers.

[4] *Cf. Case of Fernández Prieto et al. v. Argentina. Call to a hearing*. Order of the President of the Inter-American Court of Human Rights of February 12, 2020. Available at: http://www.corteidh.or.cr/docs/asuntos/fernandez_prieto_12_02_2020.pdf

took place on March 11, 2020, during the 134th regular session that the Court held at its seat in San José.[5]

10. *Acknowledgement of responsibility.* On March 4, 2020, the State submitted a brief acknowledging its international responsibility for the violation of Articles 7, 8, 11 and 25 of the Convention to the detriment of Messrs. Fernández Prieto and Tumbeiro. In the case of Mr. Tumbeiro, it also acknowledged its international responsibility for the violation of Articles 1(1) and 24 of the Convention.

11. *Amici curiae.* The Court received four *amicus curiae* briefs presented by: (a) the Centro de Estudios Legales and Sociales (CELS);[6] (b) ELEMENTA DDHH, Human Rights Consultancy;[7] (c) Instituto de Defensa del Derecho de Defensa – Márcio Thomaz Bastos,[8] and (d) the Asociación Pensamiento Penal.[9]

12. *Final written arguments and observations.* On April 23, May 21 and June 18, 2020, the Commission, the representatives and the State, respectively, forwarded their final written arguments and observations with annexes.[10]

13. *Disbursements in application of the Legal Assistance Fund.* On February 5, 2020, the representatives request to access the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights was declared admissible. On June 16, 2020, the report on the disbursements made from the Legal Assistance Fund in this case, together with its annexes, was forwarded to the State. On June 24, 2020, the State advised that it had no comments to make on the said report.

14. *Deliberation of this case.* The Court deliberated on this judgment in a virtual session on August 31 and September 1, 2020.[11]

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[5] There appeared at this hearing: (a) for the Inter-American Commission: Paulo Abrão, Executive Secretary, and Jorge H. Meza Flores, adviser; (b) for the representatives of the presumed victims: Silvia Edith Martínez, Public Defender of the National Public Defense Service, and (c) for the State of Argentina: Alberto Javier Salgado, Director for International Human Rights Litigation of the Ministry of Foreign Affairs and Worship; Andrea Viviana Pochak, Assistant Secretary for Human Rights Protection and International Liaison of the Human Rights Ministry, and Gonzalo Bueno, Legal Counsel for International Human Rights Litigation of the Ministry of Foreign Affairs and Worship.

[6] The brief was signed by Agustina Lloret and Paula Litvachky and refers to the problem of arbitrary stop and search without a court order.

[7] The brief was signed by Adriana Muro Polo, Paula Aguirre Ospina and Renata Demichelis Ávila and refers to the practice of arbitrary detentions for drug-related offenses in Argentina.

[8] The brief was signed by Flávia Rahal, Hugo Leonardo, Guilherme Ziliani Carnelos, Marina Dias Werneck DeSouza, Domitila Köhler, Gustavo de Castro Turbiani, Johaína Matida, Clarissa Tatiana de Assunçao Borges and Thiago De Souza Amparo. It provides an analysis of similarities between Brazil and Argentina in relation to police excesses, as well as in relation to stop and search actions by the police in society and within the Brazilian Judiciary.

[9] The brief was signed by Indiana Guereño and Mario Alberto Juliano and refers to the context in which the facts of the case occurred, the content of the right to personal liberty and exclusion of evidence obtained during an illegal detention.

[10] The Court recalls that, in keeping with Court decisions 1/20 and 2/20, time limits were suspended from March 17 to May 20, 2020, owing to the COVID-19 health emergency.

[11] Owing to the exceptional circumstances caused by the COVID-19 pandemic, this judgment was deliberated on and adopted during the 136th session, which was held virtually using technology, pursuant to the provisions of the Court's Rules of Procedure.

III
JURISDICTION

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

IV
ACKNOWLEDGEMENT OF RESPONSIBILITY

A. Observations of the parties and of the Commission

16. The ***State***, in a brief of March 4, 2020 (*supra* para. 10), indicated that it agreed to accept the conclusions reached by the Inter-American Commission in its Merits Report No. 129/17 and asked the Court to examine the evidence offered, and to rule on both the legal consequences of the accepted facts and the reparations. During the public hearing, the State indicated that "the parties to this case have signed a memorandum of understanding based on the Argentine State's assumption of its international responsibility for the facts that have been reported, and this includes specific requests […] addressed not only at making reparation to the victim in this case, but also so that, based on the judgment that this Court will deliver, the necessary conditions are implemented to ensure that facts such as those revealed in this case do not happen again."[12] In its final written arguments, the State repeated the requests. In particular, in its brief of March 4, 2020, the State indicated the following:

> Having examined IACHR Report No. 129/17, which has been submitted to the contentious jurisdiction of the Inter-American Court of Human Rights, and the brief with pleadings, motions and evidence presented by the victims' representatives, and in light of the other facts verified in the case being processed, as well as taking into account its traditional policy of cooperating with the organs of the inter-American system for the protection of human rights, the Argentine State understands that it should accept the conclusions reached by the Inter-American Commission on Human Rights that verified the violation of Articles 7, 8, 11 and 25 of the American Convention on Human Rights, in relation to the general obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro. Moreover, with regard to Carlos Alejandro Tumbeiro, and in accordance with the Commission's findings in the said report, the Argentine State also acknowledges its international responsibility for the violation of Articles 1(1) and 24 of the American Convention.
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> In order to delimit the scope of the acknowledgement of international responsibility, the Argentine State advises the Commission and the representatives that, as revealed by IACHR Report No. 129/17 and the brief with pleadings, motions and evidence, the police stop and search of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, in the context of their respective cases, did not respect the required inter-American standards, thereby violating Articles 7 and 11 of the American Convention, in relation to Articles 1(1) and 2 of this instrument. For the same purpose, the Argentine State accepts the allegations of the Commission and the representatives that, subsequently, these police stop and search actions were not subject to adequate control of conventionality, thereby violating Articles 7, 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 of this instrument and also, in the specific case of Carlos Alejandro Tumbeiro, the violation of Articles 1(1) and 24 of the American Convention, because the Commission verified that the reasons alleged to stop and search him were discriminatory."
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[12] Statement by the State's representatives during the public hearing held on March 11, 2020.

> Notwithstanding the foregoing, the parties request the Inter-American Court to examine the evidence offered, receive the arguments of the parties and deliver a judgment in which it rules on the legal consequences of the facts that haves been accepted, reinforcing the international standards on the matter that is the purpose of these proceedings and permitting adequate monitoring of its decision.
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> Furthermore, pursuant to Article 63 of the American Convention, the parties request the Court to rule on the scope of the reparations included by the Inter-American Commission on Human Rights in Merits Report No. 129/17, and on the arguments made by the victims' representatives in this regard in section VIII of their brief with pleadings, motions and evidence, which include compensation, in equity, for pecuniary and non-pecuniary damage to the victims, measures of satisfaction and guarantees of non-repetition with a transformative purpose. The foregoing without prejudice to the considerations that the parties may make on this point in due course.[13]

17. The ***representatives*** stated during the public hearing that they considered that "the attitude taken by the State was very positive and underst[oo]d that it made a very important contribution to the development of these proceedings and to respect for the principles that inspire the American Convention." Nevertheless, the representatives asked the Court "to deliver a judgment that establishes very clear and precise standards for stop and search without a court order, and this over and above the responsibility acknowledged by the Argentine State."[14] This request was repeated in their final written arguments.[15]

18. The ***Commission*** indicated during the public hearing, with regard to the acquiescence made by the State, that it "wished to acknowledge and express its appreciation for the willingness of the Argentine State to recognize those violations and to make reparation to the victims in this case."[16] In addition, in its brief with observations of March 23, 2020, the Commission considered that "the acknowledgement made by the State encompasses the facts, the relevant law, and the measures of reparation established in Report No. 129/17. This was without prejudice to the fact that the State had also decided to acknowledge its international responsibility for the violation of the principle of equality alleged by the representatives." In this way, the Commission considered that the acknowledgement of responsibility "made a positive contribution to the proceedings, and also to the exercise of the human rights established in the American Convention." Lastly, the Commission asked the Court: "(i) to accept the State's acknowledgement of international responsibility and establish that it incorporates all the facts and the violations committed in this case, and (ii) to make a detailed determination of the facts, the relevant law, and the corresponding reparations."[17]

B. Considerations of the Court

19. The Court recalls that, pursuant to Articles 62 and 64 of the Rules of Procedure, and in exercise of its powers for the judicial protection of human rights, a matter of international public order, it is incumbent on it to ensure that acts of acknowledgment of responsibility are

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13 Brief of March 4, 2020 (merits file, folios 400 to 402).

14 Statement of a representative of the presumed victims during the public hearing held on March 11, 2020.

15 *Cf.* Brief with final written arguments of the representatives of May 21, 2020 (merits file, folios 758 to 761).

16 Statement of the representative of the Inter-American Commission on Human Rights during the public hearing held on March 11, 2020.

17 Brief with observations of the Inter-American Commission on Human Rights on the Argentine State's brief of March 4, 2020 (merits file, folio 543).

acceptable for the purposes that the inter-American system seeks to achieve.[18] In this case, the Court considers that the statements made by the State and the representatives in the agreement of March 4, 2020, during the public hearing of March 11, 2020, and in their final written arguments, as well as the observations of the Commission of March 23, 2020, clearly reveal that the State has made a total acknowledgement of responsibility with regard to the facts and the alleged human rights violations as laid out by the Commission in its Merits Report, and has recognized the need to adopt measures of reparation. Consequently, the Court considers that the dispute has ceased with regard to the following:

a) The facts related to: (i) the relevant law; (ii) the context of detentions without a court order or the existence of a situation of *flagrante delicto* in Argentina at the time of the facts, and (iii) the detentions and the criminal proceedings brought against Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro.
b) The violation of the rights to personal liberty, judicial guarantees, honor and dignity, and judicial protection recognized in Articles 7, 8, 11 and 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro. These violations occurred as a result of the illegal and arbitrary detention of which they were victims, as well as of the violations of due process and the lack of an effective judicial remedy in the proceedings brought against them.
c) The violation of the right to equality and non-discrimination recognized in Articles 1(1) and 24 of the Convention to the detriment of Carlos Alejandro Tumbeiro.
d) The need to grant measures of reparation in keeping with the requests presented by the Commission and the representatives for: (i) pecuniary and non-pecuniary damage to the victims; (ii) measures of satisfaction, and (iii) guarantees of non-repetition with a transformative purpose.

20. The Court finds that the total acknowledgement of international responsibility makes a positive contribution to the development of these proceedings and the observance of the principles that inspire the Convention, as well as to the victims' needs for reparation.[19] The acknowledgement made by the State has full legal effects pursuant to above-mentioned Articles 62 and 64 of the Court's Rules of Procedure, and has significant symbolic value to ensure that similar facts are not repeated. Owing to the comprehensive acknowledgement made by the State, the Court considers that the legal dispute in this case has ceased with regard to the facts, the relevant law, and the need to adopt measures of reparation.

21. In this case, based on the violations acknowledged by the State and the requests of the parties and the Commission, the Court considers it necessary to deliver a judgment in which it determines the facts that occurred based on the evidence provided in the proceedings before it. This will contribute to making reparation to the victims, to avoiding a repetition of similar facts and, in short, to the purposes of the inter-American human rights jurisdiction.[20] In particular, the Court considers it necessary to analyze the scope of the State's international responsibility owing to the actions of the police in the context of the illegal and arbitrary

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[18] *Cf. Case of Manuel Cepeda Vargas v. Colombia*. *Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 17, and *Case of Noguera et al. v. Paraguay. Merits, reparations and costs.* Judgment of March 9, 2020. Series C No. 401, para. 21.

[19] *Cf. Case of Benavides Cevallos v. Ecuador. Merits, reparations and costs.* Judgment of June 19, 1998. Series C No. 38, para. 57, and *Case of Noguera et al. v. Paraguay*, *supra*, para. 27.

[20] *Cf. Case of Tu Tojin v. Guatemala. Merits, reparations and costs.* Judgment of November 26, 2008. Series C No. 190, para. 26, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 28, 2018. Series C No. 371, para. 41.

detentions of Messrs. Fernández Prieto and Tumbeiro, as well as its responsibility in relation to the right to equality before the law and the prohibition of discrimination in the case of Mr. Tumbeiro. The Court will also rule on the corresponding reparations.

22. Nevertheless, on this occasion, the Court does not find it necessary to open up the discussion on all the points that were the purpose of the litigation, because some legal claims argued in this case, such as the violation of the judicial guarantees and judicial protection of Messrs. Fernández Prieto and Tumbeiro, were expressly recognized by the State in its acknowledgement of international responsibility, and have been extensively developed in the Inter-American Court's case law.

V
EVIDENCE

A. Admissibility of the documentary evidence

23. 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 (Article 57 of the Rules of Procedure)[21] and their admissibility was not contested or refuted.

B. Admissibility of the testimonial and expert evidence

24. This Court finds it pertinent to admit the statements provided by affidavit[22] and during the public hearing[23] insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

VI
FACTS

25. This case relates to the illegal and arbitrary detention of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, in 1992 and 1998, respectively. The Court will describe the facts acknowledged by the State in the following order: (a) context of detentions without a court order or a situation of *flagrante delicto* in Argentina; (b) detention and criminal proceedings against Carlos Alberto Fernández Prieto; (c) detention and criminal proceedings against Carlos Alejandro Tumbeiro, and (d) applicable laws.

A. Context of detentions without a court order or a situation of **flagrante delicto** *in Argentina*

26. In its acknowledgement of international responsibility, signed on March 4, 2020, the State accepted all the conclusions set out by the Commission in its Merits Report, which include

[21] In general, the documentary evidence may be submitted according to Article 57(2) of the Rules of Procedure together with the brief submitting the case, the brief with pleadings and motions, or the answering brief, as applicable, and evidence forwarded outside these procedural occasions is not admissible, safe for the exceptions established in the said Article 57(2) of the Rules of Procedure (namely, force majeure and grave impediment) or if it relates to a supervening fact; that is, one that occurred after the said procedural moments.

[22] *Cf.* Expert opinion of Juan Pablo Gomara and statements of Fátima Adriana Castro and Carlos Alejandro Tumbeiro.

[23] *Cf.* Opinions of expert witnesses Sofía Tiscornia and Hernán Víctor Gullco provided during the public hearing held in this case.

those indicating that the detentions of Messrs. Fernández Prieto and Tumbeiro took place in a general context in Argentina of detentions carried out without a court order or grounds for *flagrante delicto*. Moreover, in its brief with final arguments of June 18, 2020, the State acknowledged that this "case is emblematic of what, during the 1990s, our country knew of as the 'policing intuition' (*olfato policial*), which involved unchecked police actions, encouraged by public security policies based on discretional preventive operations, without any prior investigation or intelligence that were, therefore, profoundly inefficient." The State also indicated that "this type of police practice was promoted by security policies that were defined under the paradigm of the so-called "war on drugs" and were also protected by inadequate or inexistent judicial control."[24]

27. In this regard, in the *Case of Bulacio v. Argentina,* the Court noted that in Argentina, in 1991, "indiscriminate police detentions were carried out."[25] In that case, the Court observed that, from 1991 to 2003, the crime control policy in the city of Buenos Aires "implemented intervention techniques" aimed at crime prevention that "included police presence and surveillance in public spaces and police detention of individuals without a court order."[26] In the same case, the Court noted the following:

> In the case of detentions for identification purposes, the police, generally and belatedly, submit to the judge a list of persons detained stating as causes for detention: "loitering," "wandering aimlessly," "window watching" […]. The judges conduct an "quasi-administrative" control of police detentions […]; therefore, it is utterly impossible to control roughly 100,000 to 150,000 detentions every month in the city of Buenos Aires effectively. […] The police arrest large numbers of individuals together or separately and it is only at the police station that they are "classified" as adults, youths, women, men. These mass detentions take place under the *a priori* consideration that there are certain individuals who, according to the social defense program, *per se* may commit crimes.[27]

28. In this regard, since 1995, the United Nations Human Rights Committee (hereinafter also, "the UN Committee") has urged Argentina to take all necessary measures to prevent cases of arbitrary detention.[28] Also, in a report on a visit to Argentina in 2003, the United Nations Working Group on Arbitrary Detention (hereinafter also, "the Working Group") referred to the general situation of the rule of law in that country following the return to democracy in 1983[29] and indicated that, "in some provinces, such as Buenos Aires […], police officers haves the authority to arrest or apprehend individuals who they believe are intending to commit an offence," and "may make arrests on the grounds of public order or security and for the purposes of identity and background checks." The Working Group indicated that it had been advised by non-governmental organisations "that police officers tended to abuse this power of detention" and indicated that in "practice, many individuals are arrested simply for loitering, or because they cannot give a good reason for being in a particular place or because they have no money in their pockets." "According to the representatives of various social

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[24] Argentina's brief with final arguments dated June 18, 2020 (merits file, folio 832).

[25] *Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 69.

[26] *Cf. Case of Bulacio v. Argentina, supra*, para. 53.

[27] *Cf. Case of Bulacio v. Argentina, supra*, para. 56.

[28] UN, Human Rights Committee, Concluding observations on Argentina, April 5, 1995, para. 161.

[29] UN, Working Group on Arbitrary Detention, Report on visit to Argentina, E/CN.4/2004/3/Add.3, December 23, 2003, para. 11.

groups," the Working Group noted that "this kind of police action has the effect of intimidating average citizens."[30]

29. The Working Group also referred to irregular police procedures and, in this regard, indicated that the Public Prosecutor's Office had "uncovered many cases involving police officers who, eager to demonstrate their effectiveness in combatting the crime wave, had invented and fabricated cases by detaining innocent individuals after reporting the successful prosecution of an offence." The Working Group indicated that the "pattern in these cases is to take the individuals to a particular place, "plant" evidence, accuse them of theft, and so on […]" and that, in this situation, the "ability of the victims of such situations to defend themselves is virtually non-existent, since most of them are from the most vulnerable groups on the fringes of society: the unemployed, beggars, illegal immigrants or individuals with a police record."[31] In this regard, it recommended that Argentina "[…] monitor closely the behaviour of senior and junior police officers, particularly with regard to their powers of arrest and detention," and "any manifestation of racist, xenophobic, homophobic or other behaviour that is incompatible with the full observance of human rights – which the police are expected to enforce – should be punished."[32]

30. Similarly, in 2010, the UN Committee expressed its concern "at the subsistence of legislation giving the police the power to detain persons […] who they have not apprehended in the act of committing an offence, and to do so without a warrant or subsequent judicial review, for the sole stated purpose of verifying their identity, in violation of, *inter alia,* the principle of the presumption of innocence […]."[33] In 2016, the Committee reiterated "its concern about the police practice, and the regulation under which it is permitted, of taking people into custody without a warrant in order to verify their identity and then detaining them for lengthy periods of time […]," and recommended that the State "take all necessary steps, including the adoption of legislative measures, to put an end to the practice of detaining persons when such detention is not related to the commission of an offence."[34]

31. Similarly, in a report on a visit to Argentina in 2017, the Working Group referred to the "wide powers of the police to deprive persons of liberty based on either the suspicion of the commission of a crime or for verification of identification" and observed "the same in relation to the inherent powers of the police to 'withhold' persons in order to carry out identity checks." The Working Group indicated that:

> The possibility of arresting someone on the basis of a suspicion of a crime being carried out is widely used in a discriminatory and subjective manner, namely towards those in situations of vulnerability, such as street children, members and leaders of indigenous communities, migrants, lesbian, gay, bisexual, transgender and intersex persons and others.[35]

32. In 2012, the Ombudsman of the city of Buenos Aires indicated that, in most cases, the use of the mechanism of "detention to carry out identity checks" was automatic, and that "the

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[30] UN, Working Group on Arbitrary Detention, Report on visit to Argentina, E/CN.4/2004/3/Add.3, December 23, 2003, paras. 42, 43 and 46.

[31] UN, Working Group on Arbitrary Detention, Report on visit to Argentina, *supra*, paras. 47 and 48.

[32] UN, Working Group on Arbitrary Detention, Report on visit to Argentina, *supra*, para. 71.

[33] UN, Human Rights Committee, Concluding observations on Argentina, CCPR/C/ARG/CO/4, March 31, 2010, para. 15.

[34] UN, Human Rights Committee, Concluding observations on Argentina, CCPR/C/ARG/CO/5, August 10, 2016, paras. 17 and 18.

[35] UN, Working Group on Arbitrary Detention, Report on visit to Argentina, A/HRC/39/45/Add.1, July 19, 2018, paras. 26 and 27.

individuals identified were not committing, nor could be understood to be about to commit, a criminal act or offense, so that there was no reason to verify their identity; they were merely poor people living on the street and it would appear that this was the situation that, in practice, authorized the police to act."[36]

33. The Court notes that, as the State has acknowledged, the detentions of Messrs. Fernández Prieto and Tumbeiro in 1992 and 1998, respectively, occurred in a general context of arbitrary detentions and searches in Argentina. In this regard, in its final arguments, the State indicated that, "in our country, the police authority to stop and search people without a court order and without evident situations of *flagrante delicto* merits comprehensive review"[37] and this, added to the aforementioned reports, allows the Court to conclude that this context continues up until today.

B. Detention and criminal proceedings against Carlos Alberto Fernández Prieto

B.1. Interception and inspection in 1992

34. The corresponding arrest report indicates that, on May 26, 1992, an inspector and two sergeants of the Police of the Province of Buenos Aires were "patrolling the precinct" when, at around 7.00 p.m., they saw, in an almost uninhabited area of Mar del Plata, a green vehicle with "three individuals inside behaving suspiciously," one of whom was Mr. Fernández Prieto, a salesman of 45 years of age. The police agents intercepted the vehicle, made the passengers get out and, in the presence of two witnesses summoned for this purpose, proceeded to conduct a search. In the trunk of the vehicle was a package wrapped in silver-colored paper with a brown ribbon the aroma and characteristics of which indicated that "it could be […] marihuana," and a 38-caliber revolver with ten bullets and 30 bullet cases. Inside the vehicle, in the seat occupied by Mr. Fernández Prieto, there were five similar packages, and a 22-caliber pistol with 8 bullets, a magazine and two holsters.[38]

35. According to the arrest report, the police officers proceeded to confiscate these items, and detained Mr. Fernández Prieto and the other passengers and took them to a police station.[39] The same day, one of the officers signed a statement in which he asserted that, when they were searching the vehicle, Mr. Fernández Prieto had acknowledged that "they were going to deliver the drug" to "a man called Guillermo or Toti," who would pay them when they made the delivery.[40] On June 16, 1992, another of the officers stated that Mr. Fernández Prieto told his companions, "who were rather angry," that he would assume responsibility for everything.[41]

36. The day after the detention, one of Mr. Fernández Prieto's companions stated that the weapons that had been confiscated were his and that he had the respective permit to carry them. He also stated that "at no time was he aware of what Fernández Prieto was carrying in his case."[42] The same day, Mr. Fernández Prieto stated that, about a month before, someone

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[36] Decision of the Ombudsman of the city of Buenos Aires of April 27, 2012 (evidence file, folios 68 to 128).

[37] Final written arguments of Argentina of June 18, 2020 (merits file, folio 833).

[38] *Cf.* Arrest report, Carlos Alberto Fernández Prieto of May 26, 1992 (evidence file, folios 129 to 131).

[39] *Cf.* Arrest report, Carlos Alberto Fernández Prieto of May 26, 1992 (evidence file, folios 129 to 131).

[40] Statement of items confiscated from vehicle signed by Fabián Raúl Casanova on May 26, 1992 (evidence file, folios 132 and 133).

[41] *Cf.* Statement signed by Juan Carlos Norberto on May 16, 1992 (evidence file, folios 134 and 135).

[42] Statement signed by Alberto José Julián Argente on May 27, 1992 (evidence file, folios 136 to 140).

called Julio had contacted him – because an individual with the alias "Pantera" had given him his telephone number – and offered him the possibility of earning US$500 (five hundred United States dollars) to take some "merchandise" to Mar del Plata. He stated that he had met up with Julio on a corner in Buenos Aires and that the latter had advanced him US$200.00 (two hundred United States dollars), and that, as regards Julio, he only knew the address that the latter had given him in order to deliver the packages to a supposed Guillermo. He clarified that his two companions, who had invited him to travel with them, were unaware of the situation. Also, when he was shown the arrest report, he stated that he had signed it in good faith because "one could not see anything that night" and that the factual account was incorrect because the packages seized were not in the trunk, but rather under and towards the back of the driver's seat.[43]

B.2. The criminal proceedings

37. On June 16, 1992, the federal judge of Mar del Plata (hereinafter "the federal judge") ordered the pre-trial detention of Mr. Fernández Prieto because, owing to the nature of the offense he was accused of – namely, transportation of narcotics – it was the federal judiciary that had jurisdiction to hear the case. The judge argued that, based on where and how the packages were confiscated, there was evidence to characterize the incident as the offense of transportation of narcotics established in article 5(c) of Law 23,737.[44] On November 8, 1995, the deputy federal prosecutor (hereinafter "the federal prosecutor") filed charges against Mr. Fernández Prieto for the offense of the transportation of 2,370 grammes of cut marijuana distributed in six packages, requesting that he be sentenced to five years' imprisonment. Regarding the inconsistency as regards the place where the packages had been found, the federal prosecutor indicated that this was "irrelevant" because Mr. Fernández Prieto "had assumed full responsibility for the custody of the items seized."[45]

38. On February 23, 1996, the federal judge rejected an objection of *res judicata* filed by Mr. Fernández Prieto's defense counsel, a decision that was confirmed by the Federal Chamber of Mar del Plata on April 29, 1996.[46] On May 26, 1996, Mr. Fernández Prieto's defense counsel asked that his client be acquitted and that the proceedings be declared null and void. In his brief, the defense counsel argued that there were no "strong indications […] that would have authorized the police officers to [carry out] the interception, arrest and search […]," so that this constituted "an arbitrary measure." The defense counsel also argued that it was "not possible to curtail the liberty" of Mr. Fernández Prieto or proceed to "search his belongings just because his behavior appeared to be suspicious," indicating that "a mere suspicion […] could never authorize such a procedure."[47]

39. On July 19, 1996, the federal judge sentenced Mr. Fernández Prieto to five years' imprisonment and a fine of three thousand pesos for the offense of transportation of narcotics. In his judgment, the judge found that it had been "full and legally proved […] that, on May 26, 1992, in the indicated circumstances of manner, time and place […] the accused […] was transporting a certain quantity of […] marijuana." Regarding the defense's argument of the absence of sufficient grounds to make the arrest, the judge indicated that the police officers "acted within their legal remit," because the vehicle in which Mr. Fernández Prieto was

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43 *Cf.* Statement signed by Carlos Alberto Fernández Prieto on May 27, 1992 (evidence file, folios 141 to 145).

44 *Cf.* Ruling No. 93/95 of June 16, 1992, ordering the pre-trial detention of Carlos Alberto Fernández Prieto.

45 Brief with charges brought against Carlos Alberto Fernández Prieto of December 14, 1995 (evidence file, folios 146 to 150).

46 *Cf.* Judgment of Federal Chamber of Mar del Plata of April 29, 1996 (evidence file, folios 1478 to 1471).

47 Defense brief of Carlos Alberto Fernández Prieto of May 26, 1996 (evidence file, folios 151 to 168).

travelling "was being driven in a suspicious way." Regarding the legal characterization, the judge indicated that criminal intent had been constituted because, owing to the amount seized, it was clear that "Fernández Prieto was transporting drugs for a purpose other than mere possession." Regarding the inconsistency as regards the place where the seized substance had been found, the judge indicated that this did not alter "the confession" made by Mr. Fernández Prieto. In order to reach his decision, the judge stated that he had taken into account the statements of the police officers and the expert appraisal of the nature of the seized substance, "granting special importance to the express acknowledgement that [Mr. Fernández Prieto had] made in his initial statement."[48]

40. On September 16, 1996, Mr. Fernández Prieto filed an appeal against the said judgment. In his appeal he argued that the federal judge had made an "inappropriate legal characterization of the conduct" by considering that "the search without a court order of the vehicle in which [Mr. Fernández Prieto] was travelling was not null and void." The grievances alleged were based on two arguments: (a) the arbitrary nature of the search without a court order, and (b) the erroneous legal characterization.[49]

41. On November 26, 1996, the Federal Court of Appeal of Mar del Plata (hereinafter also "the Federal Chamber") dismissed the appeal, confirming the sentence. The Chamber considered that "a reading of the proceedings necessarily leads to the conclusion that the search conducted […] originated from a prior suspicious situation noted by the police officers, in circumstances in which it was impossible to request a prior court order," and that this "was carried out without violating any individual guarantee or right." The Federal Chamber also indicated that, if it accepted the defense's arguments, this would impede "the work of crime prevention" by the "police authority" by restricting their ability to "revise a vehicle in "suspicious circumstances," and it added that the specific case was merely a "prudent action by the police exercising their specific functions and without any violation of either constitutional or procedural rules."[50]

42. On December 12, 1996, Mr. Fernández Prieto filed a federal special appeal against this judgment.[51] On February 14, 1997, the Federal Chamber rejected this appeal considering it inadmissible. In its reasoning, the Federal Chamber explained that, in this case, "no matter with serious institutional implications was observed that […] would allow for the appeal" and that the contested judgment was not the result of a "reasoned derivation from the law in force"[52] and it had not entailed a violation of constitutional guarantees.

43. On February 28, 1997, Mr. Fernández Prieto filed a remedy of complaint against the said decision. In this remedy, his defense argued the violation of due process as a result of the "notable absence of impartiality in the case" and affirmed its admissibility considering that the matter under discussion did "meet the requirements of serious institutional implications" because it affected "fundamental principles of a social nature," especially if "the number of cases similar" to that of Mr. Fernández Prieto was considered. His defense concluded that "the

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[48] Judgment of the Federal Court of Mar del Plata of July 19, 1996 (evidence file, folios 169 to 196).

[49] Appeal filed by Carlos Alberto Fernández Prieto against the judgment convicting him (evidence file, folios 198 to 204).

[50] *Cf.* Judgment of the Federal Appeals Chamber of Mar del Plata of November 26, 1996 (evidence file, folios 206 to 214).

[51] Special federal appeal filed by Carlos Alberto Fernández Prieto on December 12, 1996 (evidence file, folios 215 to 229).

[52] Decision of the Federal Appeals Chamber of Mar del Plata of February 14, 1997 (evidence file, folios 230 to 232).

failure to place clear limitations on the actions of law enforcement personnel not only affect[d] the liberty and security of the population,"[53] but also threatened the institutions involved that required the establishment of a "framework for their actions." In parallel, the defense filed a motion for release from prison, which was admitted by the federal judge in a decision of October 17, 1997, because Mr. Fernández Prieto had served two-thirds of his sentence, without a final judgment having been delivered.[54]

44. On November 12, 1998, the Supreme Court of Justice of the Nation (hereinafter also "the Supreme Court") rejected the remedy of complaint and confirmed the sentence. As grounds for its decision, the Supreme Court referred to the case law of the Supreme Court of the United States and indicated that, "as a general rule, regarding the exceptions that legitimate stop and search without a court order," the said court had "accorded special relevance to the time and place in which the procedure [was carried out] and to the existence of urgent reasons to implement this, and had validated arrests without a court order conducted in the light of day and in public places." Likewise, the judgment affirmed that the said court had also validated the search of vehicles and the resulting evidence obtained "based on the fact that the police officers had a probable cause for suspecting that there was contraband or evidence of an unlawful activity."[55] When considering that this case law applied to the case of Mr. Fernández Prieto, the Supreme Court found that the arguments of the defense were inadmissible, and concluded that:

> […] An examination of the special circumstances in which the contested action occurred is decisive to consider that the search of the vehicle and the detention of the occupants by the police officers was legitimate. This was because the latter had been ordered to patrol the precinct with the specific function of crime prevention and, in that context, they intercepted a vehicle on noting that the individuals inside it were 'acting suspiciously' and presumably committing an offense, a suspicion that was corroborated by finding items linked to drug-trafficking and, subsequently, had immediately informed the judge of the detention.[56]

45. Owing to the sentence, Mr. Fernández Prieto was deprived of liberty for two years, eight months and five days.[57] Mr. Fernández Prieto died in 2020.

C. Detention and criminal proceedings against Carlos Alejandro Tumbeiro

C.1. Detention for identification purposes and body search in 1998

46. According to the respective arrest report, on January 15, 1998, at around midday, Mr. Tumbeiro, an electrician of 44 years of age,[58] was intercepted by agents of the Argentine Federal Police "for identification purposes,"[59] while he was walking along a street in Buenos Aires. The police officers asked Mr. Tumbeiro what he was doing in the area, and he answered that he was looking for electronic material for replacement parts and "proceeded to hand over

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[53] Special remedy of complaint of February 28, 1997 (evidence file, folios 233 to 248).

[54] *Cf.* Ruling of the Federal Court of Mar del Plata of October 17, 1997 (evidence file, folios 1347 to 1349).

[55] Judgment of the Supreme Court of Justice of the Nation of November 12, 1998 (evidence file, folios 249 to 262).

[56] Judgment of the Supreme Court of Justice of the Nation of November 12, 1998 (evidence file, folios 249 to 262).

[57] *Cf.* Ruling of the Federal Court of Mar del Plata of October 17, 1997 (evidence file, folios 1347 1349).

[58] *Cf.* Arrest report of Carlos Alejandro Tumbeiro of January 15, 1998 (evidence file, folio 1485).

[59] Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

his identity document."[60] Noting that he appeared "extremely nervous,"[61] "after searching his clothes" on the street,[62] one of the officers "asked him to get into" the patrol vehicle "until his identity had been verified."[63] While awaiting verification of whether he had a criminal record, the officers noticed that "inside a newspaper [Mr. Tumbeiro] was carrying a white […] substance similar to cocaine hydrocholoride"; they therefore requested the presence of witnesses and proceeded to arrest him.[64]

47. According to the police officers' version, Mr. Tumbeiro's attitude "was suspicious because "his attire was unusual for the area and because he became evasive in the presence of the patrol vehicle."[65] For his part, Mr. Tumbeiro stated that, on that day, he was wearing jeans and a shirt, that the police officers made him "get into the patrol vehicle" and "planted the drug" on him; also, that up until that time he had never had a "record." Mr. Tumbeiro was also obliged to lower his jeans and underwear inside the patrol vehicle.[66]

C.2. The criminal proceedings

48. On August 26, 1998, Federal Oral Criminal Court No. 1 of the Federal Capital issued a "suspended" sentence of one year and six months' imprisonment against Mr. Tumbeiro[67] and a fine of one hundred and fifty pesos for the offense of possession of narcotics established in article 14 of Law 23,737. Mr. Tumbeiro filed a motion for cassation against the judgment and requested that the record of the seizure be annulled considering that "a sufficient level of suspicion" had not existed to proceed to search him without a court order.[68]

49. As a result of this appeal, the First National Chamber for Criminal Cassation (hereinafter "the Criminal Cassation Chamber") acquitted Mr. Tumbeiro in a judgment of March 15, 1999.[69] In this judgment, the Criminal Cassation Chamber indicated that "the interception of someone in a public place for [identification] purposes and their subsequent introduction into a police vehicle while awaiting the results of a criminal background check […] constitutes a real arrest that only by using […] euphemisms could be considered a simple delay." The Criminal Cassation Chamber also indicated that "nervousness" was an "ambiguous circumstance and, as such, could not be used to authorize the said interception," and added that, in the specific case, the arrest to make a background check was not justified because "no duly founded circumstances existed leading to the presumption that someone had committed an unlawful act […] and not to believe his identity documents."[70]

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60 Petition No. 1181-03 of Carlos Alejandro Tumbeiro, lodged before the Inter-American Commission on March 31, 2003 (evidence file, folios 285 to 303).

61 Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

62 *Cf.* Petition No. 1181-03 of Carlos Alejandro Tumbeiro, lodged before the Inter-American Commission on March 31, 2003 (evidence file, folios 285 to 303).

63 Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

64 *Cf.* Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

65 Petition No. 1181-03 of Carlos Alejandro Tumbeiro, lodged before the Inter-American Commission on March 31, 2003 (evidence file, folios 285 to 303).

66 Petition No. 1181-03 of Carlos Alejandro Tumbeiro, lodged before the Inter-American Commission on March 31, 2003 (evidence file, folios 285 to 303).

67 Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

68 *Cf.* Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

69 *Cf.* Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

70 Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

50. On March 30, 1999, the Prosecutor General filed a special appeal against the said decision. The Prosecutor General argued that, the higher court's interpretation of the causes for the admissibility of the arrest without a court order entailed an "unnecessarily formal rigorism that impaired the right […] to due process" by using "grounds that were merely apparent to reject evidence that had been validly submitted to the proceedings." He argued that the reason that justified Mr. Tumbeiro's arrest "was not simply his nervousness, but he was also behaving strangely and his attire was unusual in light of the area where he was."[71]

51. El October 3, 2002, the Supreme Court overturned the judgment of the Criminal Cassation Chamber and ordered that a new ruling be issued. Referring to the United States case law on "probable cause," "reasonable suspicion" and "emergency situations," the Supreme Court indicated that, in the specific case, these were applicable because the "suspicious behavior" attributed to Mr. Tumbeiro was "subsequently corroborated by finding drugs." The Supreme Court found that "no irregularity could be noted" in the proceedings and that the contested judgment disregarded "the legitimacy of the actions taken to prevent crime" and failed to assess the "nervousness" of Mr. Tumbeiro together with "the other circumstances based on which the judicial agents decided to check his identity."[72]

52. Mr. Tumbeiro filed an appeal against this judgment, which was rejected by the National Criminal Cassation Chamber on October 24, 2002; consequently, the judgment convicting him was final.[73] When the said judgment was declared final, Mr. Tumbeiro was asked to present a community service plan in order to serve his sentence.[74] Mr. Tumbeiro presented this plan which involved working for a foundation.[75] However, owing to problems concerning the designation of the center where he would provide his services, attributable to the authorities monitoring execution of judgment, Mr. Tumbeiro never provided the said services. On May 2, 2006, the national judge for execution of criminal judgments decided to consider that he had served his sentence.[76] Mr. Tumbeiro died on July 30, 2014.[77]

D. Applicable laws

53. Article 18 of the Argentine Constitution establishes the guarantees of due process and personal liberty as follows:

> No inhabitant of the Nation may be punished without a previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he is tried. Nobody may be compelled to testify against himself, nor be arrested except by virtue of a written warrant issued by a competent authority. The defense by trial of persons and rights may not be violated. The domicile may not be violated, as well as the written correspondence and private papers; and a law shall determine in which cases and for what reasons their search and occupation shall be allowed. Death penalty for political causes, any kind of tortures and

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71 Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

72 Judgment of the Supreme Court of Justice of the Nation of October 3, 2002 (evidence file, folios 304 to 311).

73 *Cf.* Judgment of the National Criminal Cassation Chamber of October 24, 2002 (evidence file, folios 1709 to 1711).

74 *Cf.* Statement of intent of November 6, 2002 (evidence file, folio 1733).

75 *Cf.* Community service proposal of December 17, 2002 (evidence file, folio 1715).

76 *Cf.* Ruling of the national judge for execution of criminal judgments of May 2, 2006 (evidence file, folios 1820 to 1822).

77 Death certificate of Carlos Alejandro Tumbeiro of August 1, 2014 (evidence file, folio 357).

> whipping, are forever abolished. The prisons of the Nation shall be healthy and clean, for the security and not for the punishment of the prisoners confined therein; and any measure taken with the pretext of precaution which may lead to mortify them beyond the demands of security, shall render liable the judge who authorizes it.[78]

54. At the time of the detention of Mr. Fernández Prieto in 1992, the Code of Criminal Procedure (hereinafter also "the Procedural Code") established the following:

> Article 2. No one may be subjected to pre-trial detention without a written order from a competent judge, issued against a specific person, and when there is *prima facie* evidence against them of an offense or strong indications of guilt.
>
> Article 3. In situations of *flagrante delicto,* any member of the population may arrest the offender, with the sole purpose of bringing him immediately before the competent judge or the nearest agent of the public authorities, swearing that he has seen him perpetrate the offense.
>
> Article 4. The Chief of Police of the Capital and his officers have the duty to arrest anyone found *in flagrante delicto,* and anyone against whom there are strong indications or *prima facie* evidence of guilt, and must bring them immediately before the competent judge.
>
> […]
>
> Article 6. When the individual presumed to be guilty has been brought before the competent judge, the latter shall proceed during the first working hours of his office to question him and to conduct the necessary procedures to order his pre-trial detention or his release.
>
> […]
>
> Article 184. In the case of public offenses, police officers shall have the following duty and authority: 1. To investigate the offenses committed in their precinct. […] To proceed to detain anyone presumed guilty in the cases mentioned in article 4 […].[79]

55. In 1991, Law 23,950 was enacted amending the 1958 Organic Law of the Federal Police as regards the cases in which an arrest without a court order was admissible and established the following:

> Paragraph 1. No one may be arrested without an order from the competent judge other than in the cases established in the Code of Criminal Procedure. However, if there are duly justified circumstances leading to the presumption that someone has committed or may commit a misdemeanor or a crime and that person does not reliably prove his identity, he may be taken to the corresponding police station, notifying the judge with correctional jurisdiction on duty, for the minimum time necessary to establish his identity and this may never exceed ten hours. The said individual shall be allowed to communicate immediately with a family member or person of his confidence to advise them of his situation. Anyone retained for purposes of identification may not be accommodated together with, or in places destined for, those detained for misdemeanors or crimes.[80]

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[78] 1853 Constitution of the Argentine Nation, with amendments enacted in 1860, 1866, 1898, 1957 and on August 22, 1994.

[79] Law 2372 of October 4, 1888, issuing the "Code of Criminal Procedures for the Federal Judiciary and the Ordinary Court of the Capital and of the National Territories."

[80] Law 23,950 of September 4, 1991, substituting "paragraph 1 of article 5 of Decree Law 333/58, ratified by Law No. 14,467." Official Gazette of September 11, 1991.

56. As of September 1992, and therefore applicable at the time of Mr. Tumbeiro's arrest, Law 23,984 entered into force issuing the Criminal Procedural Code, articles 284, 230 and 184(5) of which indicate the following:

> Article 284. Police officers and agents have the duty to arrest, even without a court order: (1) Anyone who attempts to commit a criminal offense punishable by imprisonment, at the time they are about to commit it. (2) Anyone who, having been legally detained, escapes. (3) Exceptionally, anyone against whom there are strong indications of guilt and when there is an imminent danger of flight or serious obstruction of the investigation and only to bring them before the competent judge immediately to decide on their detention, and (4) Anyone surprised *in flagrante delicto* committing a criminal offense punishable by imprisonment […].
>
> Article 230. The judge shall order the search of an individual, by a justified order, provided there are sufficient reasons to presume that he is hiding on his body items related to a crime. Before proceeding to take this measure, the said individual may be invited to reveal the item in question. Searches shall be conducted separately, respecting the person's privacy. If a woman it searched, this shall be carried out by another woman.
>
> This measure shall be recorded in a written document signed by the person searched; if they should refuse to sign it, the reason shall be indicated. A person's refusal to be searched shall not prevent this unless there are justifiable reasons.
>
> Article 184. Law enforcement personnel shall have the following powers: […] (5) To order the searches indicated in article 227 and the urgent inspections pursuant to article 230, immediately notifying the competent judicial organ.[81]

VII
MERITS

57. The Court recalls that the State made a total acknowledgement of international responsibility, and that the Court has decided to hand down a judgment on the merits of this matter (*supra* paras. 16 to 22). Accordingly, the Court will rule on the arguments of the Commission and the representatives regarding the interception and search of the vehicle in which Mr. Fernández Prieto was travelling, as well as the arrest for identification purposes and subsequent body search of Mr. Tumbeiro. In particular, the Court will examine the facts of this case in relation to the right to personal liberty, to equality before the law and the prohibition of discrimination, as well in relation to the right to protection of honor and dignity.

VII-1
RIGHTS TO PERSONAL LIBERTY,[82] EQUALITY BEFORE THE LAW AND PROHIBITION OF DISCRIMINATION,[83] AND PROTECTION OF HONOR AND DIGNITY[84] IN RELATION TO THE OBLIGATION TO RESPECT AND TO GUARANTEE RIGHTS[85] AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS[86]

A. Arguments of the Commission and the parties

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81 Law 23,984 of September 4, 1991, issuing "the Criminal Procedural Code." Official Gazette of September 29, 1991.

82 Article 7 of the American Convention.

83 Articles 24 and 1(1) of the American Convention.

84 Article 11 of the American Convention.

85 Article 1(1) of the American Convention.

86 Article 2 of the American Convention.

A.1. Regarding personal liberty

58. The ***Commission*** argued that the legal exception required to infringe the right to personal liberty pursuant to Article 7(2) of the Convention must necessarily be accompanied by the principle of the prior definition of the criminal offense that obliges the States to establish, as specifically as possible and "beforehand," the "causes" and "conditions" for the deprivation of physical liberty. Accordingly, any requirement established in domestic law that is not met when depriving a person of liberty will mean that this deprivation of liberty is illegal. Regarding Article7(3), the Commission indicated that any arrest must be carried out not only in keeping with the provisions of domestic law, but must also be proportionate. In this specific case, it considered that the regulation which granted the authority used by the police to make the arrests did not include specific references or objective parameters or reasons that could potentially have justified the suspicion that resulted in the arrests of Mr. Fernández Prieto and Mr. Tumbeiro, and did not require the police authorities to be accountable to their superior officers, in writing, in relation to the reasons for the arrests. This meant that Mr. Fernández Prieto was arrested merely because of his "suspicious behavior," and Mr. Tumbeiro owing to his "nervousness," his attire, and the fact that he had indicated that he was in the area to purchase electronic devices when such produces were not sold there. The absence of objective evidence for carrying out the arrests – which were not mentioned in the arrest reports – the questioning and search, and the fact that the law did not provide safeguards against this type of action, did not meet the standard of legality and non-arbitrariness.

59. The ***representatives*** argued that, according to the law at the time, the police did not have the authority to arrest Mr. Fernández Prieto. They indicated that, if the existence of such authority was accepted, then the law was contrary to the American Convention because it was "extremely vague and unpredictable, and left a broad margin of discretion to law enforcement personnel, which was exacerbated in contexts of arbitrary conduct and disproportionate use of force by the police." They argued that the "suspicious behavior" cited by the police did not fall within any of the legally established reasons for arrest, or the exceptional reason that permitted an arrest to be made without a court order (it was not covered by the notion of *flagrante delicto*, or strong indications or *prima facie* evidence of guilt). They added that there was no element that would allow the existence and reasonableness of "suspicious behavior" to be assessed. In the case of Mr. Tumbeiro, they indicated that the reasons for his arrest were not included in the law in force at the time. Furthermore, they argued that none of the circumstances for which he was arrested (the fact that the presumed victim was nervous when being questioned, the way he was dressed, or that he was in the neighborhood on an urgent mission) could be considered comparable to the "strong indications of guilt" indicated in the Criminal Procedural Code.

A.2. Regarding protection of honor and dignity

60. The ***Commission*** argued that the right to privacy was one of the rights at issue in the case of the searches. The Commission referred to the standard developed by the European Court of Human Rights that interference with this right must meet the test of proportionality. In this case, the Commission considered that the police had interfered disproportionately in the private life of the presumed victims. First, in the case of Mr. Fernández Prieto, there was no law that authorized the search of cars or individuals in situations such as that of the presumed victim, because article 4 of the Code of Criminal Procedures permitted arrests for reasons that offered broad discretionality in its interpretation. In the case of Mr. Tumbeiro, the law that authorized the search – namely, article 230 of the National Criminal Procedural Code provided broad discretionality to the police and failed to establish clear limits to its application. The Commission also argued that the State had not proved that the measure was appropriate, necessary and proportionate, considering that there was no sign of a criminal act

in either case, so that it was not possible to affirm that the police acted for objective reasons that would imply a criminal act in both cases, nor was there a relationship or connectivity between the search and the objective of seeking to prevent a crime. Furthermore, a search was neither necessary nor proportionate taking into account the gravity of the fact that in the case of one of the victims, Mr. Tumbeiro, they proceeded to make him lower his jeans and his underwear. In short, the Commission considered that the actions of the police constituted arbitrary interference in their privacy in violation of Article 11 of the Convention.

61. The ***representatives*** argued that the fact that the Mr. Fernández Prieto was stopped and searched due to "the doubtful analogical application of a law" that suffered from "ambiguity and a lack of precision" constituted a violation of his right to honor and dignity, as well as "arbitrary and abusive interference in his private life." In the case of Mr. Tumbeiro, the representatives indicated that he was searched twice and, during the second search, he was obliged to undress inside a patrol vehicle, which was "especially distressing for his honor and dignity." They also indicated that the invalidity of the searches meant that the evidence found should have been "considered illegal"; however, to the contrary, it was "assessed as appropriate and essential evidence to convict him." During the public hearing, the representatives argued that the violations occurred because the searches carried out had no legal basis in the case of Mr. Fernández Prieto and, in the case of Mr. Tumbeiro, the alleged justification failed to abide by the legal reasons that would have authorized the police intervention. Moreover, in both cases the text of the laws was imprecise, general and broad, and thus enabled arbitrary interference in the private lives of these individuals. Consequently, the representatives argued that the State was responsible for the violation of Article 11(1), 11(2) and 11(3) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Messrs. Fernández Prieto and Tumbeiro.

B. Considerations of the Court

62. The Court notes that this case relates to two specific instances of restrictions of rights due to police actions: the interception and subsequent search of the vehicle in which Mr. Fernández Prieto was travelling by the Police of the Province of Buenos Aires, and the detention for identification purposes and body search of Mr. Tumbeiro by the Argentine Federal Police. These actions involved both a restriction of freedom of movement, and a search of the belongings they had with them, due either to the search of the vehicle in the case of Mr. Fernández Prieto, or to the body search of Mr. Tumbeiro. The Court also recalls that both detentions carried out by the police – in the course of their crime prevention work and not as part of a criminal investigation – became arrests owing to the evidence obtained during the search of the vehicle and the body search, respectively. Therefore, both situations can be examined based on the rights to personal liberty and to the protection of honor and dignity recognized in Articles 7 and 11 of the Convention.

63. In this regard, the Court recalls that the State has acknowledged its international responsibility because, in both situations, the actions of the Police of the Province of Buenos Aires and the Argentine Federal Police did not meet the standard of legality, were arbitrary and, also, constituted interference in the private life of Mr. Fernández Prieto and Mr. Tumbeiro, so that they violated Articles 7(1), 7(2), 7(3) and 11 of the Convention, in relation to Articles 1(1) and 2 of this instrument. Taking the foregoing into consideration and in order to analyze the scope of the State's international responsibility, the Court will make a legal analysis of these violations as follows: (a) the right to personal liberty in relation to the interception of the car in which Mr. Fernández Prieto was travelling, and the detention for identification purposes of Mr. Tumbeiro, and (b) the protection of honor and dignity in relation to the search of the car in which Mr. Fernández Prieto was travelling and the body search of Mr. Tumbeiro.

B.1. Right to personal liberty

64. The Court has indicated that personal liberty and safety are guarantees against illegal or arbitrary detention or imprisonment. In this way, although the State has the right and obligation to ensure safety and maintain public order, its powers are not unlimited because, at all times, it has a duty to use procedures that are in keeping with the law and respect the fundamental rights of every individual subject to its jurisdiction.[87] The objective of ensuring safety and maintaining public order requires the State to legislate and to take measures of different types to prevent and regulate the conduct of its citizens, one of which is to ensure the presence of law enforcement personnel in public spaces. However, the Court observes that improper actions by such state agents in their interaction with those they should protect represents one of the main threats to the right to personal liberty, which, when it is violated, results in a risk that other rights will be violated, such as to personal integrity and, in some case, to life.[88]

65. The Court recalls that the essential content of Article 7 of the American Convention is the protection of the liberty of the individual against any arbitrary or illegal interference by the State.[89] This article contains two types of very different regulations, one general and the other specific. The general one is included in the first paragraph: "Every person has the right to personal liberty and security." While the specific one is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7(2)) or arbitrarily (Article 7(3)), to be informed of the reasons for the detention and of the charges against the person detained (Article 7(4)), to judicial control of the deprivation of liberty and to the reasonableness of the length of pre-trial detention (Article 7(5)), to contest the legality of the detention (Article 7(6)) and not to be detained for debt (Article 7(7)). Any violation of paragraphs 2 to 7 of Article 7 of the Convention will necessarily result in the violation of Article 7(1).[90]

66. The Court has indicated that restriction of the right to personal liberty is only permissible "for the reasons and under the conditions established beforehand by the Constitution or by a law established pursuant thereto" (material aspect) and also strictly subject to the procedures objectively defined in the law (formal aspect).[91] Thus, although the Convention refers to the domestic law of the State in question, this referral does not signify that, pursuant to the Convention, the Court does not need to rule;[92] rather, it must do so, precisely in accordance with this instrument and not in accordance with the said domestic law. In that case, the Court is not conducting a control of constitutionality or of legality, but only of conventionality.[93]

67. Accordingly, regarding the requirement of the legality of the detention, the Court has indicated that, when referring to the Constitution and a law established "pursuant thereto,"

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87 *Cf. Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 86.

88 *Cf. Servellón García et al. v. Honduras, supra,* para. 87.

89 *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, para. 84, and *Case of Azul Rojas Marín et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 12, 2020. Series C No. 402, para. 100.

90 *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. 54, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 100.

91 *Cf. Case of Gangaram Panday v. Surinam. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 110.

92 Article 62(3) of the Convention.

93 *Cf. Case of Azul Rojas Marín et al. v. Peru, supra*, para. 110.

the examination of the observance of Article 7(2) of the Convention entails an analysis of compliance with the requirements established, as specifically as possible and "beforehand," by domestic law concerning the "causes" and "conditions" for the deprivation of physical liberty. If domestic law, in both the material and formal aspects, is not observed when depriving an individual of his or her liberty, this deprivation of liberty will be unlawful and contrary to the American Convention in light of Article 7(2).[94]

B.1.1 Analysis of the legality of the arrest of Mr. Fernández Prieto

68. Article 18 of the Argentine Constitution establishes that "[n]o one may be obliged to testify against himself, or be arrested unless this is based on a written order of a competent authority."[95] Meanwhile, article 4 of the Procedural Code in force at the time when Mr. Fernández Prieto was detained established that: "[t]he Chief of Police of the Capital and his agents have the obligation to detain individuals who they surprise *in flagrante delicto* and those against whom there are strong indications or *prima facie* evidence of guilt, and must make them available to the competent judge immediately." Article 184.4 of this Code establishes that "[…] in the case of public offenses, officials shall have the following duty and authority: To proceed to detain anyone presumed guilty in the cases mentioned in article 4."[96]

69. The Court recalls that the car in which Mr. Fernández Prieto was travelling was intercepted and, subsequently, searched in Mar del Plata on May 26, 1992, because an inspector and two sergeants of the Police of the Province of Buenos Aires stated that they had observed the vehicle in which he was travelling with "three individuals behaving suspiciously." The officers made the passengers get out of the vehicle and searched it. In the vehicle the police found some packages of what appeared to be marihuana and a revolver. Subsequently, on July 19, 1996, the federal judge sentenced Mr. Fernández Prieto to five years' imprisonment for the offense of transportation of drugs.

70. The Court notes that the Procedural Code established three situations for arresting someone without a court order, namely: (a) if they were surprised *in flagrante delicto;* (b) if there were strong indications or *prima facie* evidence of guilt, and (c) if there was some type of indication or *prima facie* evidence of guilt. However, the Court notes that, at no time during the procedure followed against Mr. Fernández Prieto did the police officers state – or justify – that the interception of the car was based on any of the three situations established by article 4 of the said code, or on any other regulation, in order to make an arrest without a court order. The police officers merely indicated that the individuals who were in the car were "behaving suspiciously." It is clear that the presumed "suspicious behavior" was not a situation comparable to *flagrante delicto* or to a possible "strong indication or *prima facie* evidence of guilt," as required by the said code.

71. The Court considers that this failure to justify the detention of Mr. Fernández Prieto by one of the legal causes clearly fails to comply with the requirement of legality, because the police carried out an action that constituted a restriction of Mr. Fernández Prieto's personal liberty – insofar as they obliged the car in which he was travelling to stop; then they made him get out of it, they proceeded to search the vehicle and, finally, they deprived him of his liberty – acting outside the powers authorized by the Procedural Code in order to carry out these actions without a court order. Moreover, the Court also notes that the domestic courts

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[94] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra,* para. 57, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 111.

[95] Constitution of the Argentine Nation *supra*, article 18.

[96] Law 2372 of October 4, 1888, issuing the "Code of Criminal Procedures for the Federal Judiciary and the Ordinary Court of the Capital and of the National Territories," articles 4 and 184.4.

that decided on the legality of the interception of the car in which Mr. Fernández Prieto was travelling, its search, and his subsequent detention did not rule on how this fell within one of the situations established by the Procedural Code, but merely validated it considering that the police acted in compliance with their task of crime prevention, and due to the evidence obtained by means of this action.

72. In this regard, the Court recalls that, on July 19, 1996, the federal judge convicted Mr. Fernández Prieto of the offense of transportation of drugs established in article 5(c) of Law 23,737. The federal judge found that it had been duly proven that, based on the circumstances of manner, time and place, the accused was transporting a certain amount of marihuana. Regarding the defense counsel's arguments concerning the illegality of the detention and the invalidity of the evidence obtained, the federal judge stated that "the judicial officials acted within the powers granted to them by the formal law because, as they noted in the contested report, the vehicle in which Fernández Prieto and the others were travelling was being driven in a suspicious manner and this was what caused them to intercept it. They then conducted the corresponding procedure and obtained the known result. Evidently, the prior situation is not being justified with the situation resulting from the inspection; rather, it is described in order to indicate the consequence." He also affirmed that "[y]ou should enlighten me as to whether, in a situation such as the one described, the law enforcement personnel did not have the real authority to proceed as they did, not only to perform a crucial task assigned to them, but also to avoid evils from which society and the law have the right to protect themselves."[97]

73. The Supreme Court, as the organ that concludes judicial discussions, also ruled on the validity of the interception of the car in which Mr. Fernández Prieto was travelling, considering "that it found proved the existence of a situation of suspicion that an offense had presumably been committed," stating that "in order to determine whether the precautionary measure based on the existence of a situation of suspicion that an offense had presumably been committed was legitimate, it is necessary to examine this in light of the circumstances in which the detention took place."[98] In particular, regarding the validity of the legitimacy of the stop and search action, it indicated the following:

> 15) That the standards indicated in the foregoing considerations are applicable to the case because the examination of the special circumstances in which the action took place was decisive to consider that the search of the vehicle and the detention of the occupants by the police officers was legitimate. This was because the latter had been ordered to patrol the precinct with the specific function of crime prevention and, in that context, they intercepted a vehicle on noting that the persons inside it were "behaving suspiciously" as if they were committing an offense, a suspicion that was corroborated when they found items linked to drug-trafficking; and following this procedure, they immediately communicated the detention to the judge.[99]

74. The Court notes that the different domestic judgments that were delivered on the validity of the interception and search of the car in which Mr. Fernández Prieto was travelling were based on considerations related to the effectiveness of crime prevention and on arguments of a consequentialist nature (which validated the police action based on the results obtained: that is, the evidence found), without taking into consideration whether the police action conformed to the enabling circumstances established by the Procedural Code for conducting an arrest without a court order. This Court considers that, irrespective of the

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[97] Judgment of the Federal Court of Mar del Plata of July 19, 1996 (evidence file, folios 169 to 196).

[98] Judgment of the Supreme Court of Justice of the Nation of November 12, 1998 (evidence file, folios 249 to 262).

[99] Judgment of the Supreme Court of Justice of the Nation of November 12, 1998 (evidence file, folios 249 to 262).

legitimacy of the reasons mentioned by the different courts that heard the case to justify the search and subsequent arrest as a matter related to compliance with the duty of crime prevention, or because the evidence obtained from it could prove Mr. Fernández Prieto's guilt, the rulings made confirm that the interception and subsequent search and arrest were not carried out in application of the law in force at that time.

75. Consequently, the interception of the car in which Mr. Fernández Prieto was travelling, which resulted in its subsequent search and his arrest and criminal prosecution, constituted a violation of Article 7(1) and 7(2) of the Convention, in relation to Article 1(1) of this instrument. Therefore, the Court does not find it necessary to examine whether the State's actions constituted violations of Article 7(3) and 7(5) of the Convention. This is without prejudice to the fact that the State has acknowledged its responsibility for the violation of the said provisions of the Convention.

B.1.2. Analysis of the illegality and arbitrary nature of the arrest of Mr. Tumbeiro

76. The Court recalls that the Argentine Constitution establishes that no one may be "arrested unless this is based on a written order of a competent authority."[100] Meanwhile, article 284 of the National Criminal Procedural Code, in force as of October 1992, and therefore in force at the time of Mr. Tumbeiro's arrest in 1998, establishes that: "[p]olice officers and agents have the duty to arrest, even without a court order: (a) anyone who attempts to commit a criminal offense punishable by imprisonment, at the time they are about to commit this; (b) anyone who, having been legally detained, escapes; (c) exceptionally, anyone against whom there are strong indications of guilty and when there is an imminent danger of flight or serious obstruction of the investigation and only to bring him before the competent judge immediately to decide on his detention, and (d) anyone surprised *in flagrante delicto* committing a criminal offense punishable by imprisonment […]."[101]

77. In addition, Law 23,950, amending the 1958 Organic Law of the Federal Police, establishes that, other than the cases established in the criminal procedural regulations, no one may be arrested without an order from the competent judge, unless:

> "[…] if there are duly justified circumstances leading to the presumption that someone has committed or may commit a misdemeanor or a crime and that person does not reliably prove his identity, he may be taken to the corresponding police station, notifying the judge with correctional jurisdiction on duty, for the minimum time necessary to establish his identity and this may never exceed ten hours. The said individual shall be allowed to communicate immediately with a family member or person of his confidence to advise them of his situation. Anyone retained for purposes of identification may not be accommodated together with, or in places destined for, those detained for misdemeanors or crimes."[102]

78. The Court recalls that, in a statement of January 15, 1998, one of the officers who intervened in the arrest of Mr. Tumbeiro gave an account of the circumstances that led to this stating that, on the day in question, when he was patrolling the "precinct," he "observed a man wearing black shoes, blue jeans and a check shirt, who, on noting the police presence, became extremely nervous and hesitant while trying to avoid the police vehicle. Consequently,

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[100] Constitution of the Argentine Nation *supra*, article 18.

[101] Law 23,984 of September 4, 1991, issuing "the Criminal Procedural Code." Official Gazette of September 29, 1991, article 284.

[102] Law 23,950 of September 4, 1991, substituting "paragraph 1 of article 5 of Decree Law 333/58, ratified by Law No. 14,467." Official Gazette of September 11, 1991.

[he] proceeded to stop the vehicle and, to verify whether there was a record of the man having any legal problems, he was invited to get into the vehicle while his identity was verified by a radial digital system." The officer stated that "as he continued to be extremely nervous, the collaboration of witnesses was requested […] and, in their presence, the personal effects of this individual were examined."[103] This statement, together with the factual narration that appears in the judgments in the criminal proceedings,[104] allows the Court to observe that Mr. Tumbeiro was detained for identification purposes on the basis of three facts: (a) he was nervous in the presence of the police; (b) his attire was not in keeping with the attire that the police perceived as appropriate for the area where he was found, and (c) he had indicated that he was looking for materials that were "totally foreign to what one might find in the commercial establishments in the area."[105]

79. The Court notes that, under Law 23,950, temporarily holding a person for identification purposes must be duly justified by circumstances that "lead to the presumption that someone may have committed or could commit a criminal offense or misdemeanor." In this specific case, the Court considers that none of the reasons that the police gave to hold Mr. Tumbeiro and ask for his identity documents constituted, separately or as a whole, sufficient and specific facts or information that would allow a reasonable observer to objectively infer that he had probably committed or was about to commit a criminal offense or misdemeanor. To the contrary, the reasons for the detention of Mr. Tumbeiro for identification purposes appeared to respond to preconceptions about how a person who is in a certain place should be dressed, how he should behave in the presence of the police, and what activities he should be carrying out in that place.

80. This scenario corresponds to the opinion of expert witness Sofia Tiscornia concerning the biased categorization of the attitude or appearance of a person as suspicious based on the police officers' preconceived ideas about the presumed dangerousness of certain social groups and the elements that determine whether someone belongs to them.[106] The Court recalls that stereotypes consist in preconceptions about the attributes, conducts, roles or characteristics of individuals who belong to an identified group.[107] The use of stereotyped reasoning by law enforcement personnel may result in discriminatory – and therefore arbitrary – actions.

81. In the absence of objective elements, the characterization of a certain conduct or appearance as suspicious, or of a certain reaction or movement as nervous, responds to the

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103 Statement signed on January 15, 1998, by Deputy Inspector GIG I (evidence file, folios 1486 and 1487).

104 Federal Oral Criminal Court No. 1 of the Federal Capital stated the following: "[O]n January 15, 1998, […], deputy officer […] intercepted for identification purposes the individual who proved to be [Mr. Tumbeiro[], near Corea Street […]. He was invited to get into the police vehicle until his identity had been corroborated, noting that he was extremely nervous. While they were awaiting the answer, they noted that in the middle of the *Clarín* newspaper that he was carrying there was a transparent nylon bag containing a white […] substance similar to cocaine hydrochloride. Consequently, the presence of witnesses was requested and, in their presence, he proceeded to read him his rights […]." Judgment of the Federal Oral Criminal Court No. 1 of the Federal Capital of August 26, 1998 (evidence file, folios 1537 to 1576).

105 Judgment of the Supreme Court of Justice of the Nation of October 3, 2002 (evidence file, folios 304 to 311).

106 The expert witness indicated: "What the police call their policing intuition, […] but essentially and without doubt, the police detain people for the way they dress, the way they behave; we all know that different social groups behave in different ways. Consequently, it is certain that a young man from a working-class neighborhood who is walking through a residential area will have 100% possibility of being stopped, and this is exclusively due to stereotyping. Moreover, in our research, we have noted occasions in which middle-class boys use clothing worn by poor people and are stopped; then, when their identity is discovered they are released. In other words, there are many arrests based on social class, and stereotypes. Evidently, the police operate in this way." Opinion provided by Sofía Tiscornia before the Inter-American Court during the public hearing held on March 11, 2020.

107 *Cf. Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 223.

personal convictions of the officials who intervene and to the practices of law enforcement personnel that involve a level of arbitrariness that is incompatible with Article 7(3) of the American Convention. When, in addition, these convictions or personal opinions are based on prejudices with regard to the supposed characteristics or conducts of a determined category or group of persons or to their socio-economic status, this may result in a violation of Articles 1(1) and 24 of the Convention. In line with this, expert witness Juan Pablo Gomara emphasized that:

> Attributing the suspicion of unlawful conduct to someone merely because they are young and use a certain type of clothing, poor, on the street, a trans woman, etc. clearly involves discriminatory treatment, prohibited by international human rights law. In other words, to a great extent, law enforcement personnel exercise their authority to stop people for identification purposes and to search them using *discriminatory profiles.*[108]

82. The use of such profiles supposes a presumption of guilt against anyone who fits them, rather than by the case-by-case evaluation of the objective reasons that effectively indicate that a person is involved in the perpetration of an offense. Accordingly, the Court has indicated that arrests carried out for discriminatory reasons are manifestly unreasonable and, therefore, arbitrary.[109] In this case, the context of arbitrary detentions in Argentina, the express acknowledgement of international responsibility by the State, and the absence of explanations concerning the suspicious behavior attributed to Mr. Tumbeiro, over and above his nervousness, his attire,[110] and the explicit indication that this did not accord with the area "of poor people"[111] where he was walking, reveal that there were no sufficient or reasonable indications of his participation in a criminal offense; rather the detention was made *prima facie* owing to the mere fact that he did not react in the way in which the officers who intervened perceived to be correct or use an attire that they considered inappropriate based on a subjective preconception of the appearance that the inhabitants of the area should have, which involved discriminatory treatment that made the detention arbitrary.

83. The Court also notes that the domestic courts that ruled on the legality of Mr. Tumbeiro's detention validated this considering that the police acted prudently and reasonably and in compliance with their duty of crime prevention. In this regard, the Court finds that an action that is initially contrary to the Convention cannot lead to the valid formulation of a criminal charges based on the results obtained. The Court recalls that, in response to the request for annulment filed by the defense based on the illegality of the detention and search of Mr. Tumbeiro, Federal Oral Criminal Court No. 1 indicated that "the detailed and consistent version of the facts provided by law enforcement personnel and witnesses must be taken into account to justify the police intervention that resulted in the discovery of a case of *flagrante delicto* consisting of possession of cocaine by Tumbeiro."[112]

84. The Oral Court concluded that "the police intervention was justified and supported by the series of facts that determined it," and that "the search […] was carried out in the context of a prudent action by the police in exercise of their specific functions, based on objective

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[108] Affidavit made by expert witness Juan Pablo Gomara on March 4, 2020 (merits file, folios 413 to 482).

[109] *Cf. Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, para. 368, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 129.

[110] *Cf.* Statement signed on January 15, 1998, by Deputy Inspector GIG I (evidence file, folios 1486 and 1487).

[111] *Cf.* Judgment of the Supreme Court of Justice of the Nation of October 3, 2002 (evidence file, folios 304 to 311).

[112] Judgment of Federal Oral Criminal Court No. 1 of the Federal Capital of August 26, 1998 (evidence file, folios 1537 to 1576).

circumstances […] that justified the procedure."[113] The Court notes that the criminal court did not describe the objective circumstances that justified the detention for identification purposes, or discuss why they constituted a situation of *flagrante delicto,* or how the presumed nervousness of Mr. Tumbeiro objectively revealed that he was committing an offense.

85. The Court recalls that Mr. Tumbeiro filed a cassation appeal against the judgment of August 26, 1998, in which he requested the annulment of the police procedure in the understanding that "a sufficient level of suspicion" did not exist to proceed to the detention and search without a court order.[114] The Court observes that, although the Criminal Cassation Chamber carried out an adequate control of conventionality, acquitting Mr. Tumbeiro because "there were no duly justified circumstances that would lead to the presumption that someone had committed a criminal offense,"[115] owing to a special remedy filed by the Prosecutor General, the Supreme Court of Justice, as the highest instance, revoked the acquittal and confirmed the first-degree conviction in a judgment of October 3, 2002. In its judgment, the Supreme Court determined the following:

> […] That, in these circumstances, the conclusions reached by the *a quo* are inadmissible because no irregularity can be noted in the procedure from which any violation of due process of law can be inferred. Moreover, the contested ruling not only disregards the legitimacy of the crime prevention actions taken within the framework of prudent and reasonable action by police personnel in the exercise of their specific functions, but also fails to assess, together with the nervousness demonstrated by the accused, the other circumstances based on which the police personnel decided to identity him […].[116]

86. The Court considers that none of the circumstances indicated by the officers of the Argentine Federal Police that were used to justify the detention for identification purposes, and that were subsequently analyzed by the courts at the different stages of the proceedings, could be comprehended as *flagrante delicto* or the "strong or *prima facie* indications of guilt" described in the Criminal Procedural Code, or the "duly justified circumstances leading to the presumption that someone may have committed or could commit a criminal offense or misdemeanor and fails to prove his identity conclusively" referred to in Law 23,950 in order to detain a person for identification purposes. To the contrary, the Court considers that this was a detention based on the prejudices of the police, subsequently validated by the domestic courts owing to the objectives sought and the evidence obtained. On this point, the Court notes the opinion of expert witness Sofía Tiscornia that:

> [T]he reasons for detentions given by law enforcement personnel relate to a limited series of bureaucratic formulas that are far from identifying the diversity and specificity of the circumstances of the detentions. Moreover, "the use of clichés such as 'nervous gestures,' 'quickening his steps,''avoiding police scrutiny,''loitering in the area,''rapidly moving away,' or 'standing on a corner,' just to give a few examples, demonstrates the imprecision of the reasons cited.[117]

87. The foregoing allows the Court to conclude that the detention of Mr. Tumbeiro did not comply with the requirement of legality and, therefore, constituted a violation of Article 7(1)

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113 Judgment of Federal Oral Criminal Court No. 1 of the Federal Capital of August 26, 1998 (evidence file, folios 1537 to 1576).

114 Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

115 Special appeal of March 30, 1999 (evidence file, folios 263 to 284).

116 Judgment of the Supreme Court of Justice of the Nation of October 3, 2002 (evidence file, folios 304 to 311).

117 Opinion provided by Sofía Tiscornia before the Inter-American Court during the public hearing held on March 11, 2020.

and 7(2) of the Convention, in relation to Article 1(1) of this instrument. Also, the fact that the detention was not based on objective criteria, but rather on the application by the police officers of stereotypes relating to Mr. Tumbeiro's appearance and its presumed lack of correlation to his surrounding signified that the police intervention was a discriminatory and, consequently, arbitrary action that violated Articles 7(3) and 24 of the American Convention, in relation to Article 1(1) of this instrument.

B.1.3. Inadequacy of the law and existence of a practice that violated the Convention in both cases

88. The Court recalls that, in its Merits Report, the Inter-American Commission observed that the regulation that granted the authority applied in this case was "extremely vague and d[id] not include specific references to objective reasons or parameters that could potentially justify suspicion. In addition, the legislation d[id] not include any requirement that the police authorities be accountable, in writing and to their superiors, with details of the reasons that led to the arrest and search. In addition, from the context described in the section on proven facts, it appear[ed] that the incidents in this case [were] not isolated, but rather that this regulation and its application in practice ha[d] resulted in abusive actions by the police."[118] The State accepted this conclusion in its act of acknowledgement of responsibility.

89. In this regard, the Court recalls that Article 7(2) of the Convention requires not only the existence of regulations that establish the "causes" and "conditions" that authorize the deprivation of physical liberty, but also that these be sufficiently clear and detailed, so that they respect the principle of legality and prior legal definition of offenses as this has been understood by this Court in its case law. In this regard, the Court has indicated that "the categorization of an act as unlawful and the establishment of its legal effects must pre-exist the conduct of the individual who is considered to be an offender because, to the contrary, people would not be able to conduct themselves in keeping with a valid known legal system that expresses social rebuke and its consequences."[119]

90. The Court considers that regulations that determine the powers of police officials in relation to crime prevention and investigation must include specific and clear indications of parameters that avoid interceptions of a car or detentions for identification purposes being carried out arbitrarily. Consequently, those provisions that include and enable conditions that permits a detention without a court order or *in flagrante delicto*, in addition to meeting the requirements of legitimate purpose, appropriateness and proportionality, must establish the existence of objective elements so that it is not mere police intuition or subjective criteria, that cannot be verified, that are the reasons for a detention. This means that the purpose of the legislation enabling this type of detention must be for the authorities to exercise their powers when faced with the existence of real, sufficient and concrete acts or information that, concurrently, would permit an objective observer to reasonably infer that the person detained was probably the perpetrator of a criminal offense or misdemeanor. This type of regulation should also observe the principle of equality and non-discrimination in order to avoid hostility towards certain social groups based on categories prohibited by the American Convention.

91. On this point, the Court notes the opinion of expert witness Juan Pablo Gomara that, faced with the need to establish a standard of proof as a presumption for police action during

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118 Merits report (merits file, folio 22).

119 *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile, supra*, para. 106, and *Case of Pollo Rivera et al. v. Peru. Merits, reparations and costs.* Judgment of October 21, 2016. Series C No. 319, para. 219.

brief detentions and provisional searches, in order to preserve the principle of legality and to avoid police abuse and arbitrariness, an objective standard of evidence should be adopted.[120]

92. This is supported by the way in which different jurisdictions have dealt with the requirements for arrests without a court order or cases of *flagrante delicto*, which must be exceptional. Thus, the Constitutional Court of Colombia, when referring to detention by the police, has indicated that this should be based on objective causes and justified reasons; in other words, on "factual situations that, even if they do not have the immediacy of *flagrante delicto* but rather a relationship to the moment of the actual apprehension, should be sufficiently clear and urgent to justify the detention." That court indicated that "[t]he grounds that justify an apprehension are thus an articulated series of facts that permit it to be objectively inferred that the individual who will be apprehended is probably the author or a participant in them." It also indicated that the detention must be necessary; consequently, it should be carried out in urgent situations in which a court order cannot be required. Furthermore, it asserted that the only purpose of this type of detention is to verify briefly the facts related to the justified grounds for the apprehension or the identity of the individual, so that it is strictly limited in time and must be proportionate.[121]

93. Meanwhile, the Supreme Court of Justice of the Nation of Mexico has indicated that, to prove the existence of a reasonable suspicion that justifies carrying out temporary preventive control, the authority must specify the information (facts and circumstances) he had to suppose that an individual was committing an unlawful act. That court has also indicated that this information must comply with standards of reasonableness and objectivity; in other words, it must be sufficient from the perspective that anyone, from an objective point of view, would have reached the same conclusion as the authority if he had had that information. Accordingly, police authorities must provide a detailed explanation in each specific case of the circumstances of manner, time and place that, reasonably, led them to consider that an individual had acted "suspiciously" or "evasively" (in other words, that the individual was probably committing or about to commit an offense, or that he tried to escape).[122]

94. The Supreme Court of Justice of the Dominican Republic confirmed the acquittal of a defendant considering that the search report was not credible in the absence of a well-grounded suspicion for his arrest, because "the said report only indicates that, when noting the presence of the officer, […] the defendant tried to flee, and this reason is not in keeping with the law as regards the well-grounded suspicion that is required in order to arrest someone; a situation that converted the action into an illegal means of evidence." Consequently, it noted that "the testimony of the officer concerned cannot be considered credible because it validates an illegal search, as it was not possible to consider that there had been a reasonably well-grounded suspicion that would have justified the arrest." In this regard, the said court indicated that, in order to determine whether, in that specific case, there were sufficient and reasonable well-founded motives for proceeding to search an individual, it should be possible that this assessment "be made by any reasonable person placed in the same circumstances" and should be free of prejudices or stereotypes "to avoid arbitrariness in the search of an individual."[123]

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120 *Cf.* Affidavit made by expert witness Juan Pablo Gomara on March 4, 2020 (merits file, folios 413 to 482).

121 *Cf.* Judgment No. C/303/19 of the Plenum of the Constitutional Court of Colombia of July 10, 2019.

122 *Cf.* Judgment of the Plenum of the Supreme Court of Justice of the Nation of Mexico of March 22, 2018, in action on unconstitutionality 10/2014 and the joindered case 11/2014.

123 Judgment No. 416 of the Supreme Court of Justice of the Dominican Republic of November 11, 2015.

95. With regard to police checkpoints, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica considered that it was not possible to "conduct them indiscriminately and, especially, to force or oblige people to allow access to the interior of their vehicles, without the existence of *notitia criminis* or proven indications of the perpetration of a crime." The Chamber found that "to proceed to search the interior of a vehicle in this type of police control, it is necessary to have the free and express consent of the driver, which means that there can be no coercion of any kind." Regarding the requirements that must be met in this situation, the Chamber indicated that the police must act in keeping with specific protocols that establish the conditions, manner, grounds, etc. for carrying out controls. It stated that highway surveillance was not, in itself, unlawful or arbitrary; however, it should necessarily be related to the investigation of a criminal act and be carried out respecting criteria of reasonableness, which meant that it took into consideration the circumstances of each specific case. The Chamber concluded that "the act of stopping, searching and ordering a person to get out of his vehicle and proceeding to search this without any justification, as in the instant case, clearly exceeded the powers of the police under the Constitution."[124]

96. This Court considers that the verification of objective elements before intercepting a vehicle or detaining someone for purposes of identification becomes particularly relevant in contexts such as that of Argentina, where the police have normalized the practice of detentions based on a suspicion of criminality, justifying this action by crime prevention and where, in addition, the domestic courts have validated this type of practice.[125] Thus, the Court reiterates the opinion of expert witness Sofía Tiscornia during the public hearing regarding the "practice" of Argentine law enforcement personnel of carrying out "detentions for statistical purposes" in order, "ostensibly, to respond to demands for security by specific groups of neighbors," which, in the worst case scenario, entails "fabricating offenses or accusing innocent and defenseless people," the persistence of which is facilitated by a "scant, when not inexistent, judicial control of police detentions." According to the expert witness, this "has resulted in the legitimation of abusive controls of the population, harassment of poor workers and young people, unreported arrests, and searches without controls" against "a relevant number of persons."[126]

97. The Court recalls that the interception of Mr. Fernández Prieto's car and the detention for identification purposes of Mr. Tumbeiro failed to comply with the requirement of legality because they did not comply with the enabling conditions established by law for such acts and, to the contrary, were justified by the duty of crime prevention and by the evidence obtained (*supra* paras. 68 to 87). However, the Court considers that, even if the police action had been carried out under the exceptional conditions for detentions without a court order established in the law in force, the general and imprecise way in which those conditions were worded at the time the facts occurred allowed any type of "suspicion" of the authority to be sufficient to stop and search a person. Thus, the Court observes that article 4 of the Code of Criminal Procedures, article 284 of the National Criminal Procedural Code, and article 1 of Law 23,950 are significantly ambiguous as regards the parameters for detaining someone without a court order or in the absence of a situation of *flagrante delicto*. In sum, the absence of objective parameters that legitimately could justify a detention based on the existence of the

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[124] Ruling 14821-2010 of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica of September 3, 2010.

[125] *Cf.* Judgment of the Supreme Court of Justice of the Nation of Argentina of December 12, 2002, "Monzón, Rubén Manuel" (evidence file, folios 917 to 926); Judgment of the Supreme Court of Justice of the Nation of Argentina of February 6, 2003, "Szmilowsky, Tomás Alejandro" (evidence file, folios 928 to 934), and Judgment of the Supreme Court of Justice of the Nation of Argentina of May 3, 2007, "Peralta Cano, Mauricio Esteban" (evidence file, folios 936 to 942).

[126] Opinion provided by Sofía Tiscornia before the Inter-American Court during the public hearing held on March 11, 2020.

elements established in the law, and the inexistence of a subsequent obligation to justify a search or confiscation, regardless of the results obtained, created a broad margin of discretionality that led to an arbitrary application of the powers of the police authorities, which was endorsed by a judicial practice that validated such detentions based on general criteria such as crime prevention or *ex post* by the evidence obtained.

98. Accordingly, as the State accepted in its acknowledgment of international responsibility, the actions of the authorities in this case formed part of a generalized context of arbitrary interventions by the police authorities in Argentina that was incompatible with the American Convention. The broad way in which the conditions for carrying out the interception of a car or a detention for identification purposes without a court order are worded, and the practice by the state authorities – both police and judges - when applying those conditions, represents, among other matters, a problem in the design of the law, because it failed to avoid the arbitrariness of the detentions and the abuse of authority against Messrs. Fernández Prieto and Tumbeiro and, to the contrary, could even encourage this. In this regard, the Court notes the opinion of expert witness Sofia Tiscornia that:

> […] the police were and are enabled to detain people [without a court order or in a situation of *flagrante delicto*] based on the organic laws and different administrative protocols, under mechanisms for detention for purposes of identification, and in procedures such as raids, searches and police roadblocks. In addition, imprecise criteria were repeated in the procedural codes that legally enabled these police intervention practices. Thus, although such practices are regulated, the regulations are imprecise, and most of the population are unaware of their limits and conditions; added to this, a history of military and police authoritarianism has normalized the powers of the police, in particular, in relation to the poorest groups or to control political and social activism.[127]

99. The Court recalls that Article 2 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 laws and practices of any kind that entail a violation of the guarantees established in the Convention; on the other, the enactment of laws and the implementation of practices leading to the effective observance of the said guarantees.[128] 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 a control of conventionality,[129] so that the application and interpretation of domestic law is consistent with the State's international obligations in the area of human rights.[130]

100. Regarding control of conventionality, the Court has indicated that when a State is a party to an international treaty such as the American Convention all its organs, including its judges, are subject to that instrument and this obliges them to ensure that the effects of the provisions of the Convention are not impaired by the application of norms that are contrary to its object and purpose. The judges and organs involved in the administration of justice at all its levels are obliged to exercise, *ex officio,* a "control of conventionality" between domestic

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[127] Opinion provided by Sofía Tiscornia before the Inter-American Court during the public hearing held on March 11, 2020.

[128] *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 Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of July 8, 2020. Series C No. 406, para. 111.

[129] *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 Petro Urrego v. Colombia, supra*, para. 111.

[130] *Cf. Case of Andrade Salmón v. Bolivia. Merits, reparations and costs.* Judgment of December 1, 2016. Series C No. 330, para. 93, and *Case of Petro Urrego v. Colombia, supra*, para. 103.

norms and the American Convention, evidently within the framework of their respective terms of reference and the corresponding procedural regulations. In this task, the judges and organs involved in the administration of justice must take into account not only the treaty but also its interpretation by the Inter-American Court, ultimate interpreter of the American Convention.[131] Therefore, when creating and interpreting the regulations that authorize the police to carry out detentions without a court order or *in flagrante delicto*, the domestic authorities, including the courts, are obliged to take into account the interpretation of the American Convention made by the Inter-American Court that such detentions must be carried out in compliance with the standards for personal liberty that have been reiterated in this chapter.

101. Consequently, the Court concludes that both the Procedural Code, based on which the car in which Mr. Fernández Prieto was travelling was intercepted, and the National Criminal Procedural Code and Law 23,950, on the basis of which Mr. Tumbeiro was detained for identification purposes, suffered from normative defects in the regulation of the situations that supposedly authorized this police action. Despite this, in both cases, the judgements delivered justified the police action based on these regulations. This constituted a violation of Article 7(1) and 7(2) of the Convention, in relation to Article 2 of this instrument.

B.2. Protection of honor and dignity

102. The Court has stipulated, with regard to Article 11 of the American Convention, that although this provisions is entitled "Right to Privacy" ["Protection of honor and dignity" in the Spanish version], its content includes, *inter alia*, the protection of private life.[132] The Court has affirmed that the sphere of personal and family privacy protected by this article is characterized by being exempt or immune from interference or arbitrary or abusive intrusion by third parties or public authorities.[133] Consequently, the Court considers that the possessions that a person is carrying when he is in a public place, even when that person is inside a car, represent belongings that, similar to those that are to be found in his home, are included within the sphere of protection of the right to private life and privacy. Therefore, they may not be subjected to arbitrary interference by third parties or the authorities.

103. In the case of Mr. Fernández Prieto, the Court recalls that, on May 26, 1992, the car in which he was travelling was intercepted by agents of the Police of the Province of Buenos Aires, who searched it based on the presumed "suspicious behavior" of its occupants. The Court recalls that the Procedural Code in force at the time of the incident did not contain any specific provision that would have authorized the police officers to search the car without a prior court order. Consequently, since any limitation of the right to privacy must, as a first requirement in order not to be categorized as abusive or arbitrary, be "established by law[134] and, in this case, the inspection without a court order of a vehicle detained by a police control was not expressly established in the procedural code in force, the Court considers that the

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131 *Cf. Case of Almonacid Arellano et al. v. Chile, supra*, para. 124, and *Case of Petro Urrego v. Colombia, supra*, para. 107.

132 *Cf. Case of the Ituango Massacres v. Colombia, Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006 Series C No. 148, para. 193, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 141.

133 *Cf. Case of the Ituango Massacres v. Colombia, supra*, para. 194, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 86.

134 *Cf. Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27,,2009. Series C No. 193, para. 56.

search of the car in which Mr. Fernández Prieto was travelling constituted unlawful interference in his private life and non-compliance with the duty to adopt domestic legal provisions.

104. With regard to Mr. Tumbeiro, the Court considers that a body search may have an impact on, and constitute a violation of, the protection of honor and dignity. Therefore, any body search that the authorities carry out on persons who are detained must be conducted duly considering the limits imposed by the American Convention. In a similar case, the European Court of Human Rights has referred to the sphere of protection of the right to private life in relation to the search of persons in a public place. In the words of that court:

> Irrespective of whether in any particular case correspondence or diaries or other private documents are discovered and read or other intimate items are revealed in the search, the Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. Although the search is undertaken in a public place, this does not mean that Article 8 is inapplicable. Indeed, in the Court's view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public.[135]

105. The Inter-American Court has also indicated in its case law that the right to private life is not an absolute right and, therefore, may be restricted by the States provided that the interference is nor abusive or arbitrary. Consequently, such interference must be established by law, seek a legitimate purpose, and comply with the requirements of suitability, necessity and proportionality; in other words, it must be necessary in a democratic society.[136] In this case, on January 15, 1998, Mr. Tumbeiro was stopped by officers of the Argentine Federal Police while walking in a neighborhood of the city of Buenos Aires, because his behavior "was suspicious" and his attire was supposedly unusual for the area. Even though he was detained for "identification purposes," and precisely due to this, Mr., Tumbeiro showed the agents his identity document and they were able to verify its authenticity and correctness, even verifying that he had no criminal record.[137] The agents then proceeded to search him and, to this end, they made him get into the patrol vehicle and obliged him to lower his underwear.

106. In this regard, the Court observes, first, that under the National Criminal Procedural Code, in force at the time of this intervention, body searches could only be carried out following a reasoned court order "provided there were sufficient grounds to presume that an individual is hiding items related to a crime on his body."[138] In this case, there was no prior court order and the reasons given by the officers to justify, first, the detention for identification purposes and, subsequently, the search – namely, Mr. Tumbeiro's attire, his alleged suspicious behavior, and his presumed nervousness – could never constitute "sufficient grounds" in the terms of article 230 of the said code that would allow the presumption that he was hiding objects related to the perpetration of a crime and, therefore, that would permit conducting a body search.

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135 ECHR. *Case of Guillan and Quinton v. The United Kingdom,* (No. 4158/05), Judgment of June 28, 2010, para. 63.

136 *Cf. Case of Tristán Donoso v. Panama, supra*, para. 56 and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 74.

137 *Cf.* Attestation concerning legal impediment of January 15, 1998 (evidence file, folio 1489).

138 Law 23,984 of September 4, 1991, issuing "the Criminal Procedural Code." Official Gazette of September 29, 1991, article 230.

107. Although Article 184.5 of this code established an exception to the peremptory nature of obtaining a judicial order in urgent cases, the Court notes, on the one hand, that the code did not establish a definition of urgency and, therefore, gave a wide margin of discretion to the police officers to undertake this type of intervention without prior judicial control, which could evidently result in arbitrary interferences and, on the other hand, that, in the case of Mr. Tumbeiro, it was not proved that a situation of urgency existed because: (a) he duly identified himself to the police officers, providing them with his identity document, and (b) the officers were able to confirm this information by radio and verified that "at that date, there was no legal impediment against him."[139] The Court observes that, even though they had been able to verify Mr. Tumbeiro's identity, the police officers proceeded with the body search based on conjectures or merely subjective considerations that, in the absence of objective elements, were insufficient to presume that he was hiding objects related to the perpetration of, or participation in, a crime.

108. This being the case, the Court notes that the body search of Mr. Tumbeiro constituted unlawful interference in his private life that was also arbitrary and disproportionate because: (a) the regulation cited to justify it was imprecise and contrary to the principle of the need for the prior legal definition of an offense, because it failed to define the urgent situations when a search could be conducted without a court order; (b) even if the imprecision of the regulations is ignored, the police officers never proved that an urgent situation existed, especially because the initial purpose of the detention was for identification purposes, and this information was provided by Mr. Tumbeiro himself and corroborated by the officers by radio; (c) the "suspicion" based on the emotional state and whether or not Mr. Tumbeiro's reaction or attire was appropriate constituted a subjective assessment that, in the absence of objective elements, could never justify the need for the measure; (d) even if it was admitted that the foregoing was a sufficient or "urgent" reason to proceed with the search, the fact that this was more than just a superficial pat down of Mr. Tumbeiro's clothes and that he was obliged to lower his jeans was disproportionate, because it involved a serious violation of Mr. Tumbeiro's intimacy without the measure seeking to meet relevant juridical rights. Consequently, the Court finds that the body search of Mr. Tumbeiro violated Article 11 of the Convention, in relation to Articles 1(1) and 2 of this instrument.

109. In this regard, the Court recalls that body searches may only be conducted after a duly justified court order has been obtained. Nevertheless, although exceptional situations may exist in which crime prevention is a legitimate goal of the State's law enforcement personnel, and when it is not possible to obtain a prior court order, and that may justify carrying out a search, the Court considers that this can never be disproportionate or exceed a superficial pat down of a person's clothes, or involve undressing them or violating their integrity.

110. Based on the above, the Court finds that the State is responsible for the violation of Article 11 of the Convention to the detriment of Mr. Fernández Prieto in relation to Articles 1(1) and 2 of this instrument, because the police searched the vehicle in which he was travelling even though they were not legally authorized to do so, and also for the violation of this article to the detriment of Mr. Tumbeiro in relation to Articles 1(1) and 2 of this instrument, because the police officers failed to prove, based on objective criteria, the need to carry out the body search and this was disproportionate; moreover, the applicable laws did not specify the cases whose urgency would justify this measure being taken without a court order.

[139] Attestation concerning legal impediment of January 15, 1998 (evidence file, folio 1489).

VIII
REPARATIONS

111. Based on Article 63(1) of the American Convention, 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.[140]

112. 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. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of those violations.[141] 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.[142]

113. This Court has also established that the reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Accordingly, the Court must analyze the concurrence of these factors in order to rule appropriately and in keeping with law.[143]

114. Taking into account the violations of the American Convention declared in the preceding chapter in light of the criteria established in the Court's case law concerning the nature and scope of the obligation to make reparation,[144] the Court will examine the claims presented by the Commission and the representatives, together with the corresponding arguments of the State, in order to establish measures to redress the said violations.

A. Injured party

115. Pursuant to Article 63(1) of the Convention, the Court considers that anyone who has been declared a victim of the violation of any right recognized therein is an injured party. Therefore, the Court considers that Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro are the "injured party" and, as victims of the violations declared in Chapter VII, they will be considered beneficiaries of the reparations that the Court orders. The Court recalls that, as previously indicated (*supra* paras. 45 and 52), both Mr. Fernández Prieto and Mr. Tumbeiro died before the adoption of this judgment.

B. Measures of satisfaction and guarantees of non-repetition

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140 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 24, and *Case of Valle Ambrosio et al. v. Argentina, supra*, para. 55.

141 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, para. 24, and *Case of Valle Ambrosio et al. v. Argentina, supra*, para. 56.

142 *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Valle Ambrosio et al. v. Argentina, supra*, para. 56.

143 *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 Valle Ambrosio et al. v. Argentina, supra*, para. 57.

144 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25 to 27, and *Case of Valle Ambrosio et al. v. Argentina, supra*, para. 58.

B.1. Measure of satisfaction

B.1.1. Publication of the judgment

116. The ***representatives*** asked that the State publish: (i) the entire judgment on the official website of the national Judiciary, on the website of the Supreme Court of Justice of the Nation and on the website of the national Ministry of Security for at least one year, and (ii) the official summary of the judgment in three major national newspapers. Neither the ***Commission*** nor the ***State*** commented on this request.

117. The Court establishes, as it has in other cases,[145] that the State must publish, within six months of notification of this judgment, in an appropriate and legible font: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this judgment in its entirety, to be available for one year, on the official website of the national Judiciary. The State must inform this Court immediately when it has made each of the publications ordered, irrespective of the one-year time frame for presenting its first report established in the twelfth operative paragraph of this judgment.

B.2. Guarantees of non-repetition

B.2.1. Adaptation of the law on stop and search

118. The ***Commission*** asked that the State ensure that the legislation that regulates the authority to stop and search people in public places on the basis of suspicion of the perpetration of an offense is based on objective reasons and includes requirements that these reasons be justified in each case. Also, it noted the State's assertion that a new Federal Code of Criminal Procedure had been promulgated that "will gradually replace the National Criminal Procedural Code." In this regard, the Commission indicated that, currently, the National Criminal Procedural Code and also Law 23,950, which were applied in this case, remained in force, and therefore asked the Court to order the State to adopt amendments to the law that were adapted to the relevant standards of the Court.

119. The ***representatives*** indicated that the legislation on stop and search without a court order currently in force is essentially the same as that which existed at the time of the facts, because the amendments made to the regulations do not meet international human rights standards as they maintain loose and subjective criteria, liable to maximize the discretionality and arbitrariness of law enforcement personnel. They asked the Court to order the State to adapt the current legislation; in particular, to derogate Law No. 23,950, to amend articles 184.5, 230, 230 *bis and* 284 of the National Criminal Procedural Code, and to consider that future legislation on this matter must indicate the objective circumstances that justify a detention and/or a search; that these must precede the procedure and have a restrictive interpretation, placing the burden on law enforcement personnel to provide a detailed written description on the grounds and circumstances that gave rise to the detention and/or search in their report on the procedure. The representatives also asked that, to ensure the effectiveness of the legislative amendments, the Court order the State to issue regulatory protocols for the actions of law enforcement personnel in public places to be adopted by presidential decree rather than by ministerial decisions which were unreliable and of a lower rank. Lastly, they asked the Court to order the State to adopt measures to harmonize the

[145] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs, supra*, para. 79, and *Case of Valle Ambrosio et al. v. Argentina, supra*, para. 63.

provincial criminal procedural codes and the actions of their respective law enforcement personnel.

120. The ***State*** asked the Court to "bear in mind that, in the opinion of the Argentine State, it has already adapted the legislation regulating the authority to search people in public places without a court order, based on objective reasons and the requirement to justify those reasons in each case." It also stated that the case law of the Supreme Court of Justice of the Nation had made progress in limiting the authority of law enforcement personnel to carry out searches without a court order, and this had "been crystallized with the enactment of the new Federal Code of Criminal Procedure of the Nation adopted by Law No. 27,063 of December 9, 2014." The State indicated that the amendment of the law eliminated any possibility of expanding the powers of the police and granted the courts ample scope to annul any procedure that strayed from the initial requirements established therein. Thus, it indicated that the State had complied with its obligation to ensure that the legislation regulating the authority to conduct searches of people in public places was based on objective reasons. Consequently, it asked that the measures of reparation established by the Court should be addressed at the process of implementing the new Procedural Code.

121. In this judgment, the Court has determined that article 4 of the Criminal Procedural Code in force at the time when Mr. Fernández Prieto was detained, articles 230 and 284 of the National Criminal Procedural Code, in force at the time of the detention of Mr. Tumbeiro, and article 1 of Law 23,950, constituted non-compliance with Article 2 of the American Convention (*supra* paras. 62 to 110). The Court also notes that the criminal procedural regulations have been amended by the adoption of a new Federal Code of Criminal Procedure of the Nation and that article 138 of this Code regulates the situations enabling searches without a court order. The Court notes that the information provided by the State reveals that these legislative amendments constitute progress in compliance with the duty to adopt domestic legislative measures, but do not cover all the violations declared in this judgment.

122. Therefore, the Court considers that, within a reasonable time, the State must adapt its domestic legislation, which entails amending norms and implementing practices aimed at achieving the full effectiveness of the rights recognized in the Convention in order to make it compatible with the international parameters that should exist to avoid arbitrariness in the situations of detentions, body searches or searches of a vehicle addressed in this case, pursuant to the parameters established in this judgment. Consequently, when creating and applying the regulations that authorize the police to carry out detentions without a court order, the domestic authorities are obliged to carry out a control of conventionality taking into account the interpretations of the American Convention made by the Inter-American Court in relation to detentions without a court order, which have been reiterated in this case.

123. Regarding the representatives' request concerning the amendment of provincial criminal procedural codes and the issue of regulatory protocols for the actions of law enforcement personnel, the Court notes that those norms or their absence were not applied to the facts of this case so that it is not appropriate to examine them in abstract. Therefore, the Court considers that it is not incumbent on it to issue a ruling on this request when ordering the reparations in this case.[146]

B.2.2. Training for law enforcement personnel, and members of the Public Prosecution Service and the Judiciary

[146] *Cf. Case of Genie Lacayo v. Nicaragua. Preliminary objections.* Judgment of January 27, 1995. Series C No. 21, para. 50, and *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 307.

124. The ***Commission*** asked that the State adopt measures to provide appropriate training for police personnel to avoid abuses in the exercise of their authority to stop and search people, including training on the prohibition to exercise this authority in a discriminatory manner and based on profiles associated with stereotypes. The ***representatives*** asked that the State train law enforcement personnel and members of the Public Prosecution Service and the Judiciary, at both the federal level and in the country's different provinces. In this regard, they stipulated that this training should be permanent, accompanied by the necessary funding, and based on the standards of the inter-American human rights system. The ***State*** did not refer to this measure.

125. The Court finds it pertinent to order the State to create and implement, within two years, a training program for the Police of the Province of Buenos Aires and the Argentine Federal Police, and members of the Public Prosecution Service and the Judiciary on the need: (a) that the police indicate the objective circumstances in which a detention, search and/or seizure without a court order is appropriate, always in specific relation to the perpetration of an offense; (b) that these circumstances should be prior to any procedure and restrictively interpreted; (c) that such actions should only be taken in a situation of urgency that prevents requesting a court order; (d) that law enforcement personnel should provide a detailed description in the respective report of the reasons that led to the search or seizure, and (e) to eliminate the use of discriminatory criteria to conduct a detention. The training for the police should include information on the prohibition to justify detentions based on dogmatic and stereotypical formulas. In the case of the Public Prosecution Service and the Judiciary, this training should be addressed at raising awareness on the need to make an appropriate assessment of the reasons for the stop and search procedure by the police as part of the control of detentions.

B.3.3. Production of official statistics on the actions of law enforcement personnel

126. The ***representatives*** asked that the State collect, publish and disseminate official statistics on the actions of law enforcement personnel, which identify the reasons for detentions and/or searches when no court order has been issued and no situation of *flagrante delicto* exists, and even in cases that do not result in criminal charges. They asked that, when compiling these statistics, the State take into account criteria of sex, age, social status, nationality, type of clothing and personal effects, as well as all those criteria usually considered by law enforcement personnel as grounds for their suspicions and the consequent detentions. Neither the ***Commission*** nor the ***State*** commented on this measure of reparation.

127. The Court understands that it is necessary to collect comprehensive information on the actions of law enforcement personnel in order to comprehend the real scale of the phenomenon of detentions, searches and seizures and, consequently, design strategies to prevent and eradicate further arbitrary and discriminatory actions. Therefore, the Court orders the State to design immediately, and to implement within one year, through the corresponding state agency, a system for the collection of data and figures on detentions, searches and seizures when a court order has not been issued, in order to make a precise and standardized evaluation of the type, prevalence, tendencies and guidelines for the actions of the Argentine police. In addition, the number of cases that were ultimately prosecuted should be specified, identifying the number of charges, convictions and acquittals. The State should publish this information every year in the corresponding report, ensuring that it is accessible to the general public, while keeping the identity of those detained or intervened confidential. Furthermore, the State must present an annual report to the Court in which it describes the actions taken in this regard for three years following implementation of the data collection system.

B.3. Other measures requested

128. The ***Commission*** asked that the State ensure the existence and implementation of effective judicial remedies to address reports of police abuse in the context of their authority to stop and search. The ***representatives*** asked that the State annul the judgments convicting Mr. Fernández Prieto and Mr. Tumbeiro. They asked that the State verify that the sentences imposed following the domestic proceedings not be included as a criminal record in the National Registry of Reoffenders or in any other public records or, if applicable, that any annotation of this type be eliminated. They also asked that the State make a "marginal annotation" in the decisions of the Supreme Court of Justice concerning the two cases indicating that these rulings and the proceedings that led to them had been declared incompatible with the American Convention. The ***State*** did not comment on these measures.

129. The Court considers that, in this case, the absence of available judicial remedies has not been proved, but rather their inadequate response to the violations of the rights of Messrs. Fernández Prieto and Tumbeiro. Thus, the Court considers that it is not appropriate to order the creation of new judicial remedies. Regarding the measure requested by the representatives, the Court notes that the rights of Messrs. Fernández Prieto and Tumbeiro are no longer being violated by the police, administrative or judicial records owing to the proceedings followed against them. Consequently, the Court considers that the delivery of this judgment and the reparations ordered herein are sufficient and appropriate; therefore, the said measure is not granted.

C. Compensation

C.1. Pecuniary damage

130. The ***Commission*** asked that the State make full reparation, both pecuniary and non-pecuniary, for the human rights violations. It added that, to this end, it should be taken into account that both the initial stop and search procedure, and the subsequent judicial proceedings, pre-trial detention and criminal conviction were not in keeping with the requirements of the American Convention. It affirmed that all these facts took place based on the initial procedures carried out by the police officers.

131. The ***representatives*** requested monetary reparation for pecuniary and non-pecuniary damage. Regarding compensation for pecuniary damage, consequential damage and loss of earnings, they indicated that the time that had elapsed from the arbitrary police detentions to date, as well as the death of Mr. Tumbeiro, made it difficult to calculate the items to be compensated appropriately. However, they argued that, previously, the Court had accepted to provide compensation for this item under the principle of equity even in the absence of vouchers to support it. They indicated that the following should be assessed in the case of Mr. Fernández Pietro: (a) the harm derived from the impossibility of obtaining employment while he was in detention and subsequently, and (b) his loss of earnings as a result of his criminal conviction. With regard to Mr. Tumbeiro, they indicated that the Court should take into account: (a) the sum disbursed to pay the fine included in his sentence, equivalent to 150 pesos, and (b) the expenses he incurred while seeking a place to carry out his community service, and the consequent time he was unable to carry out his usual work. Based on the foregoing, they requested payment of monetary compensation to the victims, to be determined based on the age, training and activities of the victims at the time of the facts. The ***State*** did not comment on this measure.

132. 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.[147] The Court takes note that the specific harm indicated by the representatives in the case of Mr. Fernández Prieto relates to the loss of income while he was deprived of liberty. However, the case file does not contain any probative elements to make an exact calculation of his monthly income. Therefore, the Court deems it pertinent to establish, in equity, the sum of US$10,000.00 (ten thousand United States dollars) in favor of Mr. Fernández Prieto, as compensation for loss of earnings during the time he was deprived of his liberty, and this must be paid to his heirs pursuant to the applicable domestic law (*infra* para. 145).

133. In the case of Mr. Tumbeiro, the Court observes that the specific damage indicated by the representatives stems from the fine that he paid as part of his sentence and the expenses he incurred while seeking a place to carry out his community service, which also prevented him from carrying out his usual activities. However, the case file does not contain any probative elements to calculate those losses. Therefore, the Court deems it pertinent to establish, in equity, the sum of $5,000.00 (five thousand United States dollars) in favor of Mr. Tumbeiro, as compensation for the fine he paid, as well as for his loss of earnings while seeking where to carry out the community service, and this must be paid to his heirs pursuant to the applicable domestic law (*infra* para. 145).

C.2. Non-pecuniary damage

134. The ***Commission*** asked that the State make full reparation, both pecuniary and non-pecuniary, for the human rights violations. It added that, to this end, it should be taken into account that both the initial stop and search procedure, and the subsequent judicial proceedings, pre-trial detention and criminal conviction were not in keeping with the requirements of the American Convention. It affirmed that all these facts took place based on the initial procedures carried out by the police officers.

135. The ***representatives*** argued that the non-pecuniary damage should respond to the emotional and mental suffering of their clients not only because of the violations of their human rights, but also because of the impact on their family and interpersonal relations and in their self-referential sphere. In the case of Mr. Fernández Prieto, they indicated that it should be taken into account: (a) that the victim had to undergo flawed and unjust judicial proceedings that sentenced him to five years' imprisonment and a fine of 3,000 pesos; (b) that he spent the equivalent of two years, eight months and five days in prison, and suffered the consequences inherent in deprivation of liberty: that is, deficient detention conditions, separation from his companion and his underage children, and the subsequent difficulties of social and employment reinsertion, and (c) the lack of access to medical care and rehabilitation that would have allowed him to treat a motor disability from which he suffered as the result of a car accident some months before the detention.

136. In the case of Mr. Tumbeiro, they indicated that the Court should take into account: (a) that, even though he did not suffer the consequences of deprivation of his liberty, he was subjected to criminal proceedings that sentenced him to pay a fine, and carry out community service and adapt to strict rules of conduct to avoid imprisonment; (b) the problems resulting from having tried to find a place where he could carry out his community service, because he was rejected in numerous places, which had an impact on the length of time he was serving this sentence, and (c) the repercussions that flawed and unjust criminal proceedings had on his family circle. Based on the foregoing, they asked the Court to decide, in equity, payment of a sum of money in favor of the victims. The ***State*** did not comment on these requests.

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147 *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Petro Urrego v. Colombia, supra*, para. 160.

137. In its case law, this Court has developed the concept of non-pecuniary damage and has established that this may include both the suffering and affliction caused to the direct victim and his family, and also the impairment of values of great significance for the individual, as well as the alterations of a non-pecuniary character in the living conditions of victims or their families.[148]

138. The Court takes into consideration that, in this case, it has declared the violation of the right to personal liberty of Mr. Fernández Prieto and Mr. Tumbeiro owing to the illegality of the restriction of their personal liberty that also resulted in a violation of their right to privacy. Moreover, the State has acknowledged its responsibility for the ineffectiveness of the different remedies filed during the proceedings by Mr. Fernández Prieto and Mr. Tumbeiro. In addition, the representatives have argued that these violations had diverse impacts in the non-pecuniary sphere of the two victims, particularly as regards non-pecuniary harm.

139. As a result of these violations, the Court deems it pertinent to establish, in equity, financial compensation for non-pecuniary damage of US$30,000.00 (thirty thousand United States dollars) to Mr. Fernández Prieto and US$25,000.00 (twenty-five thousand United States dollars) to Mr. Tumbeiro, and this must be paid to their heirs pursuant to the applicable domestic law (*infra* para. 145).

D. Costs and expenses

140. The Court notes that, in this case, the representatives submitted no specific petitions or arguments in this regard; therefore, the Court finds it unnecessary to rule on this point.

E. Reimbursement of expenses to the Victims' Legal Assistance Fund of the Inter-American Court

141. In 2008, the General Assembly of the Organization of American States created the Legal Assistance Fund of the Inter-American Human Rights System, in order "to facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring their cases before the system."[149]

142. In a note of the Court's Secretariat of June 12, 2020, a report was sent to the State on the disbursements made in application of the Victims' Legal Assistance Fund in this case, which amounted to US$3,251.84 (three thousand two hundred and fifty-one United States dollars and eighty-four cents) and, as established in article 5 of the Court's Rules for the Operation of the said fund, Argentina was granted a time frame for presenting any observations it deemed pertinent. The State presented a brief on June 24, 2020, in which it indicated that it had no observations to make.

143. In light of article 5 of the Rules for the Operation of the Fund and the violations declared in this judgment, and also that the requirements to access the fund were met, the Court orders the State to reimburse the said fund the sum of US$3,251.84 (three thousand two hundred

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148 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 84, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra,* para. 238.

149 AG/RES. 2426 (XXXVIII-O/08), Resolution adopted by the thirty-eighth OAS General Assembly during the fourth plenary session held on June 3, 2008, "*Establishment of the Legal Assistance Fund of the Inter-American Human Rights System,*" Operative paragraph 2.a), and CP/RES. 963 (1728/09), Resolution adopted on November 11, 2009, by the OAS Permanent Council, "*Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System,*" article 1(1).

and fifty-one United States dollars and eighty-four cents) for the disbursements made. This sum must be reimbursed within six months of notification of this judgment.

F. Method of compliance with the payments ordered

144. The State shall make the payments of compensation for pecuniary and non-pecuniary damage established in this judgment within one year of its notification, without prejudice to completing the payments in advance of that date, in accordance with the following paragraphs.

145. As the Court has verified that the beneficiaries are deceased, the payments ordered in this judgment shall be delivered directly to their heirs pursuant to the applicable domestic law.

146. The State shall comply with the monetary obligations by payment in United States dollars or, if this is not possible, in the equivalent in Argentine currency, using the highest and most beneficial rate for the beneficiaries allowed by its domestic law at the time of the payment to make the respective calculation. During the stage of monitoring compliance with the judgment, the Court may make a prudent readjustment of the equivalent of the respective sums in Argentine currency in order to avoid exchange variations substantially affecting their purchasing power.

147. If, for causes that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the indicated time frame, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Argentine financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking laws and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the interest accrued.

148. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage, must be delivered to the persons indicated in full, as established in this judgment, without any deductions resulting from possible taxes and charges.

149. If the State should fall in arrears, including in 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 the Argentine Republic.

IX
OPERATIVE PARAGRAPHS

150. Therefore,

THE COURT

DECIDES,

Unanimously:

1. To accept the acknowledgement of international responsibility made by the State, pursuant to paragraphs 19 to 22 of this judgment.

DECLARES,

Unanimously that:

2. The State is responsible for the violation of the right to personal liberty contained in Article 7(1), 7(2), and 7(3) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto, pursuant to paragraphs 19 to 21, 62 to 75 and 88 to 101 of this judgment; for the violation of the right to personal liberty, to equality before the law and the prohibition of discrimination contained in Articles 7(1), 7(2), 7(3) and 24 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alejandro Tumbeiro, pursuant to paragraphs 19 to 21, 62 to 67 and 76 to 101 of this judgment and, based on the State's acknowledgement of responsibility, for the violation of the right to personal liberty contained in Article 7(5) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto, pursuant to paragraphs 19 to 21 of this judgment.

3. The State is responsible for the violation of the right to privacy contained in Article 11 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, pursuant to paragraphs 19 to 21 and 102 to 110 of this judgment.

4. The State is responsible, based on the State's acknowledgement of responsibility, for the violation of the rights contained in Articles 8(1), 8(2), 8(2)(h) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, pursuant to paragraphs 19 to 21 of this judgment.

AND ESTABLISHES:

Unanimously that:

5. This judgment is *per se* a form of reparation.

6. The State shall make the publications indicated in paragraph 117 of this judgment, within six months of its notification.

7. The State shall adapt its domestic law concerning the regulations that permit stopping and searching vehicles or individuals without a court order, pursuant to paragraphs 121 and 122 of this judgment.

8. The State shall design and implement a training program for the police, the Public Prosecution Service and the Judiciary, pursuant to paragraph 125 of this judgment.

9. The State shall design and implement a system to compile data and figures on stop and search, pursuant to paragraph 127 of this judgment.

10. The State shall pay the amounts established in paragraphs 132, 133 and 139 of this judgment for pecuniary and non-pecuniary damage.

11. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the sum disbursed during the processing of this case, pursuant to paragraph 143 of this judgment.

12. The State shall provide the Court with a report, within one year of notification of the judgment, on the measures taken to comply with it, without prejudice to the provisions of paragraph 117 of this judgment.

13. The Court will monitor full compliance with the 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.

DONE at San José, Costa Rica, on September 1, 2020, in the Spanish language.

I/A Court HR. *Case of Fernández Prieto and Tumbeiro v. Argentina.* Merits and reparations. Judgment of September 1, 2020. Judgment adopted in San José, Costa Rica, in a virtual session.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire Eduardo Vio Grossi

Humberto Antonio Sierra Porto Eduardo Ferrer Mac-Gregor Poisot

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary