INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF AMRHEIN ET AL. V. COSTA RICA

JUDGMENT OF APRIL 25, 2018
(*Preliminary Objections, Merits, Reparations and Costs*)

In the case of *Amrhein et al.*,

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

Eduardo Ferrer Mac-Gregor Poisot, President
Eduardo Vio Grossi, Vice President
Roberto F. Caldas, Judge
Humberto Antonio Sierra Porto, Judge
Eugenio Raúl Zaffaroni, Judge and
L. Patricio Pazmiño Freire, Judge,

also present,

Pablo Saavedra Alessandri, Registrar,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment, which is structured as follows:

[*] In accordance with the provisions of Article 19(1) of the Rules of Procedure of the Court, Judge Elizabeth Odio Benito, a Costa Rican national, did not take part in the analysis and deliberation of this case.

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I
INTRODUCTION OF THE CASE AND CAUSE OF THE ACTION

1. *The case submitted to the Court.* On November 28, 2014, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Inter-American Court case No. 12,820 *Manfred Amrhein et al. v. Costa Rica*. According to the Commission, the case relates to the alleged international responsibility of Costa Rica for its failure to provide a remedy that would allow for a comprehensive review of the criminal convictions of seventeen individuals. It is alleged that, under the criminal procedural framework in force at the time of these convictions, the existing remedy was the petition for a writ of reversal on cassation (*recurso de casación*), which was limited to matters of law and excluded the possibility of reviewing matters of fact and evidence. It is further alleged that the two legislative reforms adopted by the State subsequent to these judgments also failed to guarantee the alleged victims the right to appeal their convictions, inasmuch as the mechanisms offered to persons with final convictions prior to these reforms suffered from the same limitations. Moreover, it is claimed that, with respect to some of the alleged victims, the State violated the right to judicial guarantees within the framework of the criminal proceedings against them, the right to personal liberty due to the illegality and unreasonable duration of their pretrial detention and the right to personal integrity due to the poor conditions of detention at the prison where they were held.

2. The alleged victims in this case are:[1]

- Group 1: Manfred Amrhein Pinto, Ronald Fernández Pinto, Carlos Osborne Escalante, Carlos Manuel González Lizano and Arturo Fallas Zúñiga;
- Group 2: Rafael Rojas Madrigal;
- Group 3: Luis Archbold Jay, Enrique Floyd Archbold Jay, Carlos Eduardo Yepes Cruz, Fernando Saldarriaga Saldarriaga, and Miguel Antonio Valverde Montoya;
- Group 4: Jorge Martínez Meléndez;
- Group 5: Guillermo Rodríguez Silva and Martín Rojas Hernández;
- Group 6: Manuel Adilio Hernández Quesada;
- Group 7: Miguel Mora Calvo, and
- Group 8: Damas Vega Atencio

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

a) Petition. Between March 2004 and November 2006, the Commission received eight petitions in respect of seventeen alleged victims.[2]

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[1] In the instant case, the Court uses the division of alleged victims into groups given by the Commission. In addition, each group was assigned a number to facilitate the identification of their classification throughout the judgment.

[2] The eight petitions submitted are: 1) Petition P 233-04, submitted on March 24, 2004 by Human Rights for the Americas (HR Americas) and *Servicios Interamericanos de Profesionales en Rights Humanos*. *Cf.* Petition respect of Manfred Amrhein and others (evidence file, folio 13738); 2) Petition P 669-04, submitted on July 29, 2004 by Rafael Antonio Rojas Madrigal. *Cf.* Petition regarding Rafael Antonio Rojas Madrigal (evidence file, folio 8601); 3) Petition P 1256-06, submitted on November 14, 2006 by Carlos Eduardo Yepes Cruz. *Cf.* Petition regarding Carlos Eduardo Yepes Cruz and others (evidence file, folio 4801); 4) Petition P 1083-06, submitted on October 11, 2006 by Ricardo Barahona Montero. *Cf.* Petition regarding Jorge Alberto Martínez Meléndez (evidence file, folio 3249); 5) Petition P 1111-06, submitted on October 18, 2006 by Guillermo Rodríguez Silva and Martín Rojas Hernández. *Cf.* Petition regarding Guillermo Rodríguez Silva and Martín Rojas Hernández (evidence file, folio 4240); 6) Petition P 587-05, submitted on May 24, 2005 by Manuel Hernández Quesada. *Cf.* Petition regarding

b) *Admissibility of the petition.* On July 22, 2011, the Commission adopted Admissibility Report 105/11, in which it declared the admissibility of the eight petitions, decided to join them and processed them under case No. 12,820.

c) *Merits Report.* On April 4, 2014 the Commission adopted Merits Report No. 33/14 (hereinafter "Merits Report" or "Report No. 33/14"), pursuant to Article 50 of the Convention. In its report, the Commission reached a number of conclusions and made various recommendations to the State:

i. *Conclusions*. The Commission concluded that the State was responsible for:

1. The violation of the right to appeal the judgment as established in Article 8(2)(h) of the American Convention, in connection with the obligations set forth in Articles 1(1) and 2 thereof, to the detriment of Manfred Amrhein, Ronald Fernández, Carlos Osborne, Carlos González, Arturo Fallas, Rafael Rojas Madrigal, Carlos Eduardo Yepes Cruz, Luis Archbold Jay, Enrique Floyd Archbold Jay, Fernando Saldarriaga [Saldarriaga], Miguel Antonio Valverde, Guillermo Rodríguez Silva, Martín Rojas Hernández, Manuel Hernández Quesada, Damas Vega Atencio, Miguel Mora Calvo and Jorge Martínez Meléndez.
2. The violation of the right to an impartial judge established in Article 8(1) of the American Convention, in connection with the obligations set forth in Article 1(1) thereof, to the detriment of Rafael Rojas Madrigal.
3. The violation of the right to personal liberty as established in Articles 7(1), 7(2) and 7(5) of the American Convention, in connection with the obligations set forth in Article 1(1) thereof, to the detriment of Jorge Martínez Meléndez.
4. The violation of the right to humane treatment (personal integrity) as established in Articles 5(1) and 5(2) of the American Convention, connection with the obligations set forth in Article 1(1) thereof, to the detriment of Rafael Rojas Madrigal, with respect to the failure to provide access to health services, as well as to the detriment of all the victims of the instant case who have served their sentence at CAI La Reforma prison, because of the conditions of detention in said facility.

ii. *Recommendations.* The Commission made the following recommendations to the State:

1. To order full reparation for the violations declared in the instant Merits Report, including adequate compensation.
2. To order the necessary measures to be taken so that, as soon as possible, the victims are able to pursue a remedy whereby they obtain a review of their convictions in keeping with Article 8(2)(h) of the American Convention, under the standards established in the instant report.
3. To order the necessary measures to ensure that the conditions of detention at CAI La Reforma prison comply with Inter-American standards on the subject matter. Particularly, ensure that adequate medical care is made available to persons deprived of liberty at said prison facility, including the victims of the instant case.

d) *Notification to the State.* On April 28, 2014, the Merits Report was notified to the State, which was granted an initial period of two months to report on compliance with the recommendations. Despite the two extensions granted to the State, it did not formally express its willingness to comply with the recommendations.

e) *Submission to the Court*. On November 28, 2014, the Commission submitted the case to the Court "given the need to obtain justice" in light of "all facts and human rights violations described in the Merits Report."[3] It asked the Court to declare the international responsibility of the State for the violations indicated in Report No. 33/14, and to order Costa Rica to comply with the recommendations contained in said report as measures of reparation.

Manuel Adilio Hernández Quesada (evidence file, folio 5947); 7) Petition P 221-05, submitted on March 3, 2005 by Miguel Mora Calvo. *Cf.* Petition regarding Miguel Mora Calvo (evidence file, folio 6589), and 8) Petition P 1174-04, submitted on November 3, 2004, by Damas Vega Atencio. *Cf.* Petition regarding Damas Vega Atencio (evidence file, folio 6957).

[3] The Commission appointed Commissioner José de Jesús Orozco Henríquez and the then Executive Secretary, Emilio Álvarez Icaza L. as its delegates before the Court and Elizabeth Abi-Mershed, Assistant Executive Secretary, Silvia Serrano Guzmán and Erick Acuña Pereda, lawyers of the Executive Secretariat of the Commission, as its legal advisers.

II
PROCEEDINGS BEFORE THE COURT

4. *Notification to the State and the representatives or common interveners.* On March 27, 2015, the case was notified to the Republic of Costa Rica (hereinafter "the State" or "Costa Rica"), and to the representatives or common interveners of the alleged victims (hereinafter "the representatives" or "common interveners"): i) Adrián Martínez Blanco of *Factum Consorcio*; ii) *Servicios Interamericanos de Profesionales en Derechos Humanos* (hereinafter "SIPDH"), and iii) the Inter-American Defenders, José Arnoldo González Castro, Tomás Poblador Ramírez and Belinda Guevara Casaya.[4]

5. *Brief with pleadings, motions and evidence.* On June 1 and 8, 2015, the Court received briefs containing pleadings, motions and evidence (hereinafter "pleadings and motions brief") from *Factum Consorcio*, SIPDH and the Inter-American Defenders. In their briefs, they agreed with the arguments submitted by the Commission and, in each case, they argued additional violations of the American Convention in relation to Articles 2, 4(1), 5, 5(1), 5(2), 5(6), 7(3), 7(6), 8(1), 8(2), 8(2)(c), 8(2)(d), 8(2)(f), 9, 11, 23(c), 24 and 25.

6. *Answering brief.* On February 5, 2016, the State presented to the Court a brief containing preliminary objections, its answer to the submission of the case and observations on the pleadings and motions briefs (hereinafter "answering brief"). The State filed five preliminary objections and rejected the alleged violations.[5] It also requested that a special hearing be held on the preliminary objections.

7. *Observations on the preliminary objections*. On April 8, 12 and 13, 2016, the three common interveners and the Commission presented their respective observations on the preliminary objections filed by the State. The Commission, the Inter-American Defenders and SIPDH also submitted annexes to their briefs of observations on the preliminary objections, which were forwarded to the parties and the Commission. The President of the Court granted a period until December 13, 2016, for the parties and the Commission to submit any observations deemed pertinent to said annexes. No observations were submitted.[6]

8. *Request for a special hearing on preliminary objections*. On August 17, 2016, after a query from the President of the Court,[7] the State explained the reasons why it considered it indispensable to hold a special hearing on preliminary objections. For their part, on August 30, 31, and September 1, 2016, the three common interveners and the Commission submitted their respective observations to the brief of the State.

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[4] Mr. Adrián Martínez Blanco of Factum Consorcio, represented Jorge Martínez Meléndez, of Group 4. SIPDH represented Groups 1, 3 (except the alleged victim Fernando Saldarriaga Saldarriaga), 7 and 8. The Inter-American Defenders González Castro and Poblador Ramírez represented Fernando Saldarriaga Saldarriaga, of Group 3, Guillermo Rodríguez Silva and Martín Rojas Hernández, of Group 5, while the Inter-American Defender Guevara Casaya represented Rafael Antonio Rojas Madrigal, of Group 2, and Manuel Adilio Hernández Quesada, of Group 6.

[5] On April 24, 2015, the State appointed the following persons as its agents in the instant case: Manuel A. González Sanz, Minister of Foreign Relations; Gioconda Ubeda Rivera, Legal Director, Ministry of Foreign Relations; and José Manuel Arroyo Gutiérrez, Magistrate of the Third Chamber, Vice President of the Supreme Court of Justice. Likewise, on December 13, 2016, the State appointed as additional agent for this case Eugenia Gutiérrez Ruiz, Assistant Legal Director of the Ministry of Foreign Relations.

[6] The common intervenor SIPDH filed a brief in which it merely "reiterated" and "reproduced" its observations on the preliminary objections filed by the State, without submitting observations in relation to the aforementioned annexes.

[7] Note of the Secretariat of August 4, 2016 (merits file, folio 1994).

9. *Call to a hearing.* On November 17, 2016, the President of the Court issued an order[8] in which he summoned the parties and the Inter-American Commission to a special public hearing on the preliminary objections filed in the instant case.[9]

10. *Special public hearing on the preliminary objections*. The public hearing took place on February 8, 2017, during the Court's 117th regular session held in the city of San José, Costa Rica,[10] during which the parties and the Commission, respectively, presented their oral arguments and observations.

11. *Information and helpful evidence requested.* On February 15 and 22, 2017, the Inter-American Defenders and the SIPDH, as well as the Commission and the State, submitted their respective briefs in response to the information requested during the public hearing and in the note of the Secretariat dated February 10, 2017. Together with their briefs, the State and the Commission also submitted annexes. *Factum Consorcio* did not submit the requested information. Likewise, on March 7, 2017, the State, the Inter-American Defenders and *Factum Consorcio* submitted their observations to the aforementioned annexes forwarded by the State and the Commission. For their part, the Commission and SIPDH did not submit observations to these annexes.[11]

12. *Amicus curiae*. The Court received a total of 21 *amicus curiae* briefs. [12]

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[8] *Cf. Case of Amrhein et al. v. Costa Rica.* Order to the President of the Court of November 17, 2016. Available at: http://www.corteidh.or.cr/docs/asuntos/amrhein_17_11_16.pdf

[9] In a note dated December 9, 2016, the Secretariat reminded the Commission and the parties "that there would be no opportunities to submit written arguments after the hearing on preliminary objections."

[10] The following appeared at the public hearing: a) for the Inter-American Commission: Commissioner José de Jesús Orozco, and Silvia Serrano Guzmán and Selene Soto, lawyers of the Executive Secretariat; b) for the alleged victims: the common interveners Inter-American Defenders José Arnoldo González Castro, Tomás Poblador Ramírez and Belinda Guevara Casaya; the common interveners *Servicios Interamericanos de Profesionales en Derechos Humanos* Víctor Manuel Rodríguez Rescia, Yorleny Clark Martínez, Fabián Salvioli and Miguel Ruiz Herrera, and the common interveners of Factum Consorcio, Adrián Martínez Blanco and Néstor Morera Víquez, and c) for the State of Costa Rica: Ambassador and Agent Gioconda Ubeda Rivera, Magistrate and Agent José Manuel Arroyo Gutiérrez, Assistant Legal Director of the Ministry of Foreign Relations and Agent Eugenia Gutiérrez Ruiz, Legal Adviser of the Ministry of Foreign Relations Marianela Álvarez Blanco, court attorney of the Third Chamber of the Supreme Court of Justice Carlos Jiménez González, Adviser to the General Directorate of Social Adaptation, Ministry of Justice and Peace Mariela Romero Villalobos, Adviser to the Minister of Foreign Relations, María Devandas Calderón, Legal Counsel of Ministry of Foreign Relations Víctor Guzmán Rodríguez, Legal Director of the Ministry of Foreign Relations, Natalia Córdoba Ulate, and Legal Counsel of the Ministry of Foreign Relations, José Carlos Jiménez Alpízar.

[11] The Court considers that since these did not constitute new procedural opportunities to submit arguments, any additional argument included in the aforementioned briefs that was not in response to the requests, is time-barred and, therefore, cannot be taken into account. Nevertheless, the Court notes that on February 15, 2017 and in response to the request of this Court, the State pointed out the facts that it considered to be outside the factual framework of the case, the assessment thereof and statistics on the number of cases that would be impacted by a possible decision thereon. Given that this information was only requested during the public hearing and in application of the adversarial principle, the Court admits the observations submitted on March 7, 2017, by the Inter-American Defenders and Factum Consorcio related exclusively to this point.

[12] The following *amicus curiae* briefs were received pursuant to the provisions of Article 44(3) of the Court's Rules of Procedure, and following the instructions of its President, these briefs were transmitted to the parties. The following amicus curiae briefs discussed the alleged violation of Article 8(2)(h) of the Convention: i) brief of September 6, 2017 of Marco Tulio Sandoval Meza; ii) brief of August 31, 2017 of Gerardo Aguilar Coto; iii) brief of August 31, 2017 of Víctor Zúñiga Quirós; iv) brief of August 31, 2017 of Juan Villalobos Parajeles; v) brief of September 11, 2017 of Juan Rafael Arrieta Espinoza; vi) brief of February 10, 2017 of Felipe Saavedra Cruz; vii) brief of January 9,2017 of Cristian Alpízar Arcejut; viii) brief of October 2, 2015 of José Tomás Guevara; ix) brief of August 31, 2015 of José Tomás Guevara; x) brief of August 31, 2015 of José Tomás Guevara; xi) brief of January 9, 2017 of José Gilberth Angulo Méndez; xii) brief of May 31, 2016 of José Tomás Guevara; and xiii) primer brief of August 31, 2015 of José Tomás Guevara. In addition: xiv) brief of April 22, 2016 of José Tomás Guevara concerning the alleged failure to guarantee of due process by the Third Chamber of the Supreme Court of Justice; xv) the brief of January 14, 2016 of José Tomás Guevara on the alleged violation of the rights of defense, to present evidence in criminal proceedings, the benefit of Article 55 of the Criminal Code, inter alia; xvi) the brief of January 12, 2016 of José Tomás Guevara on the alleged distortion of the writ of amparo by the

13. *Public hearing on possible merits, reparations and costs*. In an order dated July 12, 2017, the President of the Court[13] requested the statements rendered by affidavit of three alleged victims offered by SIPDH, four offered by AIDEF and one offered by *Factum Consorcio*; one witness offered by SIPDH, seven offered by AIDEF and one offered by *Factum Consorcio*; three declarants for information purposes offered by the State and three expert witnesses offered by SIPDH, four offered by AIDEF and one offered by *Factum Consorcio.*[14] Likewise, the President decided to call the State, the common interveners and the Commission to a public hearing during the Court's 119th regular session at its seat in San José, Costa Rica, on August 28, 2017.

14. *Request for clarification and/or reconsideration.* In a brief dated July 18, 2017, the common intervenor SIPDH requested clarification, or failing that, partial appeal of the decision of the President of the Court of July 12, 2017, regarding the grounds for the denial of the testimony of a declarant. In a brief dated July 28, 2017, the State submitted its observations on the request for clarification and partial appeal of the common intervener. In a ruling of August 21, 2017,[15] the Court dismissed the motion for reconsideration filed by the common intervenor SIPDH.

15. *Helpful evidence.* On September 18, 2017, the Court asked the State, *Factum Consorcio* and SIPDH to submit certain evidence to facilitate adjudication. The information requested was forwarded on September 27 and 28, 2017. On March 5, 2018, the Court asked the State and SIPDH to provide helpful evidence, which the State submitted on March 8, 2018.

16. *Final written arguments and observations.* In their briefs of September 28, 2017, the common interveners and the Commission submitted their final arguments and observations, respectively. *Factum Consorcio* submitted annexes together with its brief of final arguments. Finally, in a brief dated November 28, 2017 the State submitted its final arguments and attached several annexes.

Constitutional Chamber of the Supreme Court of Justice; xvii) the brief of September 1, 2015 of José Tomás Guevara, concerning the alleged failure by the State to apply the Court's jurisprudence and Rules of Procedure; xviii) the brief of September 1, 2015 of José Tomás Guevara on the supposed illegality of the sentences imposed on the alleged victims; xix) the brief of September 1, 2015, of José Tomás Guevara, on the alleged violation of the right to consular assistance; xx) the second brief of August 31, 2015 of José Tomás Guevara: on the violation of the following Articles: 306, 316, 319, 321, 322, 324 and 376 to 379 of the Code of Criminal Procedure, 41 of the Constitution and 8(1) of the American Convention; and xxi) the third brief of August 31, 2015 of José Tomás Guevara discussed the failure to apply double judicial conformity and the alleged incompatibility of Law 7398 with Article 5(6) of the Convention and with Article 51 of the Criminal Code.

[13] *Cf. Case of Amrhein et al. v. Costa Rica. Call to a hearing*. Order of the President of the Inter-American Court, July 12, 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/amrhein_12_07_17.pdf

[14] The persons called to testify before a notary public were: a) petitioners proposed by SIPDH: i) Damas Vega Atencio, ii) Miguel Ángel Mora Calvo, and iii) Carlos Osborne Escalante; b) proposed by Factum Consorcio: iv) Jorge Martínez Meléndez; c) proposed by the Inter-American Defenders: v) Guillermo Rodríguez Silva; vi) Martín Rojas Hernández, vii) Manuel Hernández Quesada, and viii) Rafael Antonio Rojas Madrigal. d) witness proposed by SIPDH: i) Roger Víquez Guiraud; e) witnesses proposed by Factum Consorcio, ii) José Martínez Meléndez; f) witness proposed by the Inter-American Defenders, iii) Álvaro Chambers Torres, iv) Antonio Sandoval Mendoza, v) Carlos Alberto Céspedes León, vi) Rosaura Chinchilla Calderón, vii) Eric Alfredo Chirino Sanchez, viii) Roy Murillo Rodríguez, ix) Marta Iris Muñoz Cascante; g) Declarants for information purposes proposed by the State: i) Daniel González Álvarez, ii) Edwin Jiménez González, and iii) Elías Carranza; h) expert witnesses proposed by le Commission: i) Alberto Bovino, and ii) Juan Pablo Gomara; i) expert witnesses proposed by SIPDH: iii) Walter Antillón; j) expert witnesses proposed by Adrián Martínez Blanco: iv) John Pablo Hernández Rojas, and v) Giselle Chacón Araya; k) expert witnesses proposed by AIDEF: vi) José Joaquín Ureña Chamberzar, and vii)Juan Gerardo Ugalde Lobo; and l) expert witnesses proposed by the State: viii) Carlos Alberto Beraldi.

[15] *Cf. Case of Amrhein et al. v. Costa Rica. Call to a Hearing*. Order of the Inter-American Court of Human Rights of August 21, 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/amrhein_21_08_17.pdf.

17. *Observations on the helpful evidence and annexes to the final written arguments.* On December 19, 2017, the State, the Commission, *Factum Consorcio* and SIPDH presented observations on the helpful evidence presented in September 2017 and the annexes to the final written arguments. The representatives *Factum Consorcio* and SIPDH submitted additional annexes along with their observations. On March 15, 2018, SIPDH submitted observations on the helpful evidence forwarded by the State on March 8, 2018.

18. *Deliberation on preliminary objections and possible merits, reparations and costs*. The Court began deliberation on the preliminary objections on May 15 and 16, 2017. Subsequently, it continued the deliberation of this judgment on April 23, 2018.

III
JURISDICTION

19. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention, as Costa Rica has been a State Party to the American Convention since April 8, 1970, and recognized the Court's contentious jurisdiction on July 2, 1980.

IV
PRELIMINARY OBJECTIONS

20. The ***State*** filed six preliminary objections alleging: a) objection of compliance with the judgment in the case of *Herrera Ulloa v. Costa Rica*, *res judicata* under international law; b) objection of failure to exhaust domestic remedies; c) objection regarding lack of due process on the part of the Commission, lack of procedural balance of the parties, violation of the State's right to defense; d) objection regarding the alleged "use of the inter-American system as a fourth instance"; e) objection regarding the violation of the principle of complementarity in relation to prison conditions, and f) objection *ratione temporis* and objection *ratione personae*.

A. Objection of compliance with the judgment in the case of Herrera Ulloa v. Costa Rica, as international res judicata

A.1 Arguments of the parties and the Commission

21. The ***State*** argued that it had already undergone a process of international responsibility before the Court, following the judgment in the case of *Herrera Ulloa* and the monitoring of its compliance with that judgment, in which the Court determined that, based on the criminal procedural reform of 2010, the State had complied with the provision of the judgment that established the duty to adapt, within a reasonable time, its domestic legal system to the provisions of Article 8(2)(h) of the American Convention. It also pointed out that, in the context of compliance with the judgment in the case of *Herrera Ulloa* and under Law 8837, it established measures to comply with Article 8(2)(h), not only for the future but also for cases that at that time were being heard in various criminal proceedings and even for cases in which a final conviction had already been handed down. Therefore, as per the Order on Monitoring Compliance with Judgment in the *Case Herrera Ulloa,* there was an international *res judicata* regarding the situation of the Costa Rican criminal procedure system and the guarantees of the right to appeal the judgment. During the public hearing on preliminary objections, it held that "a decision on compliance with the judgment involving a scope beyond the specific case being monitored [would be] *res judicata* for the State", and explained that "the only way to substantiate alleged violations is a case by case analysis."

22. The ***Commission*** considered this objection to be inadmissible, since the case involves alleged victims, facts and analysis of rights different from those in the *Herrera Ulloa* case. In addition, it explained that, contrary to the State's claim, the order on Monitoring Compliance with Judgment of November 22, 2010, did not state that the adoption of Law No. 8837 rectifies possible violations of the right to appeal judgments that took place prior to its entry into force. In this regard, it explained that the alleged victims were convicted prior to the enactment of said law and could not have access to the remedy of appeal created by it, pursuant to its transitory provision. Consequently, it was necessary to evaluate its execution, so that issues related to its implementation and its concrete effects on the alleged victims in the case would be a matter of merits and not of a preliminary nature.

23. The ***Factum Consorcio*** representatives explained that the State reforms did not guarantee the alleged victim Jorge Martínez Meléndez the possibility of a comprehensive review of his case or his right to challenge the criminal sentence imposed on him, consisting of two cumulative prison sentences. Likewise, regarding his second conviction, which was not final as of December 2010, transitory provision III of Law 8837 provided a period of two months to convert the writ of cassation into an appeal, and that such act had to be authorized by the Third Chamber. However, the decision issued on March 30, 2012, by Judge Rafael Ángel Sanabria Rojas of the Third Chamber of Criminal Cassation of Costa Rica, expressly denied Jorge Martínez Meléndez the conversion of his pending motion for reversal on cassation into an appeal. Consequently, the remedy provided by the State in Law 8837 did not comply with Article 8(2)(h) of the American Convention, and with respect to the cases of persons with convictions prior to the enactment of that law, there is no *res judicata*. Finally, they pointed out that the legal basis for Mr. Martínez's case is not only the violation of Article 8(2)(h) of the Convention, but also other alleged violations of rights contained therein on which *res judicata* is not even alleged.

24. The ***Inter-American Defenders*** argued that the objection of *res judicata* does not apply, since it does not comply with the principle of double identity of persons and facts. Indeed, in the instant case, the violation of several rights other than the right of appeal is alleged, as well as the inadequate application of other laws or rules that did not exist when the Herrera Ulloa judgment was handed down in 2004. They also stated that this case offers an opportunity to broaden the standards regarding the right of appeal, oral proceedings, due process and an impartial judge, as well as the State's obligations with respect to persons deprived of liberty, such as physical integrity, life, access to drinking water and adequate food.

25. The common interveners ***SIPDH*** argued, first, that the State did not initially allege the preliminary objection of international *res judicata* during the proceedings before the Commission, and therefore, by virtue of *estoppel,* its right to allege it was precluded. Secondly, they argued that the *Herrera Ulloa* and *Amrhein* cases do not share the same purpose, cause and subject. Third, they noted that the criminal procedural reforms that improved the criminal challenge system with the creation of the appeal and the appeal courts "[did] not favor any of the petitioning victims in this case, since none of the transitory provisions [of] those reforms allowed them to exercise the new remedy of appeal," maintaining them at a disadvantage and under procedural discrimination. Fourth, that the alleged victims are persons with final convictions due to the lack of an ordinary comprehensive remedy in criminal matters. In this sense, no extraordinary remedy, such as the motion for review, which must await the final criminal judgment, can be consistent with the provisions of the American Convention, due process or with the scope of Article 8(2)(h) of said treaty.

A.2 Considerations of the Court

26. First, it appears from the case files that during the respective admissibility and merits proceedings in the instant case before the Commission, the State affirmed that the reforms of the Costa Rican Criminal Procedure System made it possible to adapt its domestic legal system to the provisions of Article 8(2)(h) of the American Convention, in compliance with the judgment in the case of *Herrera Ulloa v. Costa Rica,*[16] delivered by this Court on July 2, 2004. Consequently, the Court considers that the principle of *estoppel* is not applicable to the State. [17]

27. Now, in the terms in which the present preliminary objection has been filed, this Court clarifies that, under Articles 67 and 68(1) of the American Convention, "[t]he judgment of the Court shall be final and not subject to appeal" and that "[t]he States Parties to the Convention undertake to comply with the decision of the Court in any case to which they are parties." These treaty provisions, which derive from the basic principle of the international responsibility of States, constitute the main foundation that renders the judgments of this Court binding on the parties to an international dispute, along with the correlative duty to abide by and comply with everything established therein.[18] This absolute link between the contents and effects of the judgment and the parties to the dispute, which is where the authority of *res judicata* is created, corresponds to a principle of international law.

28. Article 47(d)[19] of the American Convention provides that a petition is inadmissible when it is substantially the same as a previous petition or communication already examined by the Commission or by another international body. In this regard, the Court has established that the phrase "substantially the same" means that there must be "identity" or similarities between the cases. In order for this identity to exist, three elements must be present, namely: the parties must be the same, the subject matter must be the same and the legal grounds must be identical.[20] However, it should be noted that the State is not alleging the identity of these three elements with respect to the whole of this case with the *Herrera Ulloa* case, but rather with respect to the alleged violation of the right to appeal the judgment.

29. In this regard, it is evident that, both in the *Herrera Ulloa* case and in the instant case, part of the legal basis is identical with respect to the alleged violation of the right to appeal

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[16] During the admissibility proceeding for the eight initial petitions, the State informed the Commission that it had adopted Laws 8503, 8837 and their respective transitional provisions I and III, and argued that "by decision of the Inter-American Court of November 22, 2010 concerning monitoring compliance with the judgment in the case of *Herrera Ulloa*, the Court concluded the case, in light of the aforementioned law, and ordered it archived, finding that Costa Rica had fully complied with the decision in that judgment. Therefore, it contends that the Inter-American Court found that Costa Rica gave effect to the provisions of Article 8 (2) (h) of the American Convention, ensuring comprehensive supervision or enforcement of the decisions of the trial courts." *Cf.* Admissibility Report 105/11 of July 22, 2011 (evidence file, folios 18246).

[17] The Court has indicated that when a party in a case adopts a position that is either beneficial to it or detrimental to the other party, the principle of estoppel prevents it from subsequently assuming the contrary position. *Cf. Case of Neira Alegría et al. v. Peru. Preliminary objections.* Judgment of December 11, 1991. Series C No. 13, para. 29, and *Case of the Garífuna Community of Triunfo de la Cruz and its members v. Honduras. Merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 305, Para. 22.

[18] The Court reiterates that the obligation to comply with the judgments of this Court is a basic principle of international law, supported by international jurisprudence, according to which States must fulfill all their international treaty obligations in good faith *(pacta sunt servanda);* and, as already noted by this Court and established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, domestic law may not be invoked as justification for failure to observe international obligations. *Cf. International responsibility for the promulgation and enforcement of laws in violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35.

[19] Article 47(d) of the American Convention establishes that: "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: […] d) the petition or communication is substantially the same as one previously studied by the Commission or by another international organization."

[20] *Cf. Case of Baena Ricardo et al. v. Panama. Preliminary objections*. Judgment of November 18, 1999. Series C No. 61, para. 53, and *Case J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, Para. 30.

the judgment established in Article 8(2)(h), in relation to Articles 1(1) and 2 of the American Convention.[21] However, there is no identity or similarity as to the parties, since in the judgment in the *Herrera Ulloa* case of July 2, 2004, the Court's ruling was made only with respect to the State of Costa Rica and Mr. Mauricio Herrera Ulloa,[22] without any reference whatsoever to the seventeen alleged victims in this case. Nor is there any identity between the object of the *Herrera Ulloa* case and the instant case, given that on this occasion the petitioners allege the incompatibility with the American Convention of norms that did not exist at the time when said case was decided, namely: Law 8503 of 2006 and Law 8837 of 2010.

30. It should also be noted that in the Order on Monitoring Compliance with Judgment of November 22, 2010, issued in the *Herrera Ulloa* case*,* the Court assessed the creation of the appeal remedy established in Law 8837, but did not rule on its future application. Nor did it rule on the reforms to the remedies of cassation and review established in Laws 8503 and 8837, nor on their respective transitory provisions I and III, which established a special motion of review for persons whose convictions became final prior to the entry into force of such laws. Likewise, the Court made no mention of the possibility contemplated in transitory provision III of Law 8837 that in cases pending resolution, the appellant could convert his petition for a writ of reversal on cassation to a motion for appeal.[23] In the instant case, the compatibility of these rules with the right to a comprehensive remedy established in Article 8(2)(h) of the Convention is disputed. Therefore, the Court dismisses this preliminary objection.

B. Objection of failure to exhaust domestic remedies

B.1. Arguments of the parties and the Commission

31. The ***State*** argued that, in relation to the alleged victims who considered that Article 8(2)(h) of the Convention had been violated and who had final convictions, the domestic remedies had not been exhausted when the petition was lodged with the Commission and forwarded to the State, in accordance with the Code of Criminal Procedure of 1973, the Code of Criminal Procedure of 1996, Law 8503 of 2006 and its transitory provision I, as well as Law 8837 of 2010 and its transitory provision III. It argued that in some cases, the remedy of appeal on cassation was not pursued which, with its "de-formalization" since the early 90s, allowed for the comprehensive review of the judgment. In other cases, neither the review procedure established in the Codes of Criminal Procedure of 1973 and 1996, nor the special review procedure established in the transitory provisions of Laws 8503 and 8837 - which guarantees an accessible, adequate and effective remedy, especially for persons with convictions - were used. Furthermore, it pointed out that those alleged victims who did file review proceedings under the transitory provisions of Laws Nos. 8503 and 8837 did not indicate the reason for the alleged violation of Article 8(2)(h) and why the judgment should be reviewed, and therefore did not properly exhaust domestic remedies. The State also presented specific and detailed arguments with respect to each of the eight petitions and requested that the case be declared inadmissible.

32. At the same time, the State noted that the alleged victims Rafael Rojas Madrigal and Damas Vega Atencio raised a series of complaints in relation to their conditions of detention, health care, food and alleged acts of torture during their stay at the Institutional Care Center

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[21] In the *Case of Herrera Ulloa v. Costa Rica,* the Court also examined and declared violations of Articles 13, 8 and 25 of the Convention.

[22] *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, first and second operative paragraphs.

[23] *Cf. Case of Herrera Ulloa v. Costa Rica*. *Monitoring Compliance with Judgment*. Order of the Inter-American Court of Human Rights of November 22, 2010, Considering paragraphs 15 and 16.

(CAI) La Reforma. Regarding access to medical assistance or health care, it held that the alleged victims did not file the appropriate remedies at the time when the situations that merited it apparently arose, but two or even three years after the time when they submitted the petition. In addition, it pointed out that it was only in 2012, after the issuance of the Admissibility Report, that Rafael Rojas filed claims in relation to access to drinking water in the CAI La Reforma, which would be "outside the scope of the litigation determined in said Report." In relation to the alleged acts of torture, it argued that there is no evidence that the alleged victims had pursued remedies regarding their specific cases at the time the State became aware of the petitions. In this regard, the State argued that one of the appropriate remedies is that of *amparo* and, in addition, the national system has procedures for execution of the sentence, which, at the time the Commission transferred the petitions to the State, had not been exhausted by the alleged victims.

33. The ***Commission*** requested that the preliminary objection be declared inadmissible. On the one hand, it pointed out that the objection of failure to exhaust domestic remedies was filed at the appropriate time by the State during the admissibility stage, and was the subject of a ruling in the Admissibility Report. In that report, the Commission decided that it would analyze at the merits stage whether the domestic legislation offered the alleged victims a suitable remedy for the protection of their right to a comprehensive review of their respective convictions and considered the objection established in Article 46(2)(a) of the Convention applicable with respect to the alleged violation of Article 8(2)(h).[24] This decision was confirmed in its Merits Report, which established that neither the appeal in cassation nor the review procedure complied with the requirements of Article 8(2)(h). In relation to the State's allegations of failure to exhaust domestic remedies to challenge the conditions of detention, it recalled that in its Admissibility Report it took into account the remedies filed.[25] In its final written observations, it reiterated that the domestic remedies created after the admissibility decision and their eventual effects on a case, is an aspect that cannot be analyzed in a preliminary manner, but corresponds to the analysis of the merits.

34. The ***Factum Consorcio*** representatives argued that, in the case of Jorge Martínez Meléndez, all domestic remedies were exhausted; however, neither the appeal for cassation nor the motion of review allowed for a full review of the judgment. They explained that although transitory provision I of Law 8503 allowed the filing of a motion for review on the grounds of having encountered limitations in cassation, Article 411 of the reformed Code of Criminal Procedure indicated that it was inadmissible to raise, by way of a review, matters that had already been discussed and resolved in cassation. Likewise, transitory provision III of Law 8837 and Articles 408, 410 and 411 of the reformed Code of Criminal Procedure meant that the motion for review did not constitute an expeditious, adequate and effective remedy for the comprehensive review of the facts and evidence, in addition to which it implied the existence of a final conviction, at which point a person is neither considered innocent nor treated as such, contrary to what is implied by the right to appeal the judgment. In turn, they argued that although transitory provision III of Law 8837 established the possibility of converting petitions for writs of cassation that were pending as of December 2010 into a motion for appeal, the fact is that in decision No. 2012-00588 of March 30, 2012, the Cassation Chamber denied Jorge Martínez the possibility of such conversion in relation to his

[24] During the hearing on preliminary objections, it held that the Admissibility Report determined that the remedies mentioned by the State as being available to the victims, *prima facie* do not meet the requirements of suitability and effectiveness in respect of the alleged violation: first, because the writ of cassation, prior to the reforms of 2006 and 2010, was declared contrary to the Convention by the Court; second, because the special motion for review is only applicable to the final judgment and in specific circumstances, and third, because the motion of appeal created does not apply to the victims in this case.

[25] The Report notes that "some petitioners have filed judicial and/or administrative actions on particular situations such as medical care or food, and have thus brought the alleged situation to the attention of the prison authorities."

second conviction. Finally, they indicated that his first criminal case concluded with judgment No. 680-2007 of July 17, 2007, and the Criminal Cassation decision of March 11, 2008, and that through judgment No. 2012-001297 of August 29, 2012, the Third Chamber of Criminal Cassation ruled on an erroneous basis to determine the sentence; in other words, it did not hear the facts or evidence assessed in the trial. In their final written arguments, they held that "the fact that Jorge Martínez's challenge to judgment No. N°680-2007 […]eventually addressed in the decision on the appeal for cassation, No. 2008-00232 [...][,] or in the appeal for review, decision No. 2012-1297 […] does not make such remedies […] adequate, suitable or effective […]."

35. The ***Inter-American Defenders*** requested that the objection be rejected. They explained that all the alleged victims had filed an appeal in cassation against the conviction, considering that the domestic remedy had been exhausted, and that if some of them did not file for review, it would be because this is not part of the challenge procedure. They explained that the review provided for in the Code of Criminal Procedure of 1973 and the Code of Criminal Procedure of 1996, as well as in the transitory provisions of Laws 8503 and 8837, is an exceptional remedy; therefore, the alleged victims were not obliged to exhaust it. Furthermore, they indicated that the obligation to exhaust domestic remedies could never be extended to those means or procedures that arise after the petition has been lodged with the Commission. They also presented specific and detailed arguments regarding the alleged victims Rafael Antonio Rojas Madrigal, Fernando Saldarriaga Saldarriaga, Guillermo Rodríguez Silva, Marín Rojas Hernández and Manuel Hernández Quesada, to argue that they did exhaust the domestic remedies.

36. The common interveners ***SIPDH*** requested that the State's objection be declared inadmissible. First, they argued that in application of Article 46(2)(a) of the Convention, the Court should consider the analysis of the objection together with the examination of the merits of the case, since this is when evidence and arguments can be invoked on the alleged existence or not of effective legal remedies. Secondly, they argued that in this case there was *estoppel*, because the State acknowledged before the Commission that the review procedure was exceptional; however, before the Court, the State argued that this remedy should have been exhausted. Third, they recalled that in the *Herrera Ulloa* case the Court confirmed the inefficacy of the remedy of cassation, so that it was not a remedy that the petitioners were obliged to exhaust.

37. Fourth, they argued that none of the petitioners was under the obligation to exhaust the special remedy of review contemplated in the Code of Criminal Procedure of 1973, the Code of Criminal Procedure of 1996 and the transitory provisions of Laws 8503 and 8837, since its filing required a final criminal judgment and it did not have the characteristics of a comprehensive remedy that could review facts and assess evidence. Fifth, they alleged that when the petitioners were already serving their prison sentences, the criminal remedy was adapted to Article 8(2)(h) by means of a motion for appeal, but that the legislation did not include the right of the alleged victims to invoke the new remedy of appeal. Finally, they presented specific and detailed arguments with respect to the alleged victims Manfred Amrhein Pinto, Ronald Fernández Pinto, Carlos Osborne Escalante, Carlos Manuel González Lizano, Arturo Fallas Zúñiga, Carlos Eduardo Yepes Cruz, Luis Archbold Jay, Enrique Floyd Archbold Jay, Miguel Antonio Valverde Montoya, Miguel Mora Calvo and Damas Vega Atencio.

38. Regarding the conditions of detention and the lack of adequate medical care at the CAI La Reforma for Mr. Damas Vega Atencio, SIPDH indicated that Article 46(2)(b) of the American Convention is applicable, due to his disadvantaged situation with respect to any other citizen. It was argued that, being a person deprived of liberty materially and operationally limited his access to justice. This was exacerbated by his documented health

problems and, furthermore, he did not have the financial resources to hire private legal services to denounce the acts of which he was a victim while he was deprived of liberty. In addition, SIPDH requested that the Court follow its usual practice, namely that it is not necessary in all cases to have exhausted domestic remedies at the time the petition is lodged before the Commission, but that the remedies must have been exhausted at the time the Admissibility Report is decided. In this regard, it explained that these matters were raised with the administrative authorities of the respective prison, the authorities responsible for the execution of sentences, the Ombudsman's Office, and through *amparo* appeals and criminal complaints, and that almost all of the authorities failed to respond to these demands.

B.2. Considerations of the Court

39. Article 46(1)(a) of the American Convention establishes that in order to determine the admissibility of a petition or communication submitted to the Inter-American Commission, pursuant to Articles 44 or 45 of the Convention, it is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. In this regard, the Court has held that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be filed at the appropriate procedural moment, that is, during the admissibility proceedings before the Commission. When alleging failure to exhaust domestic remedies, it is up to the State to specify which remedies have not yet been exhausted, and to demonstrate that they were available, adequate, suitable and effective.[26] In this regard, the Court has stated that it is not for the Court or the Commission to identify *ex officio* which domestic remedies have not yet been exhausted. Therefore, it is not for the international bodies to remedy the lack of precision in the State's allegations.[27]

40. Before examining the alleged failure to exhaust domestic remedies, this Court notes that it is not disputed by the parties that the State filed this objection before the Commission in a timely manner.

41. Furthermore, the Court notes that the State's arguments in raising this objection focused on the failure to exhaust domestic remedies at the time each of the petitions was lodged with the Commission and then forwarded to the State. In this regard, the Court has already established that Article 46 of the Convention should be interpreted to mean that exhaustion of domestic remedies is required at the time of the decision on the admissibility of the petition and not at the time of its submission.[28] The Commission must have the updated, necessary and sufficient information to carry out this examination of admissibility, which must be submitted by the parties to the proceeding.[29] In the instant case, the eight petitions of the alleged victims were submitted between March 2004 and November 2006, and the admissibility process lasted until July 22, 2011, the date on which the Commission issued its Admissibility Report.

42. Thus, the Court notes that the State filed this objection in relation to two specific issues that will be analyzed in the following order: a) the criminal cases against the alleged victims

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[26] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, Para. 88, and *Case of Herrera Espinoza et al. v. Ecuador, Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2016. Series C No. 316, para. 25.

[27] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2016. Series C No. 315, para. 24.

[28] *Cf. Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2015. Series C No. 297, para. 25.

[29] *Cf. Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of February 26, 2016. Series C No. 310, para. 42.

and the alleged violation of Article 8(2)(h) of the American Convention, and b) the prison conditions of some of the alleged victims.

B.2.1. Alleged failure to exhaust domestic remedies in connection with the criminal cases against the alleged victims

43. First, in relation to the State's allegation that some of the alleged victims did not file an appeal in cassation, which would have allowed for a full review of the judgment, it is clear from the body of evidence that in the instant case all of the groups filed at least one appeal in cassation during the admissibility proceedings before the Commission.[30]

44. It should be noted that the alleged victims Miguel Mora Calvo (Group 7) and Damas Vega Atencio (Group 8) had two convictions and, therefore, two files each. In both cases, they only filed their respective cassation appeals with respect to one of their two convictions, which was decided for Miguel Mora Calvo (Group 7) on May 28, 1999 and for Damas Vega (Group 8) on March 28, 2003.[31] In the case of Miguel Mora Calvo (Group 7), he did not file an appeal in cassation in case No. 99-003994-0042-PE, in which he was convicted on December 5, 2000, for the crime of possession, transportation and storage of drugs.[32] For his part, Damas Vega Atencio (Group 8) did not file an appeal in cassation in case No. 01-002231-0063-PE, in which he was convicted on April 4, 2002 for the crime of aggravated robbery.[33]

45. The Court recalls that on July 2, 2004, it ruled in the case of *Herrera Ulloa v. Costa Rica*, establishing that "the writs of cassation filed to challenge the November 12, 1999 conviction did not satisfy the requirement of a liberal remedy that would allow the higher court to conduct a thorough analysis or examination of all the issues debated and analyzed in the lower court."[34] Therefore, it declared that the State violated Article 8(2)(h) of the American Convention in relation to Articles 1(1) and 2 thereof, to the detriment of Mauricio Herrera Ulloa,[35] and ordered Costa Rica to adapt its domestic legal system (*supra* para. 26).

46. The Court notes that, prior to the issuance of the Admissibility Report on July 22, 2011, the State enacted and gave effect on June 6, 2006, to Law 8503 "Law on the Opening of Criminal Cassation" and its transitory provision I, notifying the Commission of this fact.[36] Transitory provision I establishes the following:

> Persons convicted of a criminal act prior to the date of this Law, who have been prevented from petitioning for a writ of reversal on cassation against the judgment, due to the rules that regulated its admissibility at that time,

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30 i) *Cf.* Writs of cassation of Manfred Amrhein Pinto, Ronald Fernández Pinto, Carlos Osborne Escalante, Carlos Manuel González Lizano and Arturo Fallas Zúñiga of September 22, 2003 (evidence file, folio 28912 and ff); ii) *Cf.* Writs of cassation of Rafael Antonio Rojas Madrigal of February 2, 2001, June 8, 2001 and July 31, 2003 (evidence file, folios 1010, 33556, 1032, 33561, 1263, 33599 and 33695); iii) *Cf.* Writs of cassation of Carlos Eduardo Yepes Cruz, Miguel Antonio Valverde Montoya, Enrique Archbold Jay, Luis Archbold Jay and Fernando Saldarriaga Saldarriaga of September 9, 2004 (evidence file, folio 33736); iv) *Cf.* Writ of cassation of Jorge Alberto Martínez Meléndez of March 11, 2009 (evidence file, folios 33874 and 25948); v) *Cf.* Writs of cassation of Guillermo Rodríguez Silva and Martín Rojas Hernández of May 30, 2005 (evidence file, folio 35365); vi) *Cf.* Writ of cassation of Manuel Adilio Hernández Quesada of November 28, 2003 (evidence file, folio 2541); vii) *Cf.* Writ of cassation of Miguel Ángel Mora Calvo of May 28, 1999 (evidence file, folio 35469); viii) *Cf.* Writ of cassation of Damas Vega Atencio of March 28, 2003 (evidence file folio 35757).

31 *Cf.* Decision on the writs of cassation filed by Miguel Ángel Mora Calvo and Damas Vega Atencio of 28 May 1999 and March 28, 2003 (evidence file, folios 35469 and 35757).

32 *Cf.* Judgment of December 5, 2000 (evidence file, folio 35622).

33 *Cf.* Judgment of April 4, 2000 (evidence file, folios 2965 and 35883).

34 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra, para.* 167.

35 *Cf. Case of Herrera Ulloa v. Costa Rica, supra, para.* 168.

36 *Cf.* Admissibility Report No. 105/11, paras. 79 and 82 (evidence file, folios 18258 to 18259), and responses of Costa Rica before the Commission, regarding the petitions filed by the alleged victims. (evidence file folios 4175, 4178, 43371, 43423, 43526, 43547 and 43747).

> may seek a review of the conviction before the competent court, invoking, in each case, the grievance and the factual and legal aspects that could not be heard in cassation.[37]

47. In this regard, the Commission considered in its Admissibility Report that, "subsequent to the coming into force of Law 8503, the remedies available to the alleged victims –appeal [*casación*] and review - were limited in scope and did not offer a comprehensive examination because of the rules that governed them." However, it did not specify what those rules were or how they would limit the petitioners' rights to a comprehensive review of their conviction.

48. Before this Court, both the Commission and the common interveners have argued that the motion for review did not offer a comprehensive remedy to the alleged victims because it was an exceptional remedy that only operated once the criminal convictions became final. However, the special review remedy contemplated in transitory provision I of Law 8503 of 2006 was enacted specifically for the purpose of resolving the situation of persons with final convictions, who had been "prevented from filing an appeal in cassation against the conviction, because of the rules that governed its admissibility at that time," allowing them to invoke "the grievance and the aspects of fact and law that could not be heard in cassation." Given that this remedy was specifically intended for persons with final convictions, the fact that it is an exceptional remedy cannot be decisive, *per se,* to conclude that is it ineffective. Thus, in view of the State's arguments regarding the special remedy of review available as of June 6, 2006, a case-by-case analysis was required in order to verify whether, in each specific case, said remedy would have provided the alleged victims with the possibility of a comprehensive review of their conviction. It should be noted that, as stated in this Court's order of July 9, 2009 on monitoring compliance in the case of *Herrera Ulloa,* the Commission itself indicated that the effectiveness of Law of 8503 should be assessed "based on the application of the new model to specific cases."[38]

49. Thus, the Court considers that, for the purposes of exhausting domestic remedies, the eight groups of alleged victims should have filed a special motion for review based on transitory provision I of Law 8503 of 2006 during the admissibility proceedings before the Commission.

50. On this matter, the Court notes, first of all, that the alleged victims of Group 1, Manfred Amrhein Pinto et al., did not file any motion for review prior to the issuance of the Admissibility Report. Moreover, of the two individuals in Group 5, Martín Rojas Hernández and Guillermo Rodríguez Silva, the former did not file any motions for review while the latter filed one motion for review on July 22, 2011,[39] the same date on which the admissibility of the case was decided. In other words, by the time the admissibility decision was made, this remedy had not been filed, decided or brought to the attention of the Commission. Therefore, with respect to Groups 1 and 5, the State's objection is declared admissible.

51. Second, the Court notes that the following groups of alleged victims filed motions for review during the proceedings before the Commission, but not on the basis of transitory provision I of Law 8503: Group 7, Miguel Mora Calvo, in one of his two cases, No. 99-003994-

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[37] *Cf.* Law N°8503. Law on the Opening of Cassation, annexes 1 to the State's answering brief. (evidence file, folios 28473 and 28478).

[38] *Cf.* Order of the Court of July 9, 2009 in the case *Herrera Ulloa*, Considering paragraph 23.

[39] *Cf.* Guillermo Rodríguez Silva, in file No. 04-002096-042-PE, filed a motion for review on July 22, 2011, the date of the decision on admissibility of the case before the Inter-American Commission of Human Rights (evidence file, folios 2485/35380).

0042-PE;[40] as well as Group 8, Damas Vega Atencio, in his two cases.[41] On the other hand, Group 2, Rafael Rojas Madrigal, in one of his three cases, No. 099-0029291-042-PE, filed a special motion for review pursuant to transitory provision I, which was then withdrawn.[42] Therefore, the Court declares admissible the objection with respect to Groups 2, 7 and 8, in relation to the aforementioned cases.

52. Third, the Court confirms that three groups of alleged victims filed a motion for review based on transitory provision I of Law 8503 prior to the issuance of the Admissibility Report: Group 2, Rafael Rojas Madrigal in one of his three case files, No. 99-000136-065-PE;[43] Group 6, Manuel Hernández Quesada (only has one case file)[44]; and Group 7, Miguel Mora Calvo, in relation to one of his two cases, No. 97-000061-301-PE[45]. Therefore, the objection in relation to Groups 2, 6 and 7, as far as the aforementioned case files are concerned, is declared inadmissible.

53. Fourth, regarding Group 3, the alleged victims Carlos Eduardo Yepes Cruz et al., in their only case No. 02-000759-455-PE-2, also filed motions for review during the proceedings before the Commission, but not based on transitory provision I of Law 8503;[46] however, on March 9, 2009, the alleged victims of Group 3 Enrique Archbold Jay and Luis Archbold Jay, filed a motion for review before the Court of Cassation of Cartago, in which they did invoke said transitory provision.[47] Therefore, with respect to Group 3, the Court declares admissible the objection with respect to the alleged victims Carlos Eduardo Yepes Cruz, Miguel Antonio Valverde Montoya, and Fernando Saldarriaga Saldarriaga, but dismisses the objection with respect to Enrique Archbold Jay and Luis Archbold Jay.

54. Fifth, the Court notes that there are two groups of alleged victims who filed their cassation appeals within the framework of Law No. 8503 of 2006, "Law on the Opening of Criminal Cassation," and therefore its transitory provisions were not applicable to them, as the State itself indicated;[48] Group 2, Rafael Rojas, in another of his three cases, No. 02-004656-

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[40] *Cf.* Motion for review filed by Miguel Mora Calvo on May 24, 2007 (evidence file, folios 6048 and ff.), and Decision N° 2009-01158 of September 16, 2009 (evidence file, folios 6071 and ss.).

[41] *Cf.* Damas Vega Atencio filed several motions for review after the enactment of Law 8503 of 2006; however, he did not base the filing of this motion on transitory provision I of Law 8503. Within files Nos. 99-000506-062-PE: i) Decision of August 29, 2012 regarding the motion for review filed on September 28, 2009 (evidence file, folio 20770); b) Decision of February 8, 2013 (evidence file, folio 20792). Within file No. 01-002231-0063-PE: i) Motion for review of September 14, 2006 and decision 24 November 2006 (evidence file, folios 8468 and 35901); ii) Motion for review of May 22, 2007 and decision July 5, 2007 (evidence file, folios 7147 and 35906) and iii) Ruling of March 13, 2008 which decided the motion for review of January 11, 2008 (evidence file, folio 35909).

[42] *Cf.* Rafael Antonio Rojas Madrigal, in File No. 099-0029291-042-PE, filed a motion for review the 8 June 2007, which he subsequently withdrew. *Cf.* Motion for review filed on June 8, 2007 by Rafael Rojas (evidence file, folio 10739), letter of withdrawal of motion, dated April 17, 2007 (evidence file, folio 10726) and notification of June 21, 2007 of the Third Chamber of the Supreme Court of Justice (evidence file, folio 10830).

[43] *Cf.* Decision of the Third Chamber of May 28, 2010 (evidence file folios 33581 and 33587).

[44] *Cf.* Decision of the Third Chamber of May 23, 2007 (evidence file, folios 2575, 2578, 2579 and 33434). See also chart provided by the State (merits file, folio 3396).

[45] *Cf.* Decision of the Third Chamber 2009-225 of June 12, 2009 (evidence file, folio 35489).

[46] After the enactment of Law 8503, Carlos Eduardo Yepes Cruz, Miguel Antonio Valverde Montoya, Enrique Archbold Jay, Luis Archbold Jay and Fernando Saldarriaga Saldarriaga filed the following motions for review within file No. 02-000759-445-PE-2, but did not base these on transitory provision I of Law 8503: i) Motion for review of December 5, 2006 and Decision of April 19, 2007 (evidence file, folios 4596 and 4753), ii) Motion for review of May 22, 2007 and Decision of June 5, 2007 (evidence file, folios 4758 and 4787), and iii) Motion for review filed on behalf of Enrique Archbold Jay and Luis Archbold Jay in the hearing of August 25, 2009 (CD) (evidence file, folio 1997).

[47] *Cf.* Motion for review of March 9, 2009 and decision of 10 July 2009 (evidence file, folios 1952 and 1992).

[48] *Cf.* Chart "Failure to exhaust domestic remedies in relation to the 8(2) h)," presented by the State during the public hearing on the possible merits, reparations and costs (merits file, folio 44767).

0647-TP;[49] and Group 4, Jorge Alberto Martínez Meléndez, in his two cases.[50] Thus, for the purposes of exhaustion of domestic remedies, the filing of the special motion for review based on transitory provision I of this law is not required for these persons and in relation to these case files. Therefore, the State's objection with respect to them is inadmissible.

55. Finally, the Court recalls that during the admissibility proceedings before the Commission the State informed it[51] of the publication on July 9, 2010 of Law No. 8837 entitled "Creation of an appeals procedure, other reforms to the appeals system and implementation of new rules on oral proceedings in criminal cases," which would enter into force on December 10, 2011. The Commission issued its Admissibility Report on July 22, 2011, prior to the entry into force of said law, and therefore the filing of the special motion for review contemplated in transitory provision III of said law could not be required for the purposes of exhaustion of domestic remedies.

B.2.2 Conclusion

56. Accordingly, the Court will not hear the following criminal cases: Group 1, Manfred Amrhein Pino et al., sole case file No. 94-001127-0202-PE (conviction for embezzlement); Group 2, Rafael Rojas, case file No. 099-0029291-042-PE (conviction for rape and sexual abuse); Group 5, Guillermo Rodríguez Silva and Martín Rojas Hernández, sole case file No. 04-002096-042 (conviction for rape and sexual abuse); Group 7, Miguel Mora Calvo, case file No. 99-003994-0042-PE (conviction for possession, transportation and storage of drugs); and Group 8, Damas Vega Atencio, case files No. 99-000506-062-PE (conviction for two counts of attempted aggravated homicide and aggravated robbery) and No. 01-002231-0063-PE (conviction for aggravated robbery). Nor will it refer to the situation of the following persons in Group 3: Carlos Eduardo Yepes Cruz, Miguel Antonio Valverde Montoya and Fernando Saldarriaga Saldarriaga.

57. Accordingly, in the analysis of the merits of this case, the Court - unless other preliminary objections are successful - will only hear the criminal cases and take into account the allegations related to the following groups of alleged victims: Group 2, Rafael Rojas, cases No. 99-000136-065-PE (conviction for use of a false document) and No. 02-004656-0647-TP (conviction for embezzlement and use of a false document); Group 3, Enrique Archbold Jay and Luis Archbold Jay, case No. 02-000759-455-PE-2 (conviction for international drug transportation); Group 4, Jorge Martínez Meléndez, case No. 03-000082-016-TP (conviction for 12 counts of embezzlement in the form of a continuing offense) and No. 05-007495-0647-TP (conviction for slanderous denunciation); Group 6, Manuel Hernández Quesada, case No. 01-203116-0305-PE (conviction for rape and sexual abuse); and Group 7, Miguel Mora Calvo, case No. 97-000061-301-PE (conviction for rape and sexual abuse).

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[49] *Cf.* Decision No. 2012-00526 of March 22, 2012 (evidence file, folio 33695).

[50] *Cf.* Regarding the file of Jorge Alberto Martínez Meléndez No. 05-007495-0647-TP, he was convicted on August 3, 2010. He filed a writ of cassation, amended in accordance with Law 8503 of 2006. The Court does not have the exact date on which the appeal was filed, but it had to have been filed within 15 days of notification of the conviction judgment, in August 2010, pursuant to Article 469 of the Code of Criminal Procedure, available at: www.wipo.int/edocs/leyes/es/cr/cr090es.pdf On June 14, 2013, the Third Chamber of the Supreme Court of Justice, decided the writs of cassation filed by José Martínez Meléndez, his defense counsel and Jorge Martínez Meléndez against judgment No. 2013-00744 of August 3, 2010, for the offense of libelous denunciation and actual libel (evidence file, folio 25948).

[51] *Cf.* Report of October 30, 2010 of Costa Rica before the Commission in the Petition No. P-1174-04, Damas Vega Atencio (evidence file, folios 43370 and 43378).

B.3. Alleged failure to exhaust domestic remedies with respect to the prison conditions of Rafael Rojas and Damas Vega Atencio

58. This Court recalls that the rule of prior exhaustion of domestic remedies is conceived in the interests of the State, since it seeks to exempt it from responding before an international body for acts attributed to it before it has had the opportunity to remedy them by its own means.[52] Therefore, the Court will analyze whether, in the instant case, the alleged victims filed the remedies that would allow the State to rectify the alleged violations of the Convention in relation to prison conditions at the CAI La Reforma.[53]

59. Regarding the alleged failure to exhaust domestic remedies in relation to the conditions of detention, it is necessary to clarify that in its answering brief the State only filed a preliminary objection with respect to the alleged victims Rafael Antonio Rojas Madrigal and Damas Vega Atencio.

60. The petitions of Rafael Rojas and Damas Vega were filed on July 29, 2004[54] and November 3, 2004,[55] and the Admissibility Report was issued approximately seven years later, on July 22, 2011 (*supra* para. 3.b). Regarding the conditions of detention in the CAI La Reforma, during the admissibility stage before the Commission, Rafael Rojas filed, prior to the issuance of the Admissibility Report: a complaint of illness before the Sentence Execution Court of the first Judicial Circuit of Alajuela on June 26, 2006;[56] two writs of *habeas corpus* on July 18[57] and December 12, 2006;[58] a complaint on November 26, 2007;[59] a writ of *amparo* on May 5, 2008,[60] and a writ of *amparo* on January 18, 2010.[61] For his part, Damas Vega filed, prior to the issuance of the Admissibility Report, the following appeals: a complaint on June 19, 2006;[62] a writ of *amparo* on September 7, 2006;[63] a complaint on October 2,

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[52] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 20.

[53] *Cf. Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 244. paras. 123 to 127.

[54] *Cf.* Petition regarding Rafael Rojas Madrigal (evidence file, folio 8601). It should be noted that he allegedly filed a second petition on November 17, 2008.

[55] *Cf.* Petition regarding Damas Vega Atencio (evidence file, folio 6957). The State alleged the presentation of the petition of November 3, 2004, in relation to file 99-000506-062-PE, as well as a second petition on March 3, 2005 regarding File 01-002231-0063-PE.

[56] In this complaint he alleged that he had not received medical treatment for various physical ailments. *Cf.* Complaint filed by Mr. Rojas Madrigal, June 26, 2007 (evidence file, folios 1723-1732).

[57] In this complaint he claimed to have suffered ill-treatment, theft and death threats after collaborating with the institution on a confidential report on the extortion practiced by a gang of inmates against the rest of the prisoners. *Cf.* Decision of the Constitutional Chamber, of July 26, 2006 (evidence file, folios 1737-1739).

[58] In this complaint, he alleged the impossibility of receiving medical assistance due to the maximum weekly quotas attended by a single health professional. *Cf.* Decision of the Constitutional Chamber, of December 18, 2006. Annex to the communication of the petitioner of March 7, 2007 (evidence file, folios 1762-1766).

[59] In this complaint he alleged torture by prison officers of CAI La Reforma. *Cf.* Criminal complaint of November 26, 2007 (evidence file, folio 1752), and Merits Report of the Commission (merits file, folio 51); pleadings and motions brief of the common interveners SPIDH (merits file, folio 517), and answering brief (merits file, folio 1525).

[60] In this complaint he alleged food shortages suffered by the inmates, since the food was distributed by other inmates *Cf.* Decision No. 2008-009067 of the Constitutional Chamber, May 29, 2008 (evidence file, folio 1800).

[61] In this complaint he alleged food shortages at breakfast, reduced amounts of food on visiting days and overcrowding in Area B of the CAI La Reforma *Cf.* Decision No. 2011-001692 of the Constitutional Chamber, February 11, 2011, ruling on another motion for amparo filed by Rafael Rojas (evidence file, folio 1810).

[62] He denounced the alleged theft of food from the prison facility by prison officers. *Cf.* Petition dated June 19, 2006, sent to the Courts of Justice of Alajuela, the Office of the Public Prosecutor, the Deputy Prosecutor's Office, the Regional Delegation of the OIJ and the Office of the Comptroller General of the Republic, on June 19, 2006 (evidence file, folio 20802).

[63] In this complaint he alleged a lack of medical care for chest pains. *Cf.* Decision No. 2006-014040 of the Constitutional Chamber, of September 22, 2006 (evidence file, folios 42188-42189).

2006;[64] a request for a response to a complaint filed on November 2, 2006;[65] an incidental plea of illness on November 13, 2006;[66] a complaint on December 4, 2006;[67] one complaint of illness in 2007;[68] several appeals before the Court of Cassation between 2007 and 2008;[69] one complaint on an unknown date before the Ombudsman's Office;[70] one complaint on an unknown date before the Sentence Execution Court of Alajuela,[71] and four complaints during 2008.[72] In view of the foregoing, since a number of judicial and administrative remedies were filed in which the alleged victims presented various claims, the objection raised by the State regarding the failure to exhaust domestic remedies with respect to the prison conditions of Rafael Rojas Madrigal and Damas Vega Atencio was dismissed.

C. Objection regarding lack of due process on the part of the Inter-American Commission, lack of procedural balance and violation of the State's right to defense

C.1. Arguments of the Commission and the parties

61. The ***State*** alleged that the Commission committed serious violations of due process, procedural balance and the State's right of defense in the processing and preparation of the case, which should lead to the procedural invalidation of the case and, therefore, its evident inadmissibility before the Court, based on the following arguments:

> a) The way in which the case has been joined is unacceptable because the petitions submitted to the Commission deal with a series of different factual aspects, alleged human rights violations other than Article 8(2)(h) of the Convention and the particular circumstances of the petitioners are dissimilar. Therefore, the way of joining the cases without even differentiating the procedural rules, "only creates a cumbersome procedure and an imbalance in the adversarial nature of the case." The joining of eight

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[64] In this complaint, he alleged that the inmates received poor food, which was sometimes uncooked, and reiterated the alleged theft of food by prison officers. He also denounced a lack of hygiene in the distribution of food. *Cf.* Complaint addressed to the Sentence Execution Court, October 2, 2006 (evidence file, folio 20816).

[65] He requested the nutrition department of CAI La Reforma to respond to the complaint filed on October 2, 2006 regarding the poor quality of the inmates' food. *Cf.* Request for response to complaint before the nutrition department of CAI La Reforma, November 2, 2006 (evidence file, folio 20820).

[66] In this complaint he alleged various ailments as a result of his imprisonment. *Cf.* Report of illness of Damas Vega, November 13, 2006 (evidence file, folio 20847).

[67] In this complaint he alleged inhumane treatment received by injured inmates during their transfer to hospital. *Cf.* Official letter No. 01573-2007-DHR of the Ombudsman's Office, of March 7, 2007 (evidence file, folios 20890-20893).

[68] He alleged that he did not receive adequate medical treatment at the prison. *Cf.* Decision No. 959-2007 of the Sentence Execution Court, March 22, 2007 (evidence file, folio 20865).

[69] Referring to: i) alleged denial of a request for an operation due to his diabetes condition; ii) alleged lack of access to health care and lack of ambulances at the facility, iii) a search in which officers allegedly "touched" his genital area and his belongings were destroyed and stolen." This is an undisputed fact mentioned in the: i) Merits Report of the Commission (merits file, folio 52); ii) Pleadings and motions brief of the common interveners SPIDH (merits file, folio 518) and iii) Answering Brief of the State (merits file, folio 1523). However, this Court does not have sufficient information on this matter.

[70] Alleged that inmates began a hunger strike on December 3, 4 and 5, 2007 to protest against the poor quality of the food, the searches carried out on female visitors, and the "poor" medical care, adding that "on some occasions they were tortured." *Cf.* Official letter No. 02645-2008-DHR of the Ombudsman's Office of March 17, 2008 (evidence file, folios 20903-20905).

[71] He alleged that on September 28, 2008, he was locked up in a maximum security cell for 72 hours, without any explanation of the reasons for his transfer and being held incommunicado for more than 20 hours. Report of November 20, 2008 (evidence file, folio 3198).

[72] These complaints alleged the incorrect treatment of persons with mental illness and lack of medical attention. *Cf.* Official letter No. 00674-2010-DHR of the Ombudsman's Office of January 22, 2010 (evidence file, folios 20911-20916).

cases on the basis of a superficial and simplistic analysis based solely on the right to appeal the judgment, set aside broader considerations of the respective proceedings and the in-depth analysis of the existing effective procedural mechanisms.[73]

b) In most of the eight petitions that gave rise to the instant case, as time went by and even after the issuance of the Admissibility Report, the alleged victims added more allegations, arguments and alleged facts. This made it difficult for the State to use the relevant procedural mechanisms, including the impossibility of using preliminary objections when the subject matter of the litigation had already been defined in the Admissibility Report, but was constantly being expanded by the petitioners.

c) The Commission's weak analysis of the alleged violations in each of the criminal proceedings, specifically, in the cassation appeals, is extremely worrying. This is due to the fact that it is not possible to substantiate violations of due process and the right to appeal the judgment solely on the basis of a reading of the Code of Criminal Procedure of 1996 and without analyzing each case individually, even though the State pointed out that the cassation appeal cannot be separated from the jurisprudential development of the Constitutional Chamber and the Third Chamber of the Supreme Court of Justice, which, in accordance with control of conventionality, has modified and even disregarded the norms that the Commission mentioned in its Admissibility and Merits Reports.

d) The Commission did not properly analyze the preliminary objections filed during the admissibility phase. In this regard, it failed to conduct a thorough analysis of the review mechanism for specific cases as an adequate and effective remedy, which in the procedural codes of 1973, 1996, 2006 and 2010 served as another remedy at the domestic level, with clear characteristics of being adequate and effective for a comprehensive review of the judgment. It automatically excluded its validity and then applied the exception provided by the Convention to invalidate the argument of failure to exhaust domestic remedies. In this sense, and due to the fact that it did not conduct a precise, profound, objective and serious analysis, the Commission dismissed *ad portas* the measures adopted by the State to provide greater guarantees. Thus, in the Admissibility Report it made an advance judgment in relation to Law 8837, before it had even entered into force, rejecting the special review procedure that it established for cases such as those of the alleged victims.

e) On several occasions in the Merits Report, the Commission reached conclusions that were clearly unreasonable and superficial. Likewise, in several paragraphs of the Merits Report, false, incorrect, incomplete or inaccurate information was included.[74]

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[73] During the public hearing on preliminary objections, the State emphasized that it did not question the Commission's power to join petitions and cases, but rather requested that the Commission exercise that right responsibly respecting due process, the State's right of defense and the procedural balance between the parties. It argued that to join the cases it is necessary to provide reasons as to why the joinder is necessary in application of the Commission's Rules of Procedure.

[74] To support this argument, the State referred in detail to specific aspects of Merits Report, *inter alia*, it held that: i) there was a lack of a detailed analysis of the right to appeal the judgment, since it was sufficient to indicate that "the alleged victims began the appeals stage with a regulatory restriction of the arguments that they could present", to conclude the violation in general; ii) it concluded, without proper analysis, that "the denial of the conversion [of a petition for a writ of reversal on cassation filed by Rafael Rojas to one of appeal] for not having specified how Article 8(2)(h) was violated" is in breach of the right to full analysis; iii) it did not differentiate between the system that covered the criminal case against Manfred Amrhein Pinto and others based on the Code of Criminal Procedure of 1973, and the one applied to the other groups of alleged victims whose cases were based on the Code of Criminal Procedure of 1996. Furthermore, there seems to be an interest in making people think that the Case of Manfred Amrhein and others was limited to the 1996 Code, when this was not the case; and iv) to conclude that the cassation appeal of Law 8503 excluded the possible assessment of the facts, the judgment 2008-00232 Third Chamber of Jorge Martinez was cited, which referred to the impossibility of reviewing the facts

f) On the basis of two cases - those of Rafael Rojas and Damas Vega - the Commission argued that there is "generalized situation" regarding the conditions of detention at the CAI La Reforma and concluded the violation of the right to personal integrity to the detriment of all the victims in this case who have served their sentence at said prison facility, as well as Rojas Madrigal due to the lack of access to health services. All this is an illogical, unfounded reasoning, lacking in evidence. It pointed out that in order to comply with the Constitutional Chamber's ruling on drinking water, food, prison facilities and health care, the State provided extensive information that was not included by the Commission in the submission of the case, and it even "affirmed that the State had not provided information on compliance with the recommendations."

g) The Commission did not comply with Article 35 of the Rules of Procedure, because when it submitted the case it did not present all the documentation included in the file, especially the State's briefs submitted after the Merits Report.

h) The common interveners SIPDH submitted two briefs to the Court containing pleadings and motions in violation of procedure and abuse of the system.

62. The ***Commission*** considered that the arguments submitted by the State were inadmissible. First, on the form of joinder of the cases, it recalled that according to its Rules of Procedure it has the power to join cases in the same file if they "concern similar facts, involve the same persons or reveal the same pattern of conduct." In the Admissibility Report, it joined the eight petitions, since they all alleged that the State had violated the judicial guarantees established in Articles 8 and 25 of the Convention and, in particular, Article 8(2)(h), "for the alleged lack of an ordinary remedy for the comprehensive review of convictions handed down against the alleged victims." For its part, the State, in its only communication containing arguments on the merits, dated June 2013, did not question the joinder of cases. In addition, it noted that the State did not explain specifically the nature of the alleged harm caused to its defense by the joinder of the cases.[75]

63. Second, with respect to the failure to include all the documentation contained in the file when submitting the case to the Court, it explained that, due to an involuntary error in the process of digitalizing the information, it did not forward to the Court the documentation submitted by the parties after having issued the Merits Report. However, it sent said documentation later, in its observations to the preliminary objections, and without affecting the State's right of defense, since during the proceedings before the Commission, the information was duly transmitted to the parties. Third, regarding the alleged inadequate legal analysis, it argued that this allegation does not have the character of a preliminary objection but rather questions the analysis of the merits carried out by the Commission. Fourth,

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of the prosecutor's indictment, since these are very different from the proven facts of the conviction. During the public hearing on preliminary objections, it pointed out the contradictions of the Commission in its basic analysis, since paragraph 198 of the Merits Report states that "the determination as to whether or not the right to appeal the judgment has been violated must be examined on a case by case basis"; however, in paragraph 207 it considered it "unnecessary to delve deeper into the specific allegations raised by the alleged victims in their petitions (…), or into the response to said allegations received by them."

[75] During the public hearing on preliminary objections it explained that, according to its Rules of Procedure, "[t]he use of the joinder mechanism does not require that the cases be identical in all aspects [,] which would be impracticable, but rather that they involve similar facts or follow the same pattern of conduct." In this regard, and without prejudice to the other alleged violations declared in the Merits Report, it held that Article 8(2)(h) of the Convention "is the central violation in the instant case and constitutes a clear common and cross-cutting element in all the matters that comprise it [,] which is sufficient to justify the joinder." Finally, in the hearing on preliminary objections and in its final written arguments, it recalled that the joinder of cases has been applied on numerous occasions and that several of these cases have even been heard by the Court.

regarding the submission of two pleadings and motions briefs by the common interveners SIPDH, it recalled that this matter was already settled by the Court on September 17, 2015.

64. The common interveners ***Factum Consorcio*** reiterated that in the case of Jorge Martínez Meléndez it was clear that the legislation in force restricted the possibility of examining the arguments of fact and law in cassation. They considered that the decision of the Third Chamber was clear in indicating that it would not proceed to review the facts considered proven in the judgments, and the decision that did not allow the conversion of one of the appeals in cassation into an appeal was evident. Therefore, in this particular case, the appeal for review in the period under study was far from being an expeditious, adequate and effective remedy, as required under Article 8(2)(h). Furthermore, they affirmed that the State did not observe the limits of procedural fairness, since contrary to what it indicated in judgment No. 2008-232, the Third Chamber was clear in denying the possibility of challenging the veracity of the facts considered proven in the conviction.

65. The ***Inter-American Defenders*** alleged that the State did not indicate clearly and with evidentiary grounds which serious defects had prevented the conduct of its defense, or that any act was openly biased. They explained that in the proceeding before the Commission, the State raised objections and responded to each of the arguments in the petitions. Likewise, the Commission was diligent and respectful of due process, since it allowed all the parties to develop their evidentiary activities, provided adequate time to prepare their defenses, and took into account the arguments of the State; therefore, there was no "inequality of arms" in favor of the alleged victims. Regarding the joinder of the cases, they argued that the State had every opportunity to conduct its defense throughout the proceedings before the Commission, and that in the cases there is consistency in the rights alleged to have been infringed, that is, the overcrowded conditions in the prison, chronic and serious problems in the Costa Rican appeals system and regarding other alleged rights.

66. The common interveners ***SIPDH*** argued that the objection should be dismissed. As for the alleged erroneous joinder of cases, they argued that this was not challenged by the State in a timely manner. Likewise, they argued that the Commission joined the cases based on its own Rules of Procedure, and that in the matter of the joinder of petitions, the Commission's actions have validity and legality *iuris tantum*. In this case, the State has merely presented a number of disagreements without demonstrating to what extent its right of defense and the procedural equality of the parties have been impaired by the Commission's decision. In turn, SIPDH pointed out that the alleged victims understand that the joinder of cases "serves as an instrument for a more comprehensive analysis of their specific situations and that it can be a tool to resolve a structural problem that transcends their specific cases." Since all the joined cases refer to the alleged lack of a comprehensive ordinary remedy in criminal cases, it is appropriate and logical that, for procedural economy and structural logic, several similar cases should be resolved together in terms of this general and systematic questioning.

67. Finally, regarding the documents that the Commission had allegedly omitted to present to the Court, the State indicated that although it does not know which documents were not submitted, if this was the case, it would not represent such a serious fault as to reject the admissibility of the case or irreparably affect the State's defense.

C.2 Considerations of the Court

68. The Court recalls that, in matters under its jurisdiction, it has the power to review the legality of the Commission's actions.[76] This does not necessarily imply an *ex officio* review of the proceedings before the Commission,[77] except in those cases in which one of the parties alleges a serious error that violates their right of defense before the Court.[78] Likewise, the Court must maintain a fair balance between the protection of human rights – the ultimate purpose of the inter-American system - and the legal certainty and procedural equality that ensure the stability and reliability of international protection.[79] Therefore, any party that claims that the Commission's actions during the proceedings before it have been carried out in an irregular manner, affecting its right of defense before the Court, must effectively prove such prejudice.[80] A complaint or difference of criteria in relation to the actions of the Inter-American Commission is not sufficient.[81] It is therefore necessary to consider the grounds adduced by the State in order to determine whether the Commission's actions would have violated its right of defense.

69. Accordingly, the Court will now analyze the arguments presented by the State on this preliminary objection in the following order: i) alleged inadequate analysis by the Commission; ii) alleged incomplete submission of the case file to the Commission; iii) the two pleadings and motions briefs submitted by SIPDH; and iv) the joinder of the eight petitions that gave rise to this case.

C.2.1. Alleged inadequate analysis by the Inter-American Commission

70. The ***State*** argued that the Commission did not carry out an accurate, thorough, objective and serious analysis; reached unreasonable, illogical, unfounded and unproven conclusions; provided false, incorrect, incomplete or inaccurate information; did not present individualized evidence of the alleged violations; and incurred in contradictions (*supra* para. 61 letters c, d, e and f). The Court finds that the State's arguments constitute a disagreement with the Commission's criteria in its respective Admissibility and Merits Reports, which is not a reason to analyze the Commission's previous actions. During the proceedings before the Court, the State had procedural opportunities to exercise its right of defense and to challenge or reject the facts submitted to the consideration of the Court.[82] Therefore, the State's allegations should be examined in the analysis of the merits of the case and not as a preliminary objection.

71. With regard to the Admissibility Report's possible prejudgment of Law 8837, "before it had even entered into force" (*supra* para. 61 d), the Court recalls that "the considerations

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[76] *Cf. Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights) (arts. 41 and 44 of the American Convention on Human Rights).* Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, this operative paragraph, and *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 37.

[77] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, Para. 66, and *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 29, 2016. Series C No. 327, para. 28

[78] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra, para. 66,* and *Case Herrera Espinoza et al. v. Ecuador, supra, para.* 39.

[79] *Cf. Case of Cayara v. Peru. Preliminary objections*. Judgment of February 3, 1993. Series C No. 14, para. 63, and *Case of the Dismissed Workers of PetroPerú v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, Para. 51.

[80] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra, para.* 66, and *Case Valencia Hinojosa et al. v. Ecuador, supra, para.* 29.

[81] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of 6 August 2008. Series C No. 184, Para. 42, and *Case Valencia Hinojosa et al. v. Ecuador, supra, para.* 29.

[82] *Cf. Case of Vélez Restrepo and Family v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 32.

set forth by the Commission in its Admissibility Report are *prima facie* legal assessments and, therefore, merely constitute a preliminary analysis"[83] of the characterization it makes to establish possible violations. In this regard, the Court reiterates that "the Commission must necessarily conduct this preliminary analysis in order to determine whether or not the objections of failure to exhaust domestic are justified. To understand it otherwise would mean that the Commission could not rule, at the admissibility stage, on the reasons for declaring a petition admissible or inadmissible and would deprive the rule of Article 46(2) of the Convention of its *effet utile*, since in any of the hypotheses contained therein the Commission must carry out a prior analysis in order to justify its decision."[84] Consequently, the Court dismisses this aspect of the preliminary objection.

C.2.2. Alleged incomplete submission of the file by the Commission

72. The ***State*** argued that the Commission did not comply with Article 35 of the Rules of Procedure because when it submitted the case it did not present all the documentation included in the case file, specifically the briefs submitted by the State after the issuance of the Merits Report (*supra* para. 61 letters f and g). In its brief of observations on the preliminary objections, the ***Commission*** explained that the failure to submit information was due to an involuntary error in the process of digitalizing the information; consequently, it sent said information to the Court as an annex to this brief. Subsequently, the Commission forwarded the same documents as helpful evidence requested by the Court.[85] In this regard, the State pointed out in its observations to said documents that their submission by the Commission remained incomplete. Consequently, it forwarded those documents on February 15, 2017, together with its final written arguments.[86] The Court confirms that the documentation sent by the Commission and the State was forwarded to the parties and the Commission so that they could present any observations they considered pertinent. It should also be noted that the missing documentation was made known to the parties and to the State itself at all times, and therefore no prejudice to the latter may be inferred. Consequently, the Court dismisses this aspect of the preliminary objection. However, the Court will analyze the State's arguments on possible compliance with the recommendations contained in the Commission's Merits Report in the chapter on the merits of the case and, eventually, in the chapter on reparations.

C.2.3. Two pleadings and motions briefs submitted by SIPDH

73. The ***State*** argued that the common intervenor SIPDH submitted two pleadings and motions briefs (*supra* para. 61 letter h) in violation of procedure, abuse of the system, and in breach of the right of defense and procedural balance of the parties. Indeed, this Court confirms that on June 1, 2015, the common intervenor SIPDH submitted two pleadings and motions briefs, the first concerning five alleged victims,[87] and the second concerning six alleged victims.[88] In response, the Secretariat of the Court, in a note dated July 28, 2015,

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[83] *Cf. Case of Cruz Sánchez et al. v. Peru*, *supra, para.* 43.

[84] *Cf. Case of Cruz Sánchez et al. v. Peru*, *supra, para.* 43.

[85] In a note of the Secretariat of February 10, 2017, the Court asked the Commission to submit three briefs filed by the State in the proceeding before it, namely: the briefs of the State dated March 9 and May 12, 2009, and June 9, 2011.

[86] The State submitted together with its brief of final arguments, the briefs submitted in the processing before the Inter-American Commission that are not part of the file presented by the Commission, namely: a) Brief of June 18, 2014, b) Brief of June 25, 2014, c) Brief of September 19, 2014, d) Brief of September 23, 2014, e) Brief of November 11, 2014, f) Brief of November 17, 2014, and g) Brief of December 2, 2014.

[87] The group of five alleged victims are Manfred Amrhein Pinto, Ronald Fernández Pinto, Carlos Osborne Escalante, Arturo Fallas Zúñiga and Carlos Manuel González.

[88] The group of six alleged victims are Carlos Eduardo Yepes Cruz, Miguel Antonio Valverde Montoya, Enrique Floyd Archbold Jay, Luis Archbold Jay, Miguel Ángel Mora Calvo and Damas Vega Atencio.

informed the parties that "Article 25 of the Court's Rules of Procedure does not provide for the submission of multiple pleadings and motions briefs by the same group of representatives." However, following instructions from the Plenary of the Court, it stated that, "in order to safeguard the right of defense of the alleged victims, on this single occasion, the two aforementioned briefs will be considered as a set of pleadings. However, in the following procedural stages, the representatives should submit a single brief addressing the situations of both groups of alleged victims, so that their claims may be considered by the Court." Taking into account that the submission of such briefs was already discussed and resolved by this Court, it is not appropriate to reopen this discussion. Therefore, the Court dismisses this aspect of the preliminary objection.

C.2.4. Joinder of the eight petitions that gave rise to the case

74. First, regarding the argument of the Commission and the common interveners that the State did not object to the joinder of the eight petitions into one case in a timely manner, the Court observes that these petitions were processed separately by the Commission during their respective admissibility stages, and that was not until Admissibility Report 105/11 of July 22, 2011 that the Commission decided to join them into a single case,[89] without the parties being able to express their views on the matter until after that report had been issued. During the merits stage before the Commission, the State submitted a single brief dated April 1, 2013. Although in this brief the State did not expressly object to the joinder, the fact is that, under the heading "General Aspects," it did express its general disagreement with the "lack of clarity" with which the facts of the case unrelated to the alleged violation of Article 8(2)(h) of the Convention were admitted.[90] In addition, before this Court it has insisted on its position, following the same line of argument. Therefore, the Court considers that the State's argument has been raised opportunely.

75. Secondly, with regard to the alleged unacceptable manner of the joinder of the case, Article 29(5)[91] of the Rules of Procedure of the Inter-American Commission contemplates the possibility for the Commission to join cases. On the one hand, the Court notes that said provision establishes broad criteria for the joinder of cases and, on the other hand, that the decision on the joinder of petitions may affect the petitioners' right of access to justice and also affect the State's right of defense in adversarial proceedings, as well as on the alleged violations of rights and even the examination of the facts of the joined cases. However, the Commission's Rules of Procedure do not provide for the possibility of submitting the decision on the joinder of petitions to the prior consideration of the interested parties, so that they may express their possible objections, nor do they expressly allow for the parties to object to such decision, or establish how such objections will be decided, aspects that should be considered.

76. Article 30[92] of the Court's Rules of Procedure regulates the joinder of cases, stating that the Court may, at any stage of the proceedings, order the joinder of related cases when

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89 *Cf.* Admissibility Report No. 105/11, paras. 1, 4 and 13 (evidence file, folios 18246 and 18247 and 18249).

90 *Cf.* Report of the State of April 1, 2013 (evidence file, folios 18478 and 18479).

91 Article 29(5) of the Rules of Procedure of the Inter-American Commission establishes: "If two or more petitions address similar facts, involve the same persons or reveal the same pattern of conduct, the Commission may join and process them together in the same file".

92 Article 30 of the Rules of Procedure of the Inter-American Court of Human Rights establishes that:
1. The Court may, at any stage of the proceedings, order the joinder of related cases when there is commonality of parties, subject-matter, and applicable law.
2. The Court may also order that the written or oral proceedings of several cases, including the introduction of declarants, proceed jointly.

there is a commonality of parties, subject-matter and legal basis. It also establishes that after consulting with the Commission and the parties, the Presidency may order that two or more cases be heard jointly. The same article establishes the Court's authority to divide or split the cases submitted to its consideration; therefore, this Court can split and process separately the cases submitted jointly in the Merits Report by the Commission, since the Commission's decision to join the cases is not binding on it. In this sense, the Court may split or join cases when it deems it convenient or at the procedural opportunity it deems appropriate, in order to guarantee the right of the alleged victims to have access to inter-American justice, or when there are other relevant reasons for adopting such a decision.

77. In the instant case, the Court notes that in the Admissibility Report the Commission joined eight different petitions filed by a total of seventeen alleged victims. This involved significant complexities in terms of determining the facts of the case and examining the rights invoked, and in turn generated an unprecedented delay in its processing before the Court. However, for reasons of procedural economy and in order to guarantee as quickly and effectively as possible the right of the alleged victims to have access to inter-American justice, as well as to avoid further prejudice in terms of time, this Court did not consider it advisable to split the case, and will therefore decide all the issues raised in this judgment jointly.

78. Third, the State alleged that there were procedural irregularities during the proceedings before the Commission, that the case was allegedly complex and exceptional, with cumbersome processing, procedural imbalance and dissimilar circumstances, that there was no analysis or individualized evidence of the alleged violations declared in the eight cases, and that it was difficult to make use of procedural mechanisms and preliminary objections, since the alleged victims kept adding factual and legal arguments before and after the Admissibility Report, expanding the scope of the litigation (*supra* para.61). In this regard, the Court considers that the State had the opportunity to defend itself and to express its position whenever it considered it appropriate during the proceedings before the Commission;[93] however, before this Court it merely expressed its disagreement with the decisions taken by

3. After consulting the Agents, Delegates, and alleged victims or their representatives, the Presidency may order that the proceedings of two or more cases be joined.
4. The Court may, when it deems it appropriate, order that provisional measures applications be joined when the subject-matter or the parties are identical. If such is the case, the other provisions of this Article shall be applicable.
5. The Court may join proceedings for the monitoring of compliance of two or more judgments issued with respect to a single State if it considers that the decisions set out in each judgment are closely related. In those circumstances, the victims in those cases or their representatives shall designate a common intervener in accordance with Article 25 of these Rules of Procedure.

[93] During the respective admissibility proceedings before the Commission, the State submitted the following briefs: 1) seven briefs in the case Manfred Amrhein Pinto and other, on February 8, 2005, June 21, 2005, September 22, 2005, February 5, 2007, May 4, 2007, May 21, 2010 and August 12, 2010 (evidence file, folios 15206, 16114, 16595, 16626, 16636, 16648, 16688); 2) seven briefs in the case of Rafael Antonio Rojas Madrigal on March 9, 2009, August 6, 2009, September 24, 2009, April 29, 2010, September 15, 2010, January 17, 2011 and June 14, 2011 (evidence file, folios 12555, 13109, 12648, 13639, 13458, 13330 and 43951); 3) two briefs in the case of Damas Vega Atencio on October 30, 2010 and June 14, 2011 (evidence file, folios 6992 and 6719); 4) five briefs in the case of Miguel Ángel Mora Calvo on December 8, 2008, April 22, 2009, August 10, 2009, September 15, 2010 and January 25, 2011 (evidence file, folios 6309, 6177, 6147, 6027 and 6005); 5) six briefs in the case of Manuel Hernández Quesada on December 9, 2008, May 12, 2009, September 24, 2009, January 25, 2010, September 15, 2010 and February 18, 2011 (evidence file folios 5728, 5615, 5590, 5556 and 5417); 6) ten briefs in the case of Jorge Alberto Martínez Meléndez on September 2, 2008, December 3, 2008, April 13, 2009, June 1, 2009, August 6, 2009, September 24, 2009, April 14, 2010, May 6, 2010, October 20, 2010 and June 1, 2011 (evidence file, folios 3969, 3947, 3919, 3847, 3819, 3808, 3776, 3771, 3756 and 3201); 7) five briefs in the case of Guillermo Rodríguez Silva and Martín Rojas Hernández on July 24, 2007, December 21, 2007, July 2, 2008, December 8, 2008 and May 19, 2009 (evidence file, folios 4171, 4132, 4084, 4032 and 4010); 8) six briefs in the case of Carlos Eduardo Yepes Cruz and others on December 8, 2008, May 12, 2009, November 20, 2009, June 24, 2010, February 15, 2011 and June 9, 2011 (evidence file, folios 5387, 5364, 5380, 5013 and 4912); and 9) Report of the State of April 1, 2013 (evidence file, folios 18478 and ff). During the merits stage, the State submitted a brief on April 1, 2013 (evidence file, folios 18478 and 18479).

the Commission, without specifying the serious error that had allegedly been committed in violation of its right of defense or effectively demonstrating such prejudice.[94] In particular, the State did not identify which particular arguments it was unable to make in view of the alleged expansion of the subject matter of the dispute after the issuance of the Admissibility Report, and instead made arguments that pertain to the analysis of the merits of the case. Consequently, the Court dismisses this preliminary objection.

D. Objection regarding the alleged "use of the inter-American system as a fourth instance"

D.1. Arguments of the Commission and the parties

79. The ***State*** alleged that the Commission used the inter-American system as a fourth instance. It argued that the Commission's basic premise for understanding the alleged violations and concluding that there was a violation of the right to appeal the judgment was the dismissal of the appeals filed. It pointed out that the alleged victims in their arguments only expressed dissatisfaction with the outcome of the domestic judgments against them, without any real and objective basis for the alleged right to appeal the judgment. Thus, they would be using the inter-American system as a fourth instance for the review of national judicial decisions and of the respective judicial proceedings, in order to be exonerated from the criminal responsibility already determined. According to the State, the alleged victims had timely access to adequate and effective remedies, and furthermore, Costa Rica adapted its legal system and created additional remedies. However, they were unwilling to have recourse to the domestic courts, so they now seek to have the inter-American system review the alleged errors of fact or law that have been decided at the national level. In addition, the State presented specific arguments with respect to Groups 2, 3, 4 and 6 of the alleged victims.[95] In particular:

> a) with respect to Group 2, the State argued that the technical defense of Rafael Rojas took "clearly inappropriate" steps in the domestic jurisdiction as part of a strategy aimed at simulating defects or irregularities in the processing and trial of the case in order to "open the door to the [inter-American system]" and thus seek a new examination of the merits of the facts that had been adjudicated. The State also considered that, in order to accept the alleged victim's arguments on the manner in which his cassation appeals were decided,[96] reference must be made to the evidence that was analyzed by the trial court, and a hypothetical operation of inclusion or exclusion of the evidence must be carried out to define its essential role in the solution of the case. Thus, such exercise is part of the analysis to be carried out by a higher judge on appeal in the domestic sphere.
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> b) with respect to Group 3, the State pointed out that the alleged victims Luis Archbold Jay and Enrique Archbold Jay, through abbreviated procedures, acknowledged their responsibility for the crime for which were convicted, and their dissatisfaction relates to the length of the sentence imposed. It considered that disagreement with the conviction is a situation that does not necessarily imply that the demand to analyze the alleged violation of Article 8(2)(h) of the Convention should be accepted, since what is legally relevant is that the alleged victims had access to a means of appeal that made possible

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[94] This, despite the fact that during the public hearing Judge Humberto Sierra Porto expressly asked the State to explain said prejudice.

[95] According to paragraphs 56 and 57 of this judgment, the Court will not refer to the arguments of the parties with respect to Groups 1 and 5, nor to arguments of the parties regarding the alleged victims Carlos Eduardo Yepes, Fernando Saldarriaga, and Miguel Antonio Valverde Montoya of Group 3, or to the criminal cases of the alleged victim Damas Vega Atencio, of Group 8.

[96] Specifically referred to paragraphs 21-22 and 199-128 of the pleadings and motions brief of the common interveners AIDEF.

the discussion and broad review on appeal of the subject matter of the claim regarding the grounds for the sentence; therefore, the attempt to simulate an apparent violation of Article 8(2)(h) of the Convention, in order to use the Inter-American System as a fourth instance, is evident.

c) with respect to Group 4, the State alleged that, based on the following arguments, Factum Consorcio seek to use the Court as a fourth instance : i) allegations concerning "the conduct of Judge Ligia Arias Céspedes during the trial against Mr. Martínez," which would be "speculative" and would not demonstrate "that the duty of objectivity and impartiality had been violated by said judge;" ii) allegations related to the alleged extensive application and interpretation of the criminal definition used to characterize the facts of this case as constituting 12 crimes of embezzlement, seeking the review of the conviction handed down against Jorge Martínez; and iii) the alleged denial of the admission of and access to evidence for the defense. According to the State, the pleadings and motions brief "reiterates [the] claims that were not accepted internally and [are] raised under the false appearance of violations and procedural guarantees [...]." It also considered that the representatives' intention to use this Court as an appeal body is reinforced "by requesting as reparation [the] annulment of the convictions […] seeking the automatic lifting of the status of *res judicata*."

d) with respect to Group 6, the State argued that the representatives of the alleged victim Manuel Hernández "seem to understand" that the right to appeal the judgment is equivalent to accepting the arguments made against a conviction; however, in the specific case, the cassation appeal allowed for the comprehensive examination of the conviction, as well as the analysis and well-founded decision to reject the claims made. Therefore, from the alleged victim's allegations, what can be inferred is an attempt to use the Inter-American System as a fourth instance.

80. The ***Commission*** requested that this preliminary objection be declared inadmissible because its analysis of the case focused on determining whether the right to a full review of the judgment and other judicial guarantees were violated within the framework of the criminal proceedings, in breach of international treaties over which it has jurisdiction. For its part, in its defense, the State has taken as a starting point that there was no violation of human rights, when this is precisely what is at issue in the merits of the case.

81. The ***Factum Consorcio*** representatives argued that they did not intend for the Court to serve as a fourth instance, but rather for it to "determine whether or not the actions of the Costa Rican courts involved in the case of Jorge Martínez violated the State's international obligations." In particular, with regard to the actions of Judge Arias Céspedes during the proceedings against Jorge Martínez, they argued that this is a "proven fact that confirms the biased actions of the judges and therefore […] the violation of the principle of impartiality of the judge. Thus, it cannot be seen out of context in order to improperly allege that it is an attempt to seek a fourth instance." The representatives also considered that "the State's argument contains assertions that are not in accordance with Costa Rican law." With respect to the alleged extensive application of the criminal offense of embezzlement, they indicated that "evidence has been provided and offered […] [to demonstrate] that during 1997, Jorge Martínez Meléndez did not work for the State, but was an external consultant for the United Nations Program, and that by virtue of his contract he provided services in Costa Rica." In relation to the refusal to admit and allow access to evidence for the defense, they indicated that "they did not […] offer the evidence [in their pleadings and motions brief] that the State did refused to have examined at trial", but instead argued that the criminal proceeding was conducted in violation of conventional rights.

82. The ***Inter-American Defenders*** requested that this objection be dismissed, since neither the Commission nor the alleged victims intend to use the Inter-American System as a fourth instance, nor have they requested that the Court issue an acquittal or conduct a comprehensive review of the convictions. On the contrary, they stated that they sought to: ensure the validity of an effective remedy that establishes a true comprehensive review of the convictions; to determine a special procedure for the review of sentences in accordance with international standards; to ensure access by those deprived of liberty to the written judgment document; to ensure that their conditions of detention are consistent with the principle of human dignity; and to protect their health and physical integrity.

83. The common interveners ***SIPDH*** contended that the State's argument on the principle of subsidiarity is not a preliminary objection, but part of the debate as to whether or not the petitioners exhausted the remedies under domestic law. In this regard, they reiterated that the petitioners pursued the ordinary remedies available to them at the time they were convicted, without being obliged to exhaust the exceptional remedies of cassation and review. Regarding the use of the inter-American system as a "fourth instance," they argued that this argument should be rejected because at no time did they ask the Commission to review the facts or to act as a criminal court since that is not within its purview; rather, the facts of the joined case, in relation to Article 8(2)(h), would point to the lack of a comprehensive review of the judgment before a higher court. Lastly, in their final written arguments, they noted that the State failed to demonstrate that the facts investigated in each criminal proceeding were those "questioned or challenged" before the organs of the inter-American system.

D.2. Considerations of the Court

84. The Court has established that for the "fourth instance" objection to be admissible, it is necessary that the applicant or petitioner seek a review by the Court of a domestic court's ruling on the grounds of its incorrect assessment of the evidence, facts or domestic law, without at the same time alleging that said ruling violated international treaties over which the Court has jurisdiction.[97]

85. The Court has also indicated that when assessing compliance with certain international obligations, there may be an intrinsic interrelation between the analysis of international law and domestic law.[98] Therefore, in line with customary law,[99] the determination of whether or not the actions of judicial bodies constitute a violation of the State's international obligations may lead the Court to examine the respective domestic proceedings in order to establish their compatibility with the American Convention[100] and the inter-American instruments that grant it jurisdiction. Consequently, this alone does not constitute a violation of the principle of fourth instance.

86. First, the Court considers that the allegations made by the State about the Commission, as well as those of the representatives of Groups 2 (Rafael Rojas Madrigal), 3 (Luis Archbold Jay and Enrique Archbold Jay) and 6 (Manuel Hernández Quesada), do not seek to have the Court review the judgments of the domestic courts due to a possible incorrect assessment of the evidence gathered during the criminal proceedings, the facts established

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97 *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs. Judgment of November 26, 2010. Series C No. 220*, Para. 18, and *Case of Favela Nova Brasilia v. Brazil. Preliminary objection, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, para. 56.

98 *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra, para.* 16, and *Case of Favela Nova Brasilia v. Brazil, supra,* para. 56.

99 *Cf.* U.N. General Assembly, Resolution on State responsibility for internationally wrongful acts, A/RES/56/83, of December 12, 2001, Annex, Article 4.

100 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Favela Nova Brasilia v. Brazil, supra,* para. 56.

therein or the application of domestic law; rather, they argue that the alleged victims did not have an effective remedy that would allow for a comprehensive review of their convictions, in violation of Article 8(2)(h) of the Convention.[101] In order to determine whether such violations occurred, this Court will carry out, *inter alia*, an analysis of the domestic procedural stages, without ignoring the inter-American human rights protection system's complementary and auxiliary nature or acting as a fourth instance. Thus, the Court dismisses the objection in this regard.

87. With regard to the State's allegations concerning Group 4 (Jorge Martínez), in relation to the substitution of Judge Adela Sibaja Rodríguez by Judge Miriam Sandí Murcia in the Trial Court of the First Judicial Circuit of San José, the Court notes that in the pleadings and motions brief, the representatives alleged that "without the period [...] of 20 working days of suspension allowed due to the incapacity of a judge having elapsed, [...] [it] dismissed [...] Ms. Adela Sibaja Rodríguez as judge in [the] case, and appointed Ms. Miriam Sandí Murcía to the criminal court in her place." According to the representatives, the latter "did not have a current appointment that would allow her to be a member of the Criminal Trial Court of the First Judicial Circuit," in alleged violation of the principle of a competent judge and the territoriality of the criminal jurisdiction. Thus, the Court finds that the representatives challenge the compatibility of the actions of the domestic courts with the rights established in the American Convention, which is subject to evaluation by this Court, and therefore, the State's objection on this point is dismissed.

88. Regarding the alleged extensive application and interpretation of the criminal offense of embezzlement used by the State of Costa Rica, the Court notes that in the pleadings and motions brief the Factum Consorcio representatives argued that "the State could not apply the criminal offense of embezzlement and sentence [to Mr. Martínez Meléndez] to prison [...] because he was not a public official, since there was no valid and effective act of investiture that would establish him as such [...]." On this point, the Court finds that the representatives' objective is to have the international jurisdiction evaluate evidence that was substantiated in the domestic jurisdiction, in order to determine whether or not Mr. Martínez Meléndez was a public official, and therefore they are not asking the Court to assess the compatibility of the actions of the Costa Rican courts with their international obligations, but rather to evaluate a factual determination made in the judgment of conviction. Consequently, the Court upholds the State's objection on this point and will not rule on this issue.

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[101] Regarding Group 2, Rafael Rojas Madrigal, in the pleadings and motions brief, the Inter-American Defenders alleged that the cassation appeal filed by him on December 18, 2000, was rejected on the basis of formalities, because at that time Costa Rican legislation was not in line with the requirements of the Herrera Ulloa judgment. They also indicated that despite the issuance of the aforementioned judgment, it was necessary to "file [4] cassation appeals and [3] review proceedings" in order to reduce the sentence imposed to 1 year of imprisonment, which in their opinion evidenced the continuity of a formalistic process that did not allow for a comprehensive review of the conviction. *Cf.* Pleadings and motions brief of the Inter-American Defenders (merits file, folios 788 and 791).

In relation to Group 3, Luis Archbold Jay and Enrique Archbold Jay, in the pleadings and motions brief the representatives stated that the only remedy available to the alleged victims against the convictions that had not become final was the appeal in cassation. Thus, they considered that in the case of Luis and Enrique Archbold Jay the cassation appeal filed on July 9, 2004 was rejected under considerations that evidenced the practice of the principle of the intangibility of the facts. *Cf.* Pleadings and motions brief of SIPDH (merits file, folios 543 and 545).

In relation to Group 6, Manuel Hernández Quesada, in the pleadings and motions brief the representatives alleged that the cassation appeal filed on July 14, 2003, was analyzed "with the formalistic rigor that operated at the time", prior to the judgement in the case of *Herrera Ulloa*, and subsequently the review procedure initiated on October 7, 2006, was rejected "without further substantiation or sufficient grounds," arguing that the review procedure should also be an accessible resource and lacking in normative or jurisprudential limits for its real access.. *Cf.* Pleadings and motions brief of the Inter-American Defenders (merits file, folios 786 and 787).

89. Finally, regarding the alleged denial of the right to "admit" and "access" evidence for the defense, in the pleadings and motions brief, the representatives alleged that Mr. Martínez Meléndez was denied the right to "admit evidence" because he was "prevented from submitting […] essential evidence to prove that the funds of the [G]overnment programs were not taken by him, but were received by the beneficiaries." Such evidence consisted of the testimonial statements of the beneficiaries of the Social Compensation Program. Regarding the alleged denial of the right of access to evidence, they asserted, on the one hand, that the State "concealed [a] set of important documentary evidence for the defense, thereby preventing the establishment of the truth,"[102] and, on the other hand, that Mr. Martínez was denied the opportunity to be present at all the hearings for the examination of the evidence held during the first criminal proceeding against him. In relation to these facts, the representatives alleged the violation of Article 8(2)(f) of the American Convention. They further alleged that they expressed their disagreement with the actions of the domestic courts by filing an appeal in cassation, which was rejected by the Third Chamber of Criminal Cassation, which "refused to analyze" the documentation and arguments submitted, in violation of Article 8(2)(h) of the Convention. Therefore, the Court considers it pertinent to analyze these arguments, insofar as they seek to assess the compatibility of the acts of the domestic courts with the American Convention, as well as the effectiveness of the remedy of cassation, in order to determine whether in its substantiation a comprehensive evaluation of the actions of the Criminal Court of the First Judicial Circuit of San José was carried out. Consequently, the State's objection on this point is dismissed.

90. In conclusion, the Court dismisses the State's preliminary objection with respect to the arguments of the Commission and Groups 2, 3, and 6, and partially admits the arguments in respect of Group 4, in accordance with the terms of paragraph 88 of this judgment.

E. Objection regarding the violation of the principle of complementarity in relation to the prison conditions

E.1. Arguments of the Commission and the parties

91. The ***State*** argued that this Court should refrain from hearing claims related to the alleged violation of the right to personal integrity (humane treatment) of Rafael Rojas Madrigal and Damas Vega Atencio, owing to various internal decisions aimed at addressing the problems raised; therefore the intervention of this Court would be unnecessary in view of the principle of subsidiarity or complementarity, taking into account that it could only analyze the matter in the event that the State had failed to provide an adequate response at the national level. Thus, with respect to Rafael Rojas Madrigal, it maintained that he had used the remedy of *amparo* as a suitable means to demand adequate conditions at the CAI La Reforma, access to health services and other aspects related to the right to personal integrity, obtaining favorable rulings that would suggest an internal response to his claims.[103] In particular, the State issued a statement on the alleged harm to Mr. Rojas Madrigal, including his access to

[102] The evidence referred to consisted of a series of checks whose originals were allegedly not produced because the State "claimed that they had been lost, [and] that it could not produce or deliver them, and [subsequently] it provided a set of photocopies whose origin could not be determined either, and that were used to convict."

[103] Answering brief of the State (merits file, folios 1121 to 1123).

health care,[104] access to water services[105] and alleged mistreatment,[106] indicating that in all these matters he received an adequate response from the State, and even obtained rulings favorable to his interests.

92. Regarding Damas Vega Atencio,[107] with respect to the alleged violation of his right to health, the State indicated that the alleged victim filed a writ of *amparo* against the Prison Director, the Head of the Training and Work Division of Area B and the Director of the Clinic, all of them of the CAI La Reforma, arguing that "despite [his] ailments and his depression, [he] has not received adequate medical attention."[108] However, the State pointed out that "the Constitutional Chamber did not find any violation of the appellant's constitutional rights, inasmuch as, prior to the decision on the merits, it was reported that this inmate had received regular medical attention, and there is no record that the patient had mentioned health problems related to his family circumstances, nor did he inform his physicians that he was suffering from depression that caused a deterioration in his health."[109] It also held that "the Sentence Execution Court declared without merit the complaint filed by Mr. Vega Atencio, alleging a lack of medical assistance" [110](emphasis in the original). The State indicated that Damas Vega Atencio "filed various motions and appeals related to: i) the denial of a request for an operation for his diabetes ii) lack of access to health care and lack of ambulances and iii) the carrying out of a search during which [officers] allegedly touched his genital area and his belongings were destroyed or stolen. However, these appeals were rejected by the Court of Cassation on November 6 and 9, 2007 and on October 30, 2008, due to lack of evidence."[111] Regarding the complaint about food, on October 2, 2006, Damas Vega Atencio filed a complaint with the judge overseeing execution of the sentence, concerning the poor food provided at the CAI La Reforma; on March 15, 2007, the Sentence Execution Court declared the complaint inadmissible, considering that "the quantities and types of food provided to

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104 For example, the State indicated that "on July 17, 2012 the Constitutional Chamber declared admissible the writ of *amparo* No 12-008582-0007-CO and considered that the basic right to health of Rojas Madrigal was violated, a situation attributable to the authorities of CAI La Reforma. […] Consequently, it ordered the Director of CAI La Reforma to take the necessary steps to enable Mr. Rojas Madrigal to attend medical appointments at the Surgery Department of the Hospital San Rafael de Alajuela" (emphasis of the original). *Cf.,* Answering brief of the State (merits file, folios 1506 to 1514).

105 The State emphasized that on August 5, 2012 the alleged victim Rojas Madrigal filed a motion for *amparo* before the Constitutional Chamber alleging poor conditions in relation to access to drinking water (Se consume non-potable water, usually the water is rationed every 3 hours and is only available for 10 minutes; sometimes, there is no water for several days). Then it mentioned that in Decision No. 2012-012846 of September 14, 2012, the Constitutional Chamber declared admissible motion for *amparo* filed by Rojas Madrigal and noted that "the investigating judge Rueda Leal indicated that based on the evidence provided, it has been proven that the water consumed at the prison is not potable, and granted the prison administration one month to resolve the problem. The *Instituto Costarricense de Acueductos y Alcantarillados* (AYA) (Costa Rican Water Institute) was ordered to coordinate with the National Water Laboratory in order to carry out tests, within one month, at CAI La Reforma and submit a report to the Chamber on water potability" (emphasis of the original). In this regard, the State argued that this internal decision "shows that domestic law resolved the claims of the alleged victim in a timely manner [and that] the Prison Administration, for many years, has been taking measures to address the concerns about access to water. However, in addition, after the motion for *amparo* was admitted, as is clear from the judgment of the Constitutional Chamber, immediate measures were ordered to better guarantee access to drinking water." *Cf.* Answering brief of the State (merits file, folio 1515).

106 The State indicated that "the alleged victim Rojas Madrigal claimed to have suffered mistreatment while incarcerated at CAI La Reforma; however […] the Constitutional Chamber itself was aware of the allegations and his claims were addressed and resolved. The same was done by the Sentence Execution Court or the General Directorate of Social Adaptation, so that, what the IACHR is doing by calling into question the results of the different processes in its final resolutions is no more than acting, once again, as a fourth instance. The claims and demands of Mr. Rojas Madrigal were definitively addressed and decided in the domestic jurisdiction." *Cf.,* Answering brief of the State (merits file, folio 1516).

107 *Cf.* Answering brief of the State (merits file, folio 1123).

108 *Cf.* Answering brief of the State (merits file, folio 1522).

109 *Cf.* Answering brief of the State (merits file, folio 1523).

110 "The judge observed that […] the inmate's right to health has not been restricted, since he received timely treatment for his ailments." Answering brief of the State (merits file, folio 1523).

111 *Cf.* Answering brief of the State (merits file, folio 1523).

each prisoner are appropriate." The judicial authority stated that there is no "inadequate management in the preparation of food for the prison population."[112]

93. The ***Commission*** considered that the alleged victims who were detained at the CAI La Reforma lived in conditions incompatible with their human dignity, due to overcrowding, the lack of drinking water, the poor quality of the food and the system of food distribution. In addition, the Commission noted that the CAI La Reforma had infrastructure deficiencies in the walls, ceilings, electrical installations and sanitary facilities.

94. The Commission also noted that between 2006 and 2013, Mr. Rafael Rojas filed various *amparo* and *habeas corpus* petitions and complaints related to lack of access to health services. The Commission pointed out that these appeals were dismissed based exclusively on reports of the prison authorities of La Reforma, which stated that Mr. Rojas had received medical attention when he required it. It also found that the State did not present information on the measures taken to comply with the Constitutional Chamber's order, and considered that the fact that a person deprived of their liberty had to appeal twice to a judicial authority to obtain the required medical treatment evidences problems in the timely and adequate access to treatment in CAI La Reforma. However, regarding the alleged violation of Mr. Damas Vega's right of access to health, it held that it did not have sufficient elements to rule on this matter.

95. The ***SIPDH*** representatives alleged that the prison conditions denounced in this case "not only remain unresolved, but have worsened."[113]

96. The ***Inter-American Defenders*** argued that Rafael Rojas and other alleged victims have suffered "the extremely serious problem of overcrowding that exists in the national prison system." They also pointed out the State's failure to observe control of conventionality with respect to the issue of prison overcrowding, given that "innumerable actions have been filed by prisoners," the Public Defense Office, the Ombudsman's Office, foundations and NGOs, as well as rulings of the Constitutional Chamber, opinions of the sentence execution judges and repeated complaints by public officials within the prison system, which have declared overcrowding and technical closure of prison units, since "more than ten thousand people are held in a serious situation of vulnerability."[114]

E.2. Considerations of the Court

97. With respect to the arguments of the parties, the Court recalls that the inter-American human rights system consists of a national level, through which each State must guarantee the rights and freedoms set forth in the Convention and investigate and, if necessary, try and punish the violations committed; and that if a specific case is not resolved at the domestic or national level, the Convention provides for an international level in which the main organs are the Commission and the Court. This Court has also indicated that when a question has been resolved at the domestic level, pursuant to the provisions of the Convention, it is not necessary to bring the matter before the Inter-American Court for approval or confirmation. This is based on the principle of complementarity or subsidiarity, which permeates the inter-American human rights system, "reinforcing or complementing the protection offered by the

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112 *Cf.* Answering brief of the State (merits file, folio 1523).

113 *Cf.* Pleadings and motions brief of the common interveners SIPDH (merits file, folios 528).

114 *Cf.* Pleadings and motions brief of the common interveners Inter-American Public Defenders (merits file, folios 817 to 822).

domestic law of the American States," as stated in the Preamble of the American Convention."[115]

98. The complementary nature of the international jurisdiction means that the system of protection established by the American Convention on Human Rights does not replace the national jurisdiction, but rather complements it.[116] Thus, the State "is the main guarantor of human rights and, therefore, if a violation of said rights occurs, the State must resolve the matter at the domestic level and, if necessary, make reparations to the victim before having to respond before international courts.[117]

99. Therefore, it is clear that in the inter-American system, there is a dynamic and complementary control of the treaty-based obligations of the States to respect and guarantee human rights, jointly between the domestic authorities (who have the primary obligation) and the international bodies (in a complementary manner), so that their decision-making criteria and mechanisms of protection, both national and international, can be established and harmonized.[118] Thus, the jurisprudence of the Court law includes cases in which the decisions of domestic courts are used to support and conceptualize the violation of the Convention in the specific case:[119] In other cases, it has been recognized that, in accordance with international obligations, the domestic organs, agencies or courts have adopted adequate measures to remedy the situation that gave rise to the case;[120] have already resolved the alleged violation;[121] have ordered reasonable reparations;[122] or have exercised an adequate control of conventionality.[123] In this sense, the Court has pointed out that State responsibility under the Convention can only be required at the international level after the State has had an opportunity to acknowledge, if applicable, the violation of a right and to repair by its own means the damage caused.[124] Consequently, the Court has established that States are not internationally responsible when they have recognized the commission of an internationally

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115 *Cf. Case of Las Palmeras v. Colombia. Merits.* Judgment of December 6, 2001. Series C No. 90, para. 33, and *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs.* Judgment of December 1, 2016. Series C No. 330, para. 92.

116 *Cf. Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of 15 October 2014. Series C No. 286, para. 137, and *Case of Duque v. Colombia*, *supra,* para. 128.

117 *Cf. Case of Acevedo Jaramillo et al. v. Peru. Interpretation of Judgment on preliminary objections, merits, reparations and costs*, Para. 66, and *Case of Duque v. Colombia*, *supra,* para. 128.

118 *Cf. Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, Para. 143*, and Case of Andrade Salmón v. Bolivia, supra,* para. 93**.**

119 *Cf. Case of the Santo Domingo Massacre v. Colombia, supra,* paras. 143, 196, 200, 203, 206, 209, 220, 221, 225. See also, *Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 134, para. 167 and Case of Gelman v. Uruguay. Merits and reparations. Judgment of February 24, 2011. Series C No. 221, para. 124.

120 *Cf. Case of García Ibarra et al. v. Ecuador*, para. 103.

121 *Cf. Case of García Ibarra et al. v. Ecuador*, *supra,* para. 103. Also, see *Case of Tarazona Arrieta et al. v. Peru*, *supra,* para. 140.

122 *Cf. Case of García Ibarra et al. v. Ecuador*. *Preliminary objections, merits, reparations and costs.* Judgment of November 17, 2015. Series C No. 306, para. 103. Also see, *Case of the Santo Domingo Massacre v. Colombia, supra,* paras. 334 to 336, *Case of Tarazona Arrieta et al. v. Peru*, *supra,* paras. 193 and 194.

123 *Cf. Case of Gelman v. Uruguay, supra,* para. 239, and *Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2016. Series C No. 314, paras. 230 and ff.

124 *Cf. Case of the Santo Domingo Massacre v. Colombia, supra,* para. 143*, Case of Duque v. Colombia*, *supra,* paras. 126 to 128, and *Case of Andrade Salmón v. Bolivia, supra,* para. 93.

wrongful act, have ceased the violation, and have remedied the consequences of the measure or situation that gave rise to it.[125]

100. In relation to the foregoing, in situations such as those of the instant case, where the State alleged as a preliminary objection that, by virtue of the principle of complementarity, this Court should refrain from hearing the case on the grounds that it is inadmissible, the Court considers that, for a preliminary objection of this nature to be admitted, it is insufficient for the State to allege the existence of a judicial or administrative response to the remedies attempted by the alleged victims; in addition, it must be determined whether the State's response was adequate to remedy the consequences of the alleged violation.[126] In this sense, the Court recalls that preliminary objections provide a defense for the State challenging the admissibility of a case, so that the latter must prove that the remedies available in the domestic jurisdiction were capable of producing the result for which they were conceived.

101. In this regard, first, the Court has confirmed that the alleged victims filed several appeals before the judicial and administrative authorities to denounce the alleged violation of their personal integrity due to the prison conditions. The Court found that both Rafael Rojas Madrigal and Damas Vega Atencio filed appeals in relation to: i) poor food and overcrowding at the CAI La Reforma, ii) access to medical care and iii) access to drinking water. Secondly, taking into account the jurisprudence of this Court and the complementary nature of the inter-American system, the Court will proceed to determine whether such remedies were adequate, and if so, whether the alleged violations were remedied.

E.2.1 Regarding poor food and overcrowding at CAI La Reforma

102. The Court notes that, with respect to the alleged poor food and overcrowding at the CAI in La Reforma, Mr. Rojas Madrigal filed a writ of *amparo* on May 5, 2008, together with several other inmates, denouncing the poor supply of food, a situation that meant there was not enough food for all the inmates, who alleged that the food, even when rationed, was insufficient.[127] The Constitutional Chamber of the Supreme Court of Justice issued a ruling on May 29, 2008,[128] declaring the petition admissible and, based on an official letter from the prison's Administrative Directorate, found that the distribution of food was carried out by inmates. Therefore, by means of decision No. 2008-009067 it ordered the prison management of CAI La Reforma:

> "Under penalty of disobedience, to immediately issue the necessary orders within the scope of its powers and jurisdiction to ensure that the delivery and distribution of food at [CAI] La Reforma is carried out in an equitable, timely and properly supervised manner to those deprived of liberty. The respondent authority shall submit a report[129] to this Court within eight days from the notification of this ruling on its effective compliance with the measures ordered. The State is ordered to pay costs, damages and losses caused by the facts that serve as the basis for this decision, which shall be settled in the execution of the administrative contentious proceeding."[130]

103. For his part, Damas Vega filed a complaint with the Sentence Execution Court of Alajuela on October 2, 2006,[131] regarding the small amount of food received during breakfast, as well as the deficient quality and poor preparation of the food served during lunch. On

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125 *Case Andrade Salmón v. Bolivia, supra,* 96.

126 *Cf. mutatis mutandi, Case of Duque v. Colombia*, *supra, para.* 137, and *Case of the Santo Domingo Massacre v. Colombia, supra,* para. 171.

127 Decision No. 2008-009067 of the Constitutional Chamber of May 29, 2008(evidence file, folio 1800).

128 Decision No. 2008-009067 of the Constitutional Chamber of May 29, 2008(evidence file, folio 1800).

129 This report is not included in the case file.

130 *Cf.* Decision No. 2008-009067 of the Constitutional Chamber, of May 29, 2008(evidence file, folio 1805).

131 *Cf.* Complaint submitted to the Sentence Execution Court, of October 2, 2006 (evidence file, folio 20816).

November 2, 2006, he requested that the nutrition department of CAI La Reforma respond to the complaint he had filed.[132]

104. In this regard, the Head of Nutrition of the CAI La Reforma sent a report to the Sentence Execution Court, denying that the food received by the inmates was insufficient or of poor quality and attaching the menu provided at the prison.[133] He added that each prisoner was responsible for returning his clean dishes. He also stated that the distribution of food was supervised and that the amount provided was "adequate," since food containing carbohydrates, proteins and fats was prepared daily and served in both meals.[134] On March 15, 2007, the Sentence Execution Court dismissed this complaint, based on the reports provided by the prison's nutrition department, and stated that "there is no evidence of negligence or arbitrariness in the actions of the prison system officials that would infringe any rights of the prisoner."[135] In 2007, the Ombudsman's Office carried out a project in cooperation with the School of Nutrition of the University of Costa Rica, which was presented to the Ministry of Justice in October 2007 and contained a series of recommendations to guarantee the right to food of those deprived of liberty.[136]

105. On January 18, 2010, Mr. Rojas filed another writ of *amparo* before the Constitutional Chamber alleging an insufficient amount of food provided during breakfast in terms of size and quantity in proportion to the number of inmates in the prison, as well as the reduction of food during visiting days. In the same complaint, Mr. Rojas also alleged overcrowding in the cellblocks of Area B of the CAI La Reforma at the time of the motion. In this regard, the Constitutional Chamber declared the appeal inadmissible, indicating that:

> "From the reports submitted by representatives of the respondent authorities […] and the evidence provided for the resolution of this matter, there is no proof of degrading treatment through lack of food. […] Regarding the alleged prohibition for visitors to bring food: [they stated] that this is not true, but that the possibility is open for the prisoners to receive food on a daily basis from third parties who come [to the prison]… […]. Regarding the lack of food on visiting days: [they reported] that the kitchen provides the same amount of food on those days as during the rest of the week, the only difference being that the necessary amount is distributed, according to the demand of the population; but there is always a reserve of prepared food in the kitchen and if required, it is distributed. On other matters, […] there is no evidence of any irregularity [in the prices of the "pulperías" (grocery stores), since the prices in the "pulperías" are suggested by the supplier, and the Administration supervises them and carries out regular inventories; and the quantity of fruit served to the prison population at lunch or dinner is approximately four [fruits] per week, as well as the natural juices made from the pulp of different fruits, and that portions are assigned to the population 3 to 5 times per week, with amounts that exceed the number of inmates housed there.[137]

106. In the aforementioned ruling, the Chamber also pointed out that the issue of overcrowding was previously resolved by "decision No. 10-017176, issued at 10:20 a.m. on October 15, 2010 and No. 10-14807 issued at 08:40 a.am on September 3, 2010."[138] Finally, the Court notes that in addition to public policies aimed at reducing overcrowding in Costa

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132 *Cf.* Request for response to the complaint to the nutrition department of CAI La Reforma, of November 2, 2006 (evidence file, folio 20820).

133 They reportedly received 6 meals with meat products, 2 meals with sausages, 2 meals with tuna, 2 meals with pasta, 2 meals with eggs and "2 meals that do not contain any animal products."

134 *Cf.* Response of the Head of the Nutrition Department of CAI La Reforma, official letter N 305-06, November 3, 2006 (evidence file, folio 20825).

135 *Cf.* Decision No. 899-07 of the Sentence Execution Court, of March 15, 2007(evidence file, folio 20881).

136 *Cf.* Official letter No. 02645-2008-DHR of the Ombudsman's Office of March 17, 2008 (evidence file, folios 20903-20905).

137 *Cf.* Decision No. 2011001692 of the Constitutional Chamber, of February 11, 2011 (evidence file, folios 1814-1815).

138 Decision No. 2011001692 of the Constitutional Chamber, of February 11, 2011 (evidence file, folio 1816)

Rican prisons, since 2012 the statistics of the CAI La Reforma show a steady decrease in the prison population.

E.2.2. Regarding drinking water

107. On August 14, 2012, Mr. Rojas Madrigal filed a writ of *amparo* dated August 5, 2012,[139] before the Constitutional Chamber, alleging the consumption of non-potable water and water shortages at the CAI La Reforma, which allegedly could last for several days. On September 14, 2012, the Constitutional Chamber declared the appeal admissible[140] based on reports of the National Water Laboratory of the Costa Rican Institute of Aqueducts and Sewerage (*Instituto Costarricense de Acueductos y Alcantarillados, AyA)* of August 19, 2010, July 12, 2011, September 6, 2011 and September 3, 2012. The Chamber concluded that the water in this prison facility "is not potable and is a high risk for the health of consumers"[141] and ordered the prison administration to take steps to ensure a continuous supply of water within three months, as well as its potability within one month. It also ordered the Deputy General Manager of the Costa Rican Institute of Aqueducts and Sewerage to coordinate with the National Water Laboratory "in order to carry out water potability tests on the prison's water supply" and to submit a report on the matter.[142]

E.2.3. Regarding access to medical care

108. On June 26, 2006, Rafael Rojas filed an incidental plea of illness with the Sentence Execution Court of the first Judicial Circuit of Alajuela, in which he reported that he had been diagnosed with diabetes in 2001, prior to being incarcerated in the CAI La Reforma. He stated that after his transfer to that prison facility in 2002, he requested a meeting with the Prison Director to request medical follow-up for this illness, but the prison was unable to provide such treatment. He also mentioned other physical ailments, such as blindness and a hernia aggravated by his work in the prison and asked to be transferred to a facility with appropriate medical care for his condition.[143] On March 27, 2007, the court declared the motion inadmissible based on the report of the prison's medical director, and stated that there was no evidence of "negligence, neglect or arbitrariness on the part of the prison's medical authorities that would in any way harm [Mr. Rojas'] right to life or health."[144]

109. On December 18, 2006, the Constitutional Chamber ruled on the motion of *habeas corpus* filed by Mr. Rojas on December 12, 2006, in which he alleged that it was impossible for him to receive medical care as an inmate at CAI La Reforma, due to the existence of maximum weekly quotas since there was only a single health care professional. He added that the Director of cellblock Area C sent him a letter asking him to withdraw the motion, to which he agreed because "he was going [to be] transferred."[145] In view of this, the

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139 *Cf.* Brief of Rafael Antonio Rojas Madrigal addressed to the Constitutional Chamber of the Supreme Court of Justice, August 5, 2012 (evidence file, folio 1841-1845).

140 *Cf.* Decision No. 20120:1.2846 of the Constitutional Chamber, of September 14, 2012 (evidence file, folio 1851).

141 *Cf.* Decision No. 20120:1.2846 of the Constitutional Chamber, of September 14, 2012(evidence file, folio 1859).

142 *Cf.* Reports of the engineers Jairo Alfaro Vargas and Martín Echeverri Brenes, responsible for maintenance at La Reforma, of November 2, 2015 and of October 30, 2015, respectively. (evidence file, folios 36241-36257).

143 *Cf.* Complaint filed by Mr. Rojas Madrigal, of June 26, 2007(evidence file, folios 1723-1732).

144 *Cf.* Decision of the Sentence Execution Court of Alajuela No. 1004-2007 of March 27, 2007 that dismissed the plea of illness (evidence file, folio 1796).

145 *Cf.* Decision of the Constitutional Chamber, of December 18, 2006. Annex to the communication of the petitioner dated March 7, 2007 (evidence file, folios 1762-1766).

Constitutional Chamber requested the Director of CAI La Reforma to transfer Mr. Rojas "to a place where his life and personal integrity are not at risk" and "to take the measures necessary to ensure that Rafael Antonio Rojas receives the medical attention he requires to adequately treat his condition, either at the institutional care center (CAI La Reforma), or at an appropriate hospital facility […]."[146] It also ordered the prison administration to submit a report within 48 hours.[147]

110. On December 21, 2006, the Constitutional Chamber received the requested report, which stated that Mr. Rojas had refused to be taken to the hospital area and to undergo the laboratory tests offered to him. Similarly, it referred to his safety, pointing out that "it is important to note the offer made to transfer him to some other space if he considers himself to be at risk, but he has indicated that he is satisfied with his current location in Area B."[148]

111. Based on said report, on January 9, 2007, the Constitutional Chamber declared Mr. Rojas' *habeas corpus* motion inadmissible, due to the lack of evidence indicating the alleged violation of his right to physical integrity.[149] As for the violation of the inmate's right to health, it pointed out that the result of the analysis carried out on Mr. Rojas "is not consistent with an untreated diabetic patient." It added that at the prison "outpatient care is scheduled every day and an average of 16 to 20 patients are seen daily. In addition the prison clinic has an emergency service to which inmates who request medical attention can go […] whenever they need it."[150]This contradicted Mr. Rojas Madrigal's statement.[151]

112. Subsequently, on June 25, 2012, Rafael Rojas filed a writ of *amparo* alleging that he was suffering from an umbilical hernia and requesting treatment, assessment and compensation for his condition.[152] On June 28, 2012, the Constitutional Chamber ordered the prison authorities to take the necessary steps to ensure that Rafael Rojas received the medical care he required until the Chamber issued its decision.[153] On July 17, 2012, the Constitutional Chamber declared "a violation of the appellant's right to health" attributable to the prison authorities of La Reforma, and ordered that Mr. Rojas be taken to his scheduled medical appointment.[154] On December 25, 2012, Rafael Rojas filed another writ of *amparo* before the Constitutional Chamber alleging that he was suffering from a lack of medical care at the CAI La Reforma, and on December 27, 2012, the Constitutional Chamber ordered the prison

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146 *Cf.* Decision of the Constitutional Chamber, of December 18, 2006. Annex to the communication of the petitioner of March 7, 2007 (evidence file, folio 1765).

147 *Cf.* On December 21, 2006, the Constitutional Chamber received the report requested, which stated that Mr. Rojas had refused to be transferred to the hospital area and to have the tests offered to him. The report also referred to the inmate's safety, pointing out that "it is important to emphasize the offer made to relocate him in some other space if he considered himself to be at risk, but he has indicated that he is fine with his current placement in Cell Block B". *Cf.* Official letter of the Institutional Care Center of La Reforma, of December 21, 2006 (evidence file, folios 1768-1770).

148 *Cf.* Official letter of the Institutional Care Center of La Reforma, of December 21, 2006 (evidence file, folios 1768-1770).

149 *Cf.* Decision No. 2007·000008 of the Constitutional Chamber, of January 9, 2007 (evidence file, folio 1788).

150 *Cf.* Decision No. 2007000008 of the Constitutional Chamber, of January 9, 2007 (evidence file, folio 1784).

151 *Cf.* Decision No. 2007·000008 of the Constitutional Chamber, of January 9, 2007 (evidence file, folios 1783-1784).

152 *Cf.* Brief of Rafael Antonio Rojas Madrigal addressed to the Constitutional Chamber of the Supreme Court of Justice, of June 25, 2012 (evidence file, folios 1818-1822).

153 *Cf.* Decision of the Constitutional Chamber of the Supreme Court of Justice, of June 28, 2012 (evidence file, folio 1826).

154 *Cf.* Decision No. 2012009242 of the Constitutional Chamber, of July 17, 2012 (evidence file, folios 1837-1838).

administration to submit a report on this matter,[155] which was duly presented on January 2, 2013.[156]

113. On January 18, 2013, the Constitutional Chamber established that "regardless of the number of times he has previously been provided with [medical services], as well as the fact that on some occasions he refused to attend medical appointments, the fact that it was only through the filing of this *amparo* that he was provided with the care he had requested since last December 15, constitutes a violation of his right to health." Thus, it declared that the appeal was admissible with compensatory effects, since Rafael Rojas had already been treated on December 28.[157]

114. It should be noted that on May 9, 2017, Rafael Rojas was transferred to the prison's Center for Senior Citizens (*Centro del Adulto Mayor*),[158] where, as of August 2017, he considered that he was in good conditions, since "there is no overcrowding, there is good cleanliness and neatness […] he feels safe, he does not have problems with his peers, there is no aggression and the prison officers are very cooperative in stressful situations […] He eats three meals a day […and] says he has attended medical appointments on several occasions […]."[159] Likewise, Mr. Rojas "has some medical appointments [scheduled] at hospitals of the Costa Rican Social Security System (CCSS) in the medical specialties of general surgery, ophthalmology and dermatology" to treat various ailments.[160]

E.2.4. Conclusion

115. In relation to the foregoing, the Court notes that the alleged victims had access to judicial and administrative remedies to address violations of their rights, which were allegedly a consequence of the prison conditions in which they were held. The Court also notes that both the judicial and the administrative authorities responded to their claims in a fair manner, and adopted sufficient measures to remedy the alleged violations, by ordering the competent authorities to address or remedy the issues denounced when appropriate. Consequently, by virtue of the principle of complementarity, and considering the adequate judicial response of the authorities, this Court accepts the preliminary objection filed by the State with respect to the alleged violations stemming from prison conditions at the CAI La Reforma to the detriment of Rafael Rojas Madrigal and Damas Vega Atencio.

116. However, the Court finds that the State did not indicate how its domestic authorities remedied the alleged violation of Damas Vega Atencio's right to personal integrity, with respect to the search in which his genitals were touched and his belongings were destroyed or stolen. Accordingly, the Court dismisses the State's preliminary objection in this regard, and will examine this alleged violation in the chapter on merits of this judgment.

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155 *Cf.* Decision of the Constitutional Chamber, of December 27, 2012 (evidence file, folio 1873).

156 Decision No. 2013000730 of the Constitutional Chamber, of January 18, 2013 (evidence file, folios 1878 and 1879).

157 *Cf.* Decision No. 2013000730 of the Constitutional Chamber, of January 18, 2013 (evidence file, folio 1881).

158 *Cf.* Decision of the Inter-American Court of Human Rights, provisional measures for Rojas Madrigal in respect of the case of Amrhein et al., May 25, 2017.

159 *Cf.* Expert opinion of Doctor Juan Geraldo Ugalde, of August 22, 2017 (evidence file, folios 44467-44474).

160 *Cf.* Expert opinion of Doctor Juan Geraldo Ugalde, of August 22, 2017 (evidence file, folios 44470).

F. Extemporaneous submission of the petitions of Miguel Mora Calvo (Group 7), Manuel Hernández Quesada (Group 6), Guillermo Rodríguez Silva and Martín Rojas Hernández (Group 5)

F.1. Arguments the parties and the Commission

117. The ***State*** filed a preliminary objection *ratione temporis* alleging that the petitions of Manuel Hernández Quesada, Miguel Mora Calvo, Guillermo Rodríguez Silva and Martín Rojas Hernández should be declared inadmissible because they were submitted to the Commission after the six-month period allowed for their presentation, following notification of the decision that exhausted the remedy, pursuant to Article 46(1)(b) of the Convention.

118. The ***Commission*** asked the Court to declare inadmissible the preliminary objection *ratione temporis*, which does not question [the Court's] temporal jurisdiction, but addresses a different matter, that is, the requirement of timely submission of the petition which is actually an admissibility requirement closely linked to the exhaustion of domestic remedies. It argued that, since the objection of exhaustion of domestic remedies under Article 46(2) (a) of the Convention had been established, the six-month deadline for submitting the petition after the final decision was not applicable, and therefore the petitions were submitted within a reasonable time in accordance with Article 32 of the Commission's Rules of Procedure.

119. The common interveners ***Factum Consorcio*** did not present observations.

120. The ***Inter-American Defenders*** explained that the State confused the objection *ratione temporis* with the untimeliness of the petition. In this regard, they argued that the State's allegation is erroneous and untimely inasmuch as it made the same allegation before the Commission and the latter, in Admissibility Report 105/11, made it clear that the analysis of the temporality of said petitions was carried out based on the exception of reasonableness, pursuant to Article 46(2)(a) of the Convention. Finally, they noted that the State has not expressed any opposition to the reasonableness of Article 46(1) of the Convention and referred to the vulnerability and state of defenselessness in which the alleged victims would find themselves, given that the State had not personally notified each of them of the final decision on their appeals or special review procedure. They pointed out that because the alleged victims were – and remain – deprived of their liberty, they are vulnerable persons in accordance with the 100 Brasilia Rules, and the institutions that administer justice have an obligation to ensure they have efficient and effective access to judicial protection. However, the State assumes that the notifications to the offices or facsimiles of the attorneys are sufficient to consider the end of a proceeding or *res judicata* as having been notified. In the hearing on preliminary objections, they indicated that in the absence of a remedy consistent with Article 8(2)(h) of the Convention, the alleged victims were not obliged to calculate the six-month time limit for submitting their petitions before the Commission.

121. The ***SIPDH*** representatives pointed out that the State refers to the preliminary objection *ratione temporis* as one which would be a question of untimely presentation of the petition, an allegation that it did not expressly and clearly invoke at the appropriate procedural moment before the Commission.

F.2. Considerations of the Court

122. First, this Court recalls that the objection *ratione temporis* refers to its competence to rule on violations that occurred after the date on which the State recognized its jurisdiction

or on those that had not ceased on that date.[161] Consequently, the objection raised by the State does not pertain to the Court's jurisdiction *ratione temporis*, but refers to the alleged untimeliness of the presentation of the petitions of Guillermo Rodríguez, Martín Rojas, Miguel Mora Calvo and Manuel Hernández Quesada, outside the six-month period stipulated in Article 46(1) (b) of the Convention.

123. In this regard, the Court recalls that it upheld the objection of failure to exhaust domestic remedies with respect to the alleged victims Guillermo Rodríguez Silva and Martín Rojas Hernández, of Group 5 (*supra* para. 50). Therefore, the State's objection with regard to these persons has become moot and the Court will not rule on the matter.

124. Furthermore, the Court has indicated that the conditions of admissibility of petitions (Articles 44 to 46 of the American Convention) constitute a guarantee that assures the parties the exercise of their right of defense in the proceedings,[162] having a preclusive nature in those cases in which the Commission deals with admissibility and merits separately.[163] As for Miguel Mora Calvo (Group 7), the case file does not show that the State has raised this objection in any of the briefs submitted during the admissibility stage,[164] and therefore the Court dismisses this objection with respect to this person.

125. With regard to Manuel Hernández Quesada (Group 6), the case file shows that the State submitted the objection in a timely manner, on December 9, 2008, during the admissibility stage before the Commission.[165] It is also on record that the alleged victim filed an appeal in cassation against his conviction, which was decided on November 28, 2003, and notified on January 26, 2004.[166] His petition was lodged before the Commission on May 24, 2005,[167] that is, one year and four months later, outside the established six-month period.

126. In this regard, both the Commission and the representatives argued that based on Article 46(2) (a) of the Convention, and in view of the judgment in the case *Herrera Ulloa* regarding the ineffectiveness of the remedy of cassation, the six-month period established in Article 46(1)(b) of the Convention was not applicable and, therefore, they asked the Court to dismiss the objection.

127. On this point the Court confirms that in the case of *Herrera Ulloa v. Costa Rica* it was determined that:

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161 *Cf. Case of the Serrano Cruz Sisters v. El Salvador. Preliminary objections.* Judgment of November 23, 2004. Series C No. 118, paras. 66 and 67, and *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, paras. 24 and 25.

162 *Cf. Case of Grande v. Argentina. Preliminary objections and merits.* Judgment of August 31, 2011. Series C No. 231, Para. 56, *Case Cruz Sánchez et al. v. Peru, supra,* para. 60

163 *Cf. Case of Grande v. Argentina, supra, para. 56 and Case of Cruz Sánchez et al. v. Peru, supra,* para. 60.

164 With respect to the petition of Miguel Mora Calvo, during the admissibility stage the State filed briefs on December 8, 2008, April 22, 2009, August 10, 2009, September 15, 2010 and January 25, 2011. In its first brief of December 8, 2008, the State asked the Commission "to declare inadmissible the petition submitted by Mr. Miguel Mora Calvo, since it does not meet the requirements of admissibility, due to failure to exhaust the domestic remedies in Costa Rica, pursuant to Articles 46(1)(a), and 47 of the American Convention on Human Rights, Articles 30, 31 and related articles of the Rules of Procedure of the Inter-American Commission on Human Rights; and furthermore, because the facts described do not constitute a violation of the human rights protected by the American Convention." The State reiterated this position during the admissibility proceedings in the case, and there is no record that in any of its briefs submitted it has alleged that the presentation of Mr. Mora Calvo's petition was extemporaneous due to the failure to comply with the six-month period indicated in Article 46(1)(b) of the American Convention. (evidence file, folios 6005, 6027, 6147, 6177, 6309 and 6330).

165 Regarding the petition of Manuel Hernández Quesada, in the admissibility stage the State filed briefs on December 9, 2008, September 24, 2009, January 25, 2010, September 15, 2010 and February 18, 2011 (evidence file, folios 5728 to 5750, 5615, 5590, 5556 and 5417).

166 *Cf.* Electronic notification slip (evidence file, folio 35433).

167 *Cf.* Brief of July 8, 2005 (evidence file, folio 5946).

167. In the instant case, the writs of cassation filed to challenge the November 12, 1999 conviction did not satisfy the requirement of a liberal remedy that would permit the higher court to do a thorough analysis or examination of all the issues debated and analyzed in the lower court. Thus, the writs of cassation filed by Messrs. Fernán Vargas Rohrmoser and Mauricio Herrera Ulloa, and by the latter's defense attorney and the special counsel for the newspaper "*La Nación*", respectively (*supra* para. 95. w), to challenge the conviction did not meet the requirements of Article 8(2)(h) of the American Convention; the review allowed with those remedies was limited, not thorough and comprehensive.

168. The Court therefore finds that the State violated Article 8(2)(h) of the American Convention in combination with Articles 1(1) and 2 thereof, to the detriment of Mr. Mauricio Herrera Ulloa.

128. Thus, it does not follow from the judgment in the *Herrera Ulloa v. Costa Rica* case that the Court has determined a lack of due process of law for the protection of the right to appeal the judgment. Furthermore, this Court has found that since the 1990s, the Constitutional Chamber of the Supreme Court of Justice in various rulings with *erga omnes* effects alluded to the right to appeal, excluding formalities that would prevent the review of a conviction, in order to satisfy the provisions of Article 8(2)(h) of the Convention (infra para. 262). For this reason, Mr. Hernández Quesada's petition should have been submitted within six months from the date of notification of the decision on the cassation appeal. In view of the foregoing, the Court declares admissible the preliminary objection raised by the State.

G. Error in the Merits Report regarding Miguel Mora Calvo

G.1. Arguments of the parties and the Commission

129. The ***State*** filed an objection "*ratione personae,"* alleging a "contradiction" and "error" by the Commission that generates a violation of its right of defense. It pointed out that Miguel Mora Calvo was left out of the analysis of the Merits Report regarding the right to appeal the judgment, but later the Commission included him among the alleged victims in in its conclusions on the case and specifically in connection with Article 8(2)(h) of the Convention.

130. The ***Commission*** considered that the objection filed by the State did not refer to the lack of jurisdiction to analyze cases, but rather to the admissibility of individuals. It recalled that in its Merits Report it refrained from analyzing the alleged violation of the right established in Article 8(2)(h) of the Convention to the detriment of Mr. Mora Calvo, because unlike the other alleged victims, he did not file at least one cassation appeal. Therefore, it clarified that his inclusion as a victim of the violation of that article was a material error; however, it did consider him as an alleged victim in relation to the presumed violation of the right to personal integrity.

131. The ***common interveners*** did not submit any observations in this regard.

G.2. Considerations of the Court

132. First, the Court considers that the State's argument on this occasion does not constitute a preliminary objection *ratione personae,* since it does not question the standing of the Commission to file the case or the capacity of Mr. Mora Calvo or his representatives to appear as parties to the proceedings in the case. Rather, the State's objection arises from an alleged contradiction in the Merits Report regarding the alleged violation of Article 8(2)(h) of the Convention to his detriment. If such a contradiction were indeed present, this would not prevent the Court from hearing the case with respect to this person and ruling on the alleged violation.

133. In the instant case, the Court notes that in paragraphs 155 to 161 of the Merits Report, under chapter "IV. Proven Facts", the Commission identified the appeals filed by Mr. Mora Calvo against the judgments that convicted him in two different criminal cases, without mentioning any cassation appeal filed in his favor. Likewise, in chapter "V. Legal Analysis" of the Merits Report, the Commission specified in footnote No. 334 that, "all the alleged victims in this case filed at least one cassation appeal, with the exception of Miguel Mora Calvo. Accordingly, the Commission will not examine the situation of this individual." However, in paragraphs 215 and 269(1) of the Merits Report, the Commission declared Mr. Mora to be a victim of the violation of Article 8(2)(h) of the American Convention. In this regard, the Commission argued before this Court that the inclusion of Mr. Mora as a victim under said article was a material error.

134. In a different sense, in paragraph 35 of the Admissibility Report, under chapter "III. Position of the Parties," when referring to the petition of Miguel Mora Calvo, the Commission indicated that with respect to judgment No. 736-98, the petitioner filed an appeal for cassation and motions for review.[168] On this point, the Court found that two criminal cases were brought against Miguel Mora Calvo. In the first, judgment N°736-98 was issued on September 24, 1998, against which an appeal in cassation was filed, which was declared inadmissible on May 28, 1999, in Decision N° 0649-99;[169] in addition, several motions for review were filed.[170] In the second case, judgment N° 632-2000 was issued on December 5, 2000,[171] and no cassation appeal was filed against said ruling; however, a motion for review of the proceeding was filed.[172]

135. In this regard, the Court considers that the Commission's material error should not be interpreted to the detriment of the petitioner, since in the Admissibility Report the Commission had already noted the alleged existence of the cassation appeal filed against judgment N° 736-98 of September 24, 1998, which was in fact the case. Consequently, the Court will hear the factual and legal arguments of the common interveners SIPDH related to the alleged violation of Article 8(2)(h) of the Convention, to the detriment of the alleged victim Miguel Mora Calvo.

V
EVIDENCE

A. Documentary, testimonial and expert evidence

136. The Court received various documents submitted by the State, the Commission and the common interveners, attached to their main briefs (*supra* paras. 4 to 6). Likewise, the Court received several statements rendered by affidavit.[173] In addition, the Commission, the

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168 *Cf.* Admissibility Report No. 105/11, paras. 33, 34 and 35 (evidence file, folios 18254 and 18255).

169 *Cf.* Decision N° 0649-99 of May 28, 1999 (evidence file, folio 35469 al 35474).

170 Five motions for review were filed which were settled through the following decisions: Decision N° 2000-00917 of August 11, 2000 (evidence file, folio 35475 to 35478); Decision N° 2007-00546 of October 5, 2007 (evidence file, folios 35479 to 35481); Decision N° 2008-00236 of May 28, 2008 (evidence file, folio 35482 to 35484); Decision 2008-00557 of November 25, 2008 (evidence file, folio 35485 to 35488); and Decision N° 2009-00225 of June 12, 2009 (evidence file, folio 35489 to 35491).

171 *Cf.* Judgment No. 632-2000 of December 5, 2000 (evidence file, folio 35622 to 35750.

172 *Cf.* Decision N° 2009-01158 of September 16, 2009 (evidence file, folio 35611 to 35621).

173 The following persons made statements before a notary public: a) petitioners proposed by SIPDH: i) Damas Vega Atencio, ii) Miguel Ángel Mora Calvo, and iii) Carlos Osborne Escalante; b) proposed by Adrián Martínez Blanco: iv) Jorge Martínez Meléndez; c) proposed by the Inter-American Public Defenders: v) Martín Rojas Hernández, vi) Manuel Hernández Quesada, and vii) Rafael Antonio Rojas Madrigal. d) witness proposed by SIPDH: i) Roger Víquez Guiraud; e) witness proposed by Adrián Martínez Blanco, ii) José Martínez Meléndez; f) witness proposed by AIDEF, iii) Carlos Alberto Céspedes León, iv) Rosaura Chinchilla Calderón, v) Roy Murillo Rodríguez, vi) Marta Iris Muñoz Cascante; g) Witness offered by the State vii) Tricia Castillo Vetrano; h) Declarants

common interveners, the Inter-American Defenders and SIPDH submitted annexes to their briefs of observations on the preliminary objections.[174] Also, the State, the Commission and the common interveners Factum Consorcio and SIPDH forwarded the documents requested by the Court as helpful evidence (*supra* paras. 11 and 15).[175] Finally, the Court received various documents submitted by the State and the common interveners Factum Consorcio together with their final written arguments,[176] and by SIPDH with its observations on the information submitted by the State as helpful evidence on September 27, 2017[177] and its observations on the annexes to the final written arguments of the parties.[178]

B. Admission of the evidence

B.1 Admission of the documentary evidence

137. The Court admits those documents submitted at the appropriate procedural opportunity by the parties and the Commission (Article 57 of the Rules of Procedure), the admissibility of which was not challenged or disputed, and the authenticity of which was not questioned.[179] The Court also finds it pertinent to admit the statements rendered by affidavit, insofar as they are in keeping with the purpose defined by the order that required them and the purpose of this case.[180] In addition, the Court admits the documents submitted as helpful

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for information purposes proposed by the State: i) Daniel González Álvarez, ii) Edwin Jiménez González, and iii) Elías Carranza; i) expert witnesses proposed by the Commission: i) Alberto Bovino, and ii) Juan Pablo Gomara; j) expert witnesses proposed by SIPDH: iii) Walter Antillón; k) expert witnesses proposed by Adrián Martínez Blanco: iv) Giselle Chacón Araya; l) expert witnesses proposed by AIDEF: v) José Joaquín Ureña Chamberzar, and vi) Juan Gerardo Ugalde Lobo; and m) expert witnesses proposed by the State: vii) Carlos Alberto Beraldi.

174 Together with the brief of observations on the preliminary objections of April 8, 2016, AIDEF forwarded the Final Report with Recommendations of February 22, 2011, of the Ombudsman's Office. On April 12, 2016, the common interveners SIPDH submitted together with their observations on the preliminary objections: i) the death certificate of Mr. Manfred Amrhein Pinto, and ii) the judgment of cassation within a civil action for damages related to the criminal proceedings of the petitioners of Group 1 (Manfred Amrhein and others).

175 The Commission and the parties presented helpful evidence on the following dates: i) the Commission, on February 15, 2017; the State, on February 15 and 22, September 27, 2017 and March 8, 2018; Factum Consorcio, on September 28, 2017; and SIPDH in a brief of December 19, 2017. The common intervenor SIPDH submitted: a) Notarial record of September 28, 2017 and b) decisions on the pretrial detention of Miguel Mora Calvo. The State indicated that the documents listed in the Notarial Record were not found in the documentation forwarded to this Court. In this regard, the Court finds that the documents submitted to the Court were the same as those forwarded to the parties.

176 With their final written arguments the common interveners Factum Consorcio submitted: i) official invoices for the professional fees of Mr. Adrián Martínez Blanco and Néstor Morera Víquez, together with electronic airline tickets for travel from Buenos Aires, Argentina to San José; ii) temporary residence document in Argentina of Mr. Adrián Martínez Blanco; and ii) Judgment of the Inter-American Court in the case of *Herrera Espinoza et al. v. Ecuador*. For its part, the State submitted the following documentation with its brief of final arguments: i) the seven briefs submitted to the Commission in the processing before it, which had not formed part of the file presented with the submission of the case, and ii) the Study on Appeals Regimes in Adversarial Criminal Procedure Systems in the Americas: Central Aspects, prepared by the Justice Studies Center of the Americas at the request of the Inter-American Commission on Human Rights.

177 The common interveners SIPDH submitted charts on the Costa Rican legislation with their observations on the information presented by the State as helpful evidence on September 27, 2017. In this regard, the State objected to the aforementioned legislation charts or "statistics on appeals for cassation and review" considering that the subject matter contained therein does not form part of the object of the case. First, the Court considers that the State's objection relates to the merits of the case and does not affect the admissibility of the documents submitted. Secondly, the Court notes that these legislation charts are strictly for reference and illustrative purposes and will therefore be considered as such.

178 SIPDH presented the transcript of the decisions on the motions for review related to the case of Miguel Mora.

179 *Cf. Case of Velásquez Rodríguez v. Honduras, Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Acosta et al. v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of 25 March 2017. Series C No. 334, para. 21.

180 The purpose of the statements are established in the Order of the President of the Court of July 12, 2017. http://www.corteidh.or.cr/docs/asuntos/amrhein_12_07_17.pdf.

evidence requested in accordance with Article 58(b) of its Rules that were not objected to by the parties.

138. With respect to the procedural opportunity for the submission of documentary evidence, according to Article 57(2) of the Rules of Procedure, such evidence must be presented, in general, together with the briefs submitting the case, of pleadings and motions or answering briefs, as the case may be. The Court recalls that evidence submitted outside of the proper procedural opportunities is not admissible, except in the exceptions established in Article 57(2) of the Rules of Procedure, namely, *force majeure*, serious impediment or if it concerns a fact that occurred after the aforementioned procedural moments.[181]

139. In this regard, attached to their brief of April 8, 2016, containing observations on the preliminary objections, the Inter-American Defenders submitted as evidence the Final Report with Recommendations of the Ombudsman's Office, dated February 22, 2011. The Court admits said document pursuant to Article 58(a) of the Rules, considering it useful for the study of the arguments of the parties regarding the alleged violation of the right to personal integrity of the alleged victims.

140. Also, in a brief dated April 12, 2016, the common interveners SIPDH submitted, together with their brief of observations on the preliminary objections: i) the death certificate of Mr. Manfred Amrhein, and ii) the cassation judgment in a civil suit for damages related to the criminal proceeding of the petitioners of Group 1 (Manfred Amrhein et al.). Said documents pertain to Group 1, on which the Court will not rule in this judgment. Therefore, these documents will not be taken into account.

141. In addition, together with its final written arguments, the State submitted the "Study on Appeals Regimes in Adversarial Criminal Procedure Systems in the Americas: Central Aspects," prepared by the Justice Studies Center of the Americas at the request of the Inter-American Commission. In this regard, the Court observes that this report is dated August 31, 2009, and therefore it is not supervening evidence and the exceptions provided for in Article 57(2) of the Rules of Procedure do not apply. Consequently, the Court will not admit said document.

142. As for the annexes submitted by the State together with its final written arguments, corresponding to the briefs submitted by Costa Rica after the adoption of the Merits Report in the proceedings before the Commission, the Court admits them, since it considers that they were already part of the file before the Commission.

143. With regard to the documents on costs and expenses submitted by Factum Consorcio with its final written arguments, the State objected to these documents, arguing that in its answer it had requested that all claims for reparations be dismissed. However, the Court considers that the State's objection is an argument on the merits of the case that does not preclude the admissibility of the documents. In this regard, the Court will only consider those documents that refer to costs and expenses incurred after the submission of the pleadings and motions brief, pursuant to Article 40(2)(d) of the Rules of Procedure.

144. In addition, together with its brief of December 19, 2017, containing observations on the annexes forwarded by the State on September 25 and November 28, 2017, SIPDH forwarded transcribed documentation related to "motions for review decided by the Third

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[181] *Cf. Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 22, and *Case of Vásquez Durand et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 332, *supra,* para. 52.

Chamber in the case of Miguel Mora Calvo." In this regard, the Court notes that the transcripts submitted by SIPDH do not relate to the annexes submitted by the State on September 25 and November 28, 2017. Therefore, they were not submitted at the appropriate procedural stage. Nor do they constitute supervening evidence and the exceptions established in Article 57(2) of the Rules of Procedure do not apply. Consequently, the Court will not admit the transcribed documents provided by SIPDH.

145. Finally, with regard to the State's observations on the statements of the alleged victims, the witnesses, and the expert opinions,[182] the Court notes that these refer to their content and, therefore, may affect the assessment of their evidentiary weight, but do not affect their admissibility.[183]

C. Assessment of the Evidence

146. Based on Articles 46, 47, 48, 50, 51, 52, 57 and 58 of the Rules of Procedure, as well as its consistent case law concerning evidence and its assessment, the Court will now examine and assess the documentary evidence submitted by the parties and the Commission at the appropriate procedural moment, as well as the statements and expert opinions provided in affidavits. To this end, it will abide by the principle of sound judicial discretion, within the corresponding legal framework, taking into account the entire body of evidence and the arguments made in the case.[184]

VI
PRELIMINARY CONSIDERATIONS

147. The State alleged that certain facts submitted by the common interveners regarding: i) the criminal cases brought against Jorge Martínez Meléndez (Group 4); ii) the conditions of detention of the alleged victims, and iii) the alleged lack of impartiality of Judge Javier Llobet who tried Miguel Mora Calvo, were outside the factual framework of the case.[185]

148. The Court has established that the factual framework of the case before the Court is constituted by the facts contained in the Merits Report submitted for its consideration. Consequently, it is not admissible for the parties to allege new facts other than those contained in the Merits Report, without prejudice to submitting any facts that may explain, clarify or reject those that have been mentioned in said report and have been submitted to the Court's consideration. The exception to this principle are facts classified as supervening, which may be forwarded to the Court at any stage of the proceedings, provided that they are linked to the facts of the case.[186] Likewise, the alleged victims and their representatives may invoke the violation of rights other than those included in the Merits Report, provided they

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182 In its brief of January 25, 2018, the State questioned the opinion of the expert witness Alberto Bovino considering that there was a "conflict of interests" since Mr. Bovino acts as representative in Case 13.190 against Costa Rica, which is before the Commission. According to the State, this is supervening information. In this regard, the Court noted that in accordance with the information submitted by the State, Alberto Bovino acted as its representative since 2009, for which reason the State was fully aware of this fact prior to the proper procedural moments to challenge the admissibility of the evidence. Nevertheless, the Court takes note of the representation of the expert witness in the case in question and will consider this when issuing its decision.

183 *Cf. Case of Díaz Peña v. Venezuela*, *supra, para.*33, and *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340*, para. 29.

184 *Cf. Case of the "White Van" (Paniagua Morales et al) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 76, and *Case of Favela Nova Brasilia v. Brazil*, *supra,* para. 98.

185 The Court will not refer to prior matters raised by the State in relation to groups of alleged victims and files that are not being analyzed, by virtue of the decision mentioned in the chapter on preliminary objections.

186 *Cf. Case of Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, Para. 153, and *Case Acosta Calderón v. Ecuador. Merits, reparations and costs*. Judgment of June 24, 2005. Series C No. 129, para. 30.

relate to facts already contained in the application.[187] Finally, the Court will decide in each case on the admissibility of the arguments related to the factual framework in order to safeguard the procedural balance of the parties.[188] In light of the foregoing, the Court will analyze the three groups of arguments presented by the State below.

A. Criminal cases against Jorge Martínez Meléndez (Group 4)

A.1. Arguments of the parties and the Commission

149. The ***State*** argued that in the pleadings and motions brief, the Factum Consorcio representatives included new facts that are not part of the factual framework contained in the Merits Report, namely: a) the inclusion of a second criminal case contained in file 05-007495-0647-TP in which Mr. Martínez Meléndez was sentenced to six years of imprisonment for the crimes of libelous complaint and actual libel; b) the alleged substitution of Judge Adela Sibaja Rodríguez by Judge Miriam Sandí Murcia in the Trial Court of the first Judicial Circuit of San José, in case 03-82-016TP; c) the alleged extensive application and interpretation of the criminal offense of embezzlement used by the State; and d) the alleged refusal to admit and provide access to evidence for the defense.

150. The ***Commission*** held that in its answering brief the State did not indicate to which alleged new facts it was referring, and thus "it could not identify a violation of the State's right of defense and […would not be] in a position to submit detailed observations in this regard."

151. The ***Factum Consorcio*** representatives argued that:

a) the criminal case contained in file No. 05-007495-0647-TP, although it is not mentioned in the Merits Report, "is not new", since this matter was brought to the Commission's attention in briefs dated October 3, 2011, which were forwarded prior to the issuance of the Admissibility and Merits Reports.

b) the substitution of Judge Adela Sibaja Rodríguez by Judge Miriam Sandí Murcia "does not constitute a new fact, but rather an illustration of the manner, the actors, and the illegal mechanisms that the State used to violate the right to liberty, as well as the absence of impartiality in the trial."

c) the argument regarding the extensive application of the criminal offense of embezzlement "is directly related to the main fact of arbitrary deprivation of liberty, and the denial of the right to appeal in the criminal proceeding that followed, given that the sentence imposed was by application of the criminal definition of said offense." They also alleged that the criminal offense of embezzlement was applied to Mr. Martínez in order to

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187 *Cf. Case of Five Pensioners v. Peru, supra.* para. 153, and *Case of Acosta et al. v. Nicaragua*, *supra, para.* 30.

188 *Cf. Case of the Mapiripán Massacre v. Colombia*, *supra, para.* 58; and *Case of Acosta et al. v. Nicaragua*, *supra, para.* 30.

punish him, considering him a public official - even though he was not appointed as such - and applying to him the criminal offense of communicability of circumstances.

d) regarding the alleged refusal to admit and provide access to evidence for the defense, there is no attempt to recreate the oral trial, since the evidence that the State did not allow at trial is not offered, but it is stated "that the processing of these proceedings was done in violation of the victim's rights under the Convention, and that the infringement of the right to liberty was an arbitrary and illegal act."

A.2. Considerations of the Court

152. First, regarding the inclusion of a second criminal case (file 05-007495-0647-TP), in Factum Consorcio's pleadings and motions brief, in which Mr. Martínez Meléndez was sentenced to 6 years in prison for the crimes of libelous complaint (*querella calumniosa)* and actual libel (*calumnia real)*, the Court notes that this information does not appear in the Commission's Merits Report. Nor do these facts explain, clarify or dismiss those contained in the Merits Report, nor are they supervening facts that occurred after its issuance. On this point, the Court notes that the representatives informed the Commission of said criminal case on March 26, 2011,[189] even prior to the issuance of Admissibility Report No. 105/11,[190] which does not mention it either. Thus, the Court considers that the factual arguments of the representatives related to the aforementioned criminal case introduce new aspects that are not part of the factual framework, and will therefore not take them into consideration.

153. Second, regarding the substitution of Judge Adela Sibaja Rodríguez by Judge Miriam Sandí Murcia in the Trial Court of the First Judicial Circuit of San José during the substantiation of case No. 03-82-016TP and the alleged refusal to admit and provide access to evidence for the defense, the Court finds that although these facts are not expressly mentioned in the Merits Report, they are part of the alleged grievances raised in the appeal in cassation against judgment No. 680-2007, decided on March 11, 2008, by the Third Chamber of the Supreme Court[191] which is contained in the Merits Report. Therefore, this Court considers that these facts clarify aspects of the criminal proceedings referred to in the Merits Report, and which thus form part of the factual framework of the case. Finally, with respect to the alleged extensive application and interpretation of the criminal offense of embezzlement, the preliminary objection presented by the State was previously declared admissible (*supra* para. 88).

B. Regarding the prison conditions of the alleged victims

B.1. Arguments of the parties and the Commission

154. The ***State*** alleged that the following facts argued by the representatives are outside the factual framework of the instant case:

a) The SIPDH representatives alleged that Damas Vega filed a series of complaints before different authorities that do not appear in the Merits Report.

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189 *Cf.* Brief submitted by the representatives of Adrián Martínez Blanco on March 7, 2017, in response to official communication DJO-075-17 presented by the State of Costa Rica, (merits file, folio 2647).

190 *Cf.* IACHR, Report No. 105/11 Petitions 663/06 and others, Manfred Amrhein et al., Costa Rica, July 22, 2011, paras. 39-42 (evidence file, folios 18255 and 18256).

191 *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (file of annexes to the submission of the case, annex 109, folio 19004).

b) Regarding the situation of Jorge Martínez Meléndez, the Factum Consorcio representatives referred to the alleged mistreatment he received during his incarceration in the CAI San José.

c) The Inter-American Defenders alleged that "a structural violation of the law [exists] in the Costa Rican prison system." In response, the State argued that only the petitioners Rafael Rojas Madrigal and Damas Vega Atencio had alleged violations of fundamental rights from the start of the proceedings due to the prison conditions at the CAI La Reforma, and that each area of physical containment and each petitioner has his own characteristics and circumstances; therefore, the Commission should have established the specific harm caused to each of them, if it existed. Thus, they requested that the Court limit the case only to the alleged non-compliance related to "the conditions of detention at the CAI La Reforma in relation to the alleged victims."

155. The ***SIPDH*** representatives listed the complaints filed by Damas Vega Atencio during his stay at the CAI La Reforma, including six complaints concerning the search carried out on July 20, 2006, the alleged denial of access to health care, problems regarding the food provided to inmates, the complaint filed after the death of the inmate FA in January 2010, and the complaint filed after the alleged victim was transferred to maximum security, as a result of the inmates' hunger strike in 2008. The representatives alleged that all these facts "complement […] the initial facts contained in the petition of Mr. Damas Vega Atencio, since these events occurred within the framework of the execution of the criminal conviction […] and should be understood as an aggregation of new facts with respect to the initial petition." They also pointed out that "[t]he recounting of these facts, complaints and grievances proves that Mr. Vega did everything that he could possibly do […] as a person deprived of liberty who expects his access to justice to be channeled through the prison's administrative authorities […]."

156. In a brief dated March 7, 2017,[192] the ***Inter-American Defenders*** alleged that in the Merits Report the Commission established that the problem of overcrowding was general to all the alleged victims, "since it is more than evident that the overcrowding found in all the modules of La Reforma Prison […] generates very serious problems in the quantity and quality of water, among many others […]." They also argued that this report "narrates and describes in detail the conditions faced by all persons deprived of liberty in La Reforma Prison."

157. In their observations on the preliminary objections, the ***Factum Consorcio*** representatives indicated that the State had alleged "without specifying, that there is an extension of the facts in the allegations of Jorge Martínez Meléndez; this is not correct, since all the aspects mentioned are circumstances linked to the factual framework, or are a consequence of it, or are within the factual framework established by the Commission." They also alleged that Mr. Martínez Meléndez is the only person of those involved who did not serve time in prison at CAI La Reforma. They considered the absence of this fact "a regrettable involuntary omission on the part of the Commission, justified by the change from the individual case file P-1083-06 to the joined case file 12,820."

[192] In a note dated March 21, 2017, the Secretariat confirmed that "the State and the common interveners Factum Consorcio and Inter-American Defenders included arguments in their briefs that do not constitute observations on the annexes presented by the other parties as helpful evidence. Therefore, as per the instructions of the President of the Court, such arguments will not be taken into consideration by the Court." In that regard, given that in the note of February 10, 2017, the Secretariat asked the State to specify which facts were supposedly outside the factual framework of the case, the arguments of the parties concerning this point should also be admitted in order to ensure the right to adversarial proceedings.

158. The ***Commission*** indicated that it could not find any violation of the State's right of defense in relation to the alleged new facts concerning Damas Vega and Jorge Martínez, since Costa Rica did not indicate to which alleged new facts it was referring.

B.2. Considerations of the Court

159. First, the preliminary objection raised by the State regarding the alleged violations derived from the prison conditions in the CAI La Reforma to the detriment of Rafael Rojas Madrigal and Damas Vega Atencio was previously accepted; therefore, the facts presented by the SIPDH in relation to the complaints about the prison food at CAI La Reforma will not be examined within the factual framework of this case. For the same reason, the facts related to the incidental plea of illness filed on November 13, 2006 by Damas Vega Atencio will not be examined either.

160. Secondly, regarding the allegations of Factum Consorcio about what happened to Jorge Martínez Meléndez at the CAI San José, as well as the allegations of the Public Defenders regarding the alleged "structural violations in the Costa Rican prison system," the Court notes that the Merits Report of the Commission refers only to the situation of the CAI La Reforma,[193] without any considerations about the CAI San José or about the Costa Rican prison system as a whole.[194] Consequently, the Court considers that these facts do not fall within the factual framework of the case and therefore will not rule on the matter.

161. Third, the Court notes that in the Merits Report, the Commission held that the State failed to comply with its obligation to ensure the minimum conditions of detention compatible with human dignity, in violation of Articles 5(1) and 5(2) of the Convention, in relation to Article 1(1) thereof, to the detriment of all the victims in the instant case who served their sentences in the CAI La Reforma. However, it did not specify the time, manner and place of the facts that gave rise to the alleged violations of the personal integrity of each of the alleged victims who served their sentences in the CAI La Reforma, beyond those denounced by Rafael Rojas and Damas Vega.

162. This Court has established that, based on the adversarial principle, the discussion of factual issues must be reflected in the Merits Report.[195] Thus, it is for the Court to decide in each case on the admissibility of the arguments relating to the factual framework, in order to safeguard the procedural balance between the parties.[196] In this case, the Court considers that, since the facts that led to the alleged violation of the right to personal integrity of each of the victims - with the exception of Rojas Madrigal and Vega Atencio- were not specified in the Merits Report or in the pleadings and motions brief, the State found itself, in the proceedings before this Court, in a situation of procedural imbalance and therefore, these alleged violations do not form part of the factual framework of the case.

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193 *Cf.* Merits Report No. 33/14 of April 4, 2014, paras. 94 to 155, 177 to 183 and 255 to 268 (merits file, folios 28 to 35, 51, 52 and 68 to 71).

194 In relation to the situation at CAI La Reforma, the Commission mentioned in the Merits Report that "the State recognized that there has been an increase in the number of persons deprived of liberty at prison facilities and noted that more resources have been allocated in the 2013 draft budget for the construction of prison infrastructure." However, it did not provide details of time, mode or place that would enable the Court to determine which establishments it was referring to, since the Commission's analysis always focused on the situation in the CAI La Reforma. *Cf.* Merits Report No. 33/14 of April 4, 2014 (merits file, folio 68).

195 *Cf. Case of Gutiérrez and Family v. Argentina. Merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 271, para. 31, and *Case of Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, Para. 28.

196 *Cf. Case of the Mapiripán v Massacre v. Colombia, supra, para.* 58, and *Case of Human Rights Defender et al. v. Guatemala, supra,* para. 28.

C. Alleged lack of impartiality of Judge Javier Llobet who tried Miguel Mora Calvo (Group 7)

163. The ***State*** pointed out that the facts concerning the alleged lack of impartiality of Judge Javier Llobet, who, according to the representatives, had ruled on the precautionary measure to extend Miguel Mora Calvo's pretrial detention and subsequently formed part of the court of appeal that sentenced him, "are not even part of the [Commission's Merits] Report."

164. Neither the ***Commission*** nor the ***SIPDH*** r***epresentatives*** of Mr. Mora Calvo referred to this point.

165. This Court confirms that in paragraph 159 of its Merits Report, the Commission referred to the alleged lack of impartiality of one of the members of the court that tried Miguel Mora Calvo.[197] Therefore, this Court considers that the alleged lack of impartiality of Judge Llobet does indeed form part of the factual framework of this case.

VII
PROVEN FACTS

166. The Court will now outline the relevant rules of the Costa Rican appeals system, applicable to Groups 2, 3, 4, and 7 of the alleged victims. Subsequently, it will describe the criminal proceedings and remedies filed by the alleged victims of these groups, which will be then analyzed by the Court, all in accordance with the provisions set forth in Chapter IV of this judgment on the preliminary objections filed by the State.

A. Relevant regulatory framework

A.1. Code of Criminal Procedure 1996 (CCP of 1996 - Law No. 7594)

167. On December 10, 1996, the Code of Criminal Procedure (CCP) was enacted under Law No. 7594, which came into force on January 1, 1998.[198] This law established that a petition for a writ of cassation (*recurso de casación*)[199] could be filed to reverse a conviction in a criminal proceeding. In addition, under Article 408, subparagraph g),[200] the motion for review could be filed when the sentence had not been issued through due process of law or

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197 *Cf.* Merits Report No. 33/14 of April 4, 2014 (merits file, folio 46).

198 *Cf. Law No.* 7594 published in *La Gaceta* on June 4, 1996 and in force since January 1, 1998. Original version available at: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_text_completo.aspx?param1=NRTC&nValor1=1&nValor2=41297&nValor3=43524&strTipM=TC the previous Code was the Code of Criminal Procedure of 1973.

199 *Cf. Law No.* 7594, original version, Article 443: "The petition for a writ of reversal on cassation (*recurso de casación*) shall be admissible when the decision failed to observe or erroneously applied a legal precept. When the legal precept that is being claimed as unobserved or erroneously applied constitutes a procedural defect or flaw, the petition for cassation shall only be admissible if the interested party has filed a timely motion to rectify it or has sworn to petition for a writ of reversal on cassation, except in instances of absolute defects and those occurring subsequent to the closure of oral trial arguments".
Likewise, Article 445 established that "[t]he petition for a writ of reversal on cassation shall be filed before the court that issued the decision, within fifteen days from notification, stating clearly the legal provisions that it failed to observe or erroneously applied and setting forth its claim. Each reason and its grounds shall be stated separately. No other grounds may be raised outside this opportunity". In addition, Article 369 established the flaws or defects of a judgment that justify cassation.

200 *Cf. Law No.* 7594, original version, Article 408 established: "The review shall be applicable against final sentences and in favor of the convicted person or the person on whom a security and correction measure has been imposed, in the following cases: g) When the sentence has not been issued through due process or opportunity for defense. The review shall be applicable even in cases in which the sentence or security measure has been executed or has expired.

opportunity for defense. Under Article 411, it was not possible to examine matters that had already been discussed and decided in cassation, unless they were based on new grounds or new evidence.[201]

A.2. Law No. 8503 of 2006

168. On June 6, 2006, Law No. 8503 entitled "Law for the Opening of Criminal Cassation (Reforms Articles 15, 369, 410, 411, 414, 447 and 449, adds Article 449 bis and 451 bis of the Code of Criminal Procedure, reforms Articles 62, 93, adds Article 93 bis of the Organic Law of the Judiciary)" entered into force. This law amended and added various articles of the Code of Criminal Procedure related to appeals for cassation[202] and review.[203] For example, Article 369 added as a defect in the judgment that justifies cassation, subparagraph j) "[w]hen the judgment has not been issued through due process or with an opportunity for defense."[204] In addition, Article 449 of the CCP, established that "[…] evidence proposed by or on behalf of the accused is admissible [in cassation], including evidence related to the determination of the facts in dispute, when it is indispensable to support the claim being formulated and in the cases authorized in the review procedure […]."[205] Said article also authorizes the reception- even *ex officio*- of oral evidence by the Court of Cassation. Furthermore, Article 449 bis established that "[t]he Court of Cassation shall assess the merits of the claims invoked in the appeal and their grounds, examining the proceedings and the records of the hearing, so that it may evaluate the manner in which the trial judges assessed the evidence and reached their decision. If the records are insufficient to make such an assessment, it may reproduce in cassation the oral evidence of the trial which, in its view, is necessary to examine the merits of the claim, and will evaluate it in relation to the rest of the proceedings. Likewise, it may directly assess the evidence that has been introduced in writing at trial."[206] Finally, as noted previously, transitory provision I of Law 8503[207] established a special review procedure for "persons convicted of a criminal offense prior to the enactment of this law, who have been prevented from filing an appeal in cassation against the judgment, due to the rules that regulated its admissibility on that date […] and who may file a motion for review of the judgment before the competent court, invoking in each case, the grievance and the factual and legal aspects that could not be heard in cassation." (*supra* para. 46).

A.3. Law No. 8837 of 2010

169. On June 9, 2010, Law No. 8837 entitled "Creation of an appeals procedure, other reforms to the appeals system and implementation of new rules on oral proceedings in

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201 *Cf. Law No.* 7594, original version, Article 411. Declaration of inadmissibility. When the claim has been filed outside the situations that authorize it, without observing the established formalities, or when it is manifestly unfounded, the court, *ex officio*, shall declare it inadmissible; without prejudice to the corresponding caution in the case of formal errors. Nor shall it be admissible to raise, by way of review, matters that have already been discussed and resolved in cassation, unless they are based on new reasons or new evidence.

202 *Cf. Law No.* 8503 of 2006, Article 1, which amended *inter alia*, Article 447 of the CCP, indicated in relation to the processing that "[t]he Court of Cassation may declare the motion inadmissible if it finds that the decision is not subject to appeal, that the motion has been filed extemporaneously or that the party does not have the right to appeal, in which case it shall so declare and send the case file back to the original court […]." (evidence file annex 1 of the State's answering brief, folio 28474).

203 *Cf.* With respect to the review procedure, Article 1 of Law No. 8503 that amended Article 410 established that "it shall contain specific reference to the grounds on which it is based and the applicable legal provisions. Additionally, the documentary evidence that is involved shall be attached and, as the case may be, the place or archive where it is located shall be indicated." (evidence file annex 1 of the State's answering brief, folio 28473)

204 *Cf.* Law No. 8503 of 2006, Article 2 (evidence file annex 1 of the State's answering brief, folio 28475)

205 *Cf.* Law No. 8503 of 2006, Article 2 (evidence file annex 1 of the State's answering brief, folio 28474 and 28475).

206 *Cf.* Law No. 8503 of 2006, Article 2 (evidence file annex 1 of the State's answering brief, folio 28475).

207 *Cf.* Law No. 8503 of 2006, Article 2 (evidence file annex 1 of the State's answering brief, folio 28477).

criminal cases" was published, effective as of December 9, 2011.[208] Said statute created and regulated the admissibility and processing of appeals. Article 459 established admissibility requirements for a motion to appeal judgments as follows: "the motion to appeal a judgment shall allow for a comprehensive examination of the judgment, when the interested party alleges disagreement with the determination of the facts, the introduction and evaluation of evidence, the legal grounds or the establishment of the sentence. The appellate court shall rule on the points that are expressly contested, but shall declare, even *ex officio*, the absolute defects and violations of due process that are found in the judgment." Subsequent articles also regulate the filing, processing, possible hearing and the circumstances under which evidence may be taken.[209]

170. In addition, Article 468 reformed the grounds for filing an appeal in cassation: i) the existence of contradictory precedents issued by the appellate courts, or between the latter and the Chamber of Criminal Cassation, and ii) when the judgment does not observe or erroneously applies a substantive or procedural legal precept.[210] In turn, it eliminated subparagraph g) of Article 408,[211] which provided for the filing of an appeal in cassation when the judgment had not been issued through due process or an opportunity for defense.[212]

171. With regard to persons whose conviction became final or whose appeals on cassation were pending before the entry into force of this law, transitory provision III stipulated that:

> "In all matters that have a final judgment at the time of the entry into force of this Law, and in which the violation of Article 8(2) (h) of the American Convention on Human Rights has been previously alleged, the convicted person shall have the right to file, only once, during the first six months, a judgment review procedure that shall be heard according to the competencies established in this Law, by the former Courts of Cassation or the Third Criminal Chamber [of the Supreme Court]. In those matters that are pending resolution and in which a violation of Article 8(2)(h) of the American Convention on Human Rights has been previously alleged, the appellant shall be given a period of two months to convert his or her petition for writ of reversal on cassation into a motion of appeal, which shall be presented before the former Courts of Cassation or the Third Chamber, as appropriate, which shall forward the case file to the new Courts of Appeal for resolution. Under penalty of admissibility, the grievance must be specifically stated."[213]

B. Criminal proceedings related to the alleged victims of Groups 2, 3, 4 and 7[214]

B.1. Group 2: Rafael Antonio Rojas Madrigal

B.1.1. File N° 99-000136-065-PE (Use of false document)

B.1.1.1. First judgment N° 172-2000 and cassation appeals filed

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208 *Cf.* Law No. 8837 of 2010 of "Law creating a conviction appeal procedure, other reforms to the appeals system and implementing new rules on oral proceedings in criminal matters" See: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/normas/nrm_text_completo.aspx?param2=1&nValor1=1&nValor2=68077&nValor3=101879&nValor4=NO&strTipM=TC

209 *Cf.* Law No. 8837 of 2010, Articles 460, 461, 462 and 463 (evidence file annex 1 of the State's answering brief, folio 28482).

210 *Cf.* Law No. 8837 of 2010, Article 468 subparagraphs a) and b) (evidence file annex 1 of the State's answering brief, folio 28484).

211 *Cf.* Law No. 8837 of 2010 (evidence file annex 1 of the answering brief, folio 28480).

212 *Cf.* Law No. 7594 of 1996 Article 408, subparagraph g). "When the judgment has not been rendered under due process of law or with an opportunity for a defense."

213 *Cf.* Law No. 8837 of 2010 (evidence file annex 1 of the State's answer, folio 28489).

214 The Court points out that, in several cases, it did not receive briefs in which the alleged victims or their defense attorneys filed the appeals described below. In those cases, this Court extracted the reasons or arguments offered from the summary of the decisions or judgments issued by the different courts that decided these appeals.

172. On May 17, 2000, the Prosecutor's Office of San Carlos brought charges and requested the opening of criminal proceedings against Rafael Rojas Madrigal for the crime of forgery and use of a false document in connection with fraud.[215] On November 22, 2000, the Court of the Second Judicial Circuit of Alajuela, through decision N° 172-2000, acquitted Mr. Rojas Madrigal of the crime of forgery of documents, dismissed the charges of embezzlement, and sentenced him to a four-year prison term, considering him responsible for the crime of use of false document.[216]

173. On December 18, 2000, Mr. Rojas filed an appeal in cassation against judgment N° 172-2000, alleging violations of due process.[217] On December 21, 2000, his defense filed another petition for a writ of reversal on cassation against judgment N° 172-2000, alleging *inter alia*, "illegitimate grounds for the sentence," "erroneous assessment of the evidence" and "lack of intellectual evidentiary basis."[218]

174. On February 2, 2001, the Third Chamber of the Supreme Court of Justice (hereinafter, "the Third Chamber"), in decision N° 2001-000122, declared Mr. Rojas' cassation appeal inadmissible. It stated that "[…]the specific relevance of the alleged irregularities that he claims is not demonstrated, nor does he make a distinction between the arguments and the regulatory basis […] established in Article 445 of the Code of Criminal Procedure […]. The Third Chamber held that "what is being formulated [in this petition] is [his] disagreement with the final outcome of the trial […]." However, it admitted the first argument put forward in the petition filed by the defense regarding the sentence imposed, annulling that decision.[219]

B.1.1.2. Second judgment N° 172-2000 and cassation appeals filed

175. On March 28, 2001, the Court of the Second Judicial Circuit of Alajuela again issued judgment N° 172-2000, in which it sentenced Mr. Rojas to a four-year prison term for the use of a false document in abuse of public office, considering that he "used two young men to make use of the deposit made illegally […]."[220]

176. Mr. Rojas and his defense counsel filed appeals on April 2 and 24, 2001, respectively, against this judgment. Mr. Rojas alleged that: "the basis of the sentence [...] is not in accordance with the criteria of the crime for which he was sentenced […]. These descriptive [and] intellective actions do not correspond […] to the crime of use of false document but to the crime of fraud, for which I was […] acquitted in the trial […]."[221] For his part, his defense alleged: "illegitimate grounds in setting the sentence: […] the aforementioned flaw is produced [...] by imposing a four-year prison sentence for a crime [punishable] from one to six years, with the simple justification of describing the subjective and objective aspects of the punishable act [...]And [for] the fact that the accused used two youths [...], the [...]

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215 *Cf.* Accusation of the Prosecutor's Office of San Carlos within file *99-000136-065 PE,* of May 17, 2000 (evidence file, folio 907).

216 *Cf.* Judgment No 172-2000 of the Court of the Second Judicial Circuit of Alajuela, of November 22, 2000 (evidence file, folio 960).

217 *Cf.* Writ of cassation, filed by Rafael Rojas against Judgment N° 172-2000 on December 18, 2000 (file evidence, folio 966).

218 *Cf.* Writ of cassation, filed by defense counsel Luis Fernando González against Judgment N° 172-2000, the 21 December 2000 (evidence file, folio 997).

219 *Cf.* Decision N° 2001-000122 of the Third Chamber of the Supreme Court of Justice, of February 2, 2001 (evidence file, folios 1012 and 1013).

220 *Cf.* Judgment No 172-2000 of the Court of the Second Judicial Circuit of Alajuela, of March 28, 2001 (evidence file, folio 33476).

221 *Cf.* Appeal on cassation, filed by Rafael Rojas Madrigal against Judgment N° 172-2000, on April 2, 2001 (evidence file, folios 1016 and 1017).

judges forgetting that [...] in the facts accused and proven in the judgment [...], the accused was the one who made the deposit in the bank [...], without using any youths [...]."[222]

177. On June 8, 2001, in decision N° 00550-2001, the Third Chamber ruled on the cassation appeal filed by Mr. Rojas Madrigal's defense counsel. It considered the sole motive contained in the cassation appeal to be admissible, given that "[...] the grounds for the sentence imposed are illegitimate and disproportionate [...]. It is evident that the trial court committed the same error [originally] pointed out"[223] by the Third Chamber in its decision N° 2001-000122, of February 2, 2001, since it set the prison sentence higher than the minimum considering the "participation of two young people [...], ignoring the fact that the actions of those youths took place within [...] an act of fraud, a time-barred crime, and not the use of a false document, which is the punishable offense [...]."[224] Consequently, the Third Chamber ordered the prison term to be reduced to three years, and since Mr. Rojas had no previous criminal record, it granted him the benefit of conditional execution of the sentence, ordering his immediate release.

B.1.1.3. Appeals for review filed against judgment N° 172-2000

178. In August 2001, Mr. Rojas filed an appeal for review of judgment N° 172-2000,[225] in which argued, *inter alia*: i) that the crime of use of a false document was inapplicable, since it was an attempt; ii) failure to properly assess testimonial evidence; iii) lack of correlation between the charges and the conviction; iv) failure to notify him of the judgment, and v) use of false evidence by the trial court and lack of handwriting evidence in the case file.[226] On September 14, 2001, in decision N° 2001-00882, the Third Chamber declared the review proceeding inadmissible, considering that "[...] none of the grounds contain[ed] a single grievance, but rather several and of different types [...] and lacked an autonomous legal basis [...] in contravention of the first paragraph of Article 410 of the Code of Criminal Procedure, which requires specific reference to the grounds on which it is based."[227]

179. On November 29, 2004, Mr. Rojas filed a brief before the Third Chamber in which he requested "[...] the withdrawal of every appeal for review filed against judgment N° 172-2000, since [he] had not received any technical or legal support from the public defender [for] the proceedings [...]." On February 2, 2005, the Third Chamber granted his request.[228]

180. Between July and August 2005, Mr. Rojas filed two further motions for review of judgment N° 172-2000.[229] In the first, he indicated that due process was violated because

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[222] *Cf.* Writ of cassation, presented by Luis Fernando González against Judgment 172-2000, on April 24, 2001 (evidence file, folios 1021, 1025 and 1026).

[223] *Cf.* Decision N° 00550-2001 of the Third Chamber of the Supreme Court of Justice, of June 8, 2001 (evidence file, folios 1035 and 1036).

[224] *Cf.* Decision 2001-000122 of the Third Chamber of the Supreme Court of Justice, of February 2, 2001 (evidence file, folio 1012).

[225] The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, it was filed on August 24, 2001. *Cf.* Brief of the State of September 13, 2017, (merits file, folio 3396). In turn, the representatives affirmed that said motion was filed on August 14, 2001. *Cf.* Brief of the representatives of September 28, 2017, (merits file, folio 3501).

[226] *Cf.* Decision N° 2001-00882 of the Third Chamber of the Supreme Court of Justice, of September 14, 2001 (evidence file, folio 1039).

[227] *Cf.* Decision N° 2001-00882 of the Third Chamber of the Supreme Court of Justice, of September 14, 2001 (evidence file, folio 1040).

[228] *Cf.* Notification from the Third Chamber of the Supreme Court of Justice, of February 23, 2005 (evidence file, folio 1042). Decision N° 2007—01177 of October 19, 2007, establishes that "several motions for review were filed by the defendant, [...] however, in the two remaining motions the defendant himself withdrew them." (evidence file, folio 1048). The Court does not have records of the proceedings mentioned.

[229] The date on which the appeal was filed does not appear in the evidence. However, according to information provided by the State, the appeal was filed on July 12, 2005. *Cf.* Brief of the State of September 13,

"he did not have an opportunity to appeal the judgment in a court of second instance." In the second, he alleged the violation of due process owing to the non-observance of the principle of correlation between indictment and sentence; that the judgment was negligent regarding the evaluation of his statement; that his right to be notified was violated; that the witnesses he offered in the oral trial were intimidated by members of the court; that he was denied the right to testify during the preliminary hearing, and that his version of the facts was not evaluated at trial.

181. On October 19, 2007, in decision N° 2007-01177, the Third Chamber denied the motion for review of the conviction, considering that the judgment in the case of *Herrera Ulloa*, "does not create the obligation to provide a means to appeal a judgment to a higher judge or court, but rather a remedy that allows for a comprehensive review of the judgment […], [and that] this right to a full examination of the judgment [was] asserted when the two appeals on cassation were filed and declared partially admissible […]."[230]

182. Between February and March 2007, Mr. Rojas filed two motions for special review[231] against the second judgment 172-2000, based on transitory provision I of Law 8503. In the first motion he alleged that: i) his statement was not assessed; ii) the court considered a fact to be true based on the statement of a witness who could not substantiate that fact; iii) a witness gave different versions, without the court clarifying which one was credible and why, and iv) the judges who handed down the conviction were the same ones who had previously confirmed the pretrial detention of the accused. In the second motion, he alleged that the "court that had previously heard [the matter] and found the accused guilty […] also decided on the sentence to be handed down […]. Moreover, [in resolving the new cassation appeal], the Cassation Chamber directly established the sentence, preventing any possibility of appealing that decision […]."[232]

183. On May 28, 2010, the Third Chamber, in decision No. 2010-00544,[233] upheld the claim of violation of the principle of objectivity, stating that "the Chamber, when deciding the cassation appeal, directly set the sentence at three years of imprisonment, higher than the one-year minimum term established in Article 365 of the Criminal Code, and prevented the appellant from appealing the *quantum* of the sentence […]."

184. Consequently, it declared decision No. 00550-2001 invalid and declared the second judgment No. 172-2000 partially invalid, issued by the Court of the Second Judicial Circuit of Alajuela in relation to the *quantum* of the sentence, imposing the minimum penalty for the crime.

2017 (merits file, folio 3396). In turn, the representatives stated that said motion was filed on August 1, 2005. *Cf.* Brief of the representatives of September 28, 2017, (merits file, folio 3502).

230 In relation to the alleged failure to observe the principle of correlation between indictment and judgment, after an analysis of the accusation and the facts taken as proven, it found no evidentiary support to prove them. As for the alleged intimidation of witnesses, it noted that the appellant did not specify the nature of this intimidation and against whom it was directed. In relation to the alleged refusal/denial to testify in the preliminary hearing, it did not find evidentiary support nor real prejudice, since the appellant gave his version at trial, which was duly assessed in the ruling. Lastly, on the claim that the judgment failed to assess his statement, it ruled that the evidence against him was so abundant and gave rise to such a degree of certainty that this assessment would not alter the certainty of the conviction. *Cf.* Decision N° 2007-01177 of the Third Chamber of the Supreme Court of Justice, of October 19, 2007 (evidence file, folios 1045 and 1048 to 1050).

231 The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, it was filed on February 21, 2007. *Cf.* Brief of the State of September 13, 2017, (merits file, folio 3396). In turn, the representatives affirmed that this remedy was filed on March 24, 2007. *Cf.* Brief of the representatives of September 28, 2017, (merits file, folio 3502).

232 *Cf.* Decision 2010-00544 of the Third Chamber of the Supreme Court of Justice, of May 28, 2010 (evidence file, folios 33582 to 33587).

233 *Cf.* Decision 2010-00544 of the Third Chamber of the Supreme Court of Justice, of May 28, 2010 (evidence file, folio 1054).

185. Subsequently, Mr. Rojas initiated two other motions for review against judgment No. 172-2000. On February 12, 2008,[234] in a single plea, he alleged the violation of due process, arguing that "the acts [committed] to the detriment of the public interest […], were not notified or attributed to him during the investigation phase."[235] On October 29, 2010, the Third Chamber, in decision No. 2010-01205, declared the appeal inadmissible.[236]

186. The second motion for review was filed by Mr. Rojas on January 21, 2013,[237] alleging i) the violation of due process; ii) the alleged omission of the preliminary statement and notification of the charges in relation to the crime of use of a false document, and iii) that bank check No. 532-2 was unlawfully introduced to the proceeding because it was seized from an employee of the Bank of Costa Rica without an order from a judge.[238]" On July 2, 2014, the Third Chamber declared the three claims unfounded in decision No. 2014-01118.[239]

B.1.2. File N° 02-004656-0647-TP (embezzlement and use of a false document)

B.1.2.1 Criminal conviction issued in judgment N° 614-09 of July 2, 2009

187. On July 2, 2009, the Trial Court of the First Judicial Circuit of San José, in judgment No. 614-09, sentenced Mr. Rojas Madrigal to a five-year prison term for the crimes of embezzlement and use of a false document.[240] Mr. Rojas Madrigal[241] and his defense

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[234] He argued that, "upon learning of the new crime, the theft of the checkbook, he should have been questioned again, since in such case he would have requested the handwriting analysis in order to prove that [the offended party] partially filled out the form and therefore there was no malice in the use of the check […]."The date on which the appeal was filed does not appear in the evidence. However, according to information provided by the State, the appeal was filed on August 12, 2008. *Cf.* Brief of the State of September 13, 2017, Table 2 (merits file, folio 3396).

[235] *Cf.* Decision 2010-01205 of the Third Chamber of the Supreme Court of Justice, of October 29, 2010 (evidence file, folio 33589).

[236] It stated that: "Regarding the handwriting analysis […] in decision 2010-544 this Chamber […]stated […] 'the evidence indicated made it unnecessary to carry out a handwriting analysis to rule out the possibility that the offended party had drawn the check with which the deposit in question was made' […]". *Cf.* Decision 2010-01205 of the Third Chamber of the Supreme Court of Justice, of October 29, 2010 (evidence file, folio 33589).

[237] The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, the motion was filed on January 21, 2013. *Cf.* Brief of the State of September 13, 2017, Table 2 (merits file, folio 3397).

[238] *Cf.* Decision 2014-01118 of the Third Chamber of the Supreme Court of Justice, of July 2, 2014 (evidence file, folio 33592).

[239] The Chamber considered the following: First reason: violation of due process due to lack of impartiality and objectivity of the judge. "[…] the complaint cannot succeed […] it is clear that the decision of the judge [ABT] is based solely on an analysis of dates and not an assessment of the merits of the case […]"; Second reason: alleged omission of the preliminary statement and notification of the charges in relation to the crime of use of false document. "[…] The appellant is not correct. The Chamber found that the complaint made has already bene analyzed with the issuance of opinion number 1205-2010 […]"; Third reason: introduction of illegal evidence into the proceedings. "[…] Declared inadmissible […] the Chamber has previously established that the seizure of checks in financial entities may be carried out by officials of the Judicial Investigation Organism, since it does not violate against banking secrecy or the privacy of individuals [.][T]here is a complaint by the victim prior to the commission of the crime, in which the theft of the checkbook is reported, and it comes from the same account as the check that originated the illicit action […]". *Cf.* Decision 2014-01118 of the Third Chamber of the Supreme Court of Justice, of July 2, 2014 (evidence file, folio 33593 to 33597).

[240] *Cf.* Judgment 614-09 of the Trial Court of the First Judicial Circuit of San José of July 2, 2009, cited in Decision No. 2012-00526 of the Third Chamber of the Supreme Court of Justice of March 22, 2012 (evidence file folio 33695).

[241] According to the ruling, the reasons stated in these appeals were as follows: Cassation appeal filed by the defendant Rafael Rojas Madrigal. "First reason. Violation of due process and the right to defense. […] because the flawed procedural action filed was not resolved[…],resulting in a lack of grounds. The indicated claim was based on two aspects, the statute of limitations of the criminal action and the violation of the principle of objectivity and prosecutorial impartiality […], because the prosecution omitted to bring two pieces of evidence to the trial.

counsel[242] each filed a cassation appeal. On January 9, 2011[243] and February 20, 2012,[244] in briefs addressed to the Third Chamber, Mr. Rojas requested the conversion of his writ of cassation into a motion for review in cassation as provided for in transitory provision III of Law 8837.

188. Through decision No. 2012-00526 of March 22, 2012, the Third Chamber declared inadmissible the cassation appeals filed by Mr. Rojas and his defense counsel. It also denied his petition to convert the petition for a writ of cassation into a motion for appeal, considering that: "the request […] omits to state the basis for the grievance, since [the appellant] only mentions the violation of Article 8(2)(h) of the American Convention […][but] does not state the reasons that lead him to believe that, despite his petition being filed prior to Law 8837 entering into force, the appeal procedure provided for therein should be applied to him [retroactively]."[245]

[…]; Second reason. Violation of due process: The appellant pointed out that six witnesses were included in the indictment, of which only two were heard during the trial, [and] [...] the deponents who in his opinion were essential were not heard […]; Third reason. Violation of the rules of sound judgment: the defendant indicated that the Court manipulated the evidence given in the debate and did not analyze it objectively […] only the evidence that served to convict him […], and Fourth reason. Violation of due process. The appellant stated that proven fact number one [of the sentence] [...] was considered proven [...] in violation of the rules of sound judgment […]. Writ of cassation presented by the […] defense of the accused […]. Sole plea: Violation of due process and right of defense, given the lack of intellectual evidentiary grounds and violation of the rules of sound judgment: The appellant stated that the court [considered] that the accused had participated the alleged acts as co-perpetrator, both in the crime of fraud, and in the of use of false documents [,] although this is not established [...] with absolute certainty from the evidence received at the oral and public trial." *Cf.* Decision No. 2012-00526 of the Third Chamber of the Supreme Court of Justice, of March 22, 2012. (evidence file, folios 33698, 33700, 33701, 33702 and 33704).

[242] The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, it would have been filed on July 22, 2009. Brief of the State of September 13, 2017, table 1 (merits file, folio 3394).

[243] *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal to the Third Chamber of the Supreme Court of Justice, of January 9, 2011. (evidence file, folio 1489).

[244] *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal to the Third Chamber of the Supreme Court of Justice, of February 20, 2012. (evidence file, folio 1497).

[245] The Third Chamber ruled as follows: "[Writ of cassation presented by the defendant Rafael Rojas. First reason, the alleged violation of due process and the right of defense]. The claim is untenable. The Court rejected the the statute of limitations claim in a well-founded manner, just as the Criminal Court of the First Judicial Circuit of San José had done […]. The claim presented by the accused is not admissible because the act that gave rise to the present case was committed on December 15, 1997 […], so that when the [CCP] entered into force in January 1998, the statute of limitations began to run again, but reduced by half, [which was interrupted] in September 2000 with the indictment of the accused […];As for the second argument regarding the alleged lack of objectivity of the Prosecutor's Office in failing to bring two pieces of evidence to the trial]. Its absence cannot be associated with a lack of objectivity on the part of the Public Prosecutor's Office, […] notwithstanding the foregoing, this Chamber, making a hypothetical inclusion of this evidence, manages to determine that it would not be fundamental to change the direction of the judges' decision; [Regarding the second and third grounds:] The claims are resolved jointly due to the connection between the two allegations. [With respect to the witnesses that the complainant alleges were not received and were fundamental, neither the accused in his material defense nor his defense counsel objected to the rejection of the statements. […]. This Chamber notes […]that the defense's allegations vanish, since it has been determined with the required certainty that the accused, in the company of another subject, went to the business of the offended parties […] and made the respective request, with which both witnesses agree […]; [Fourth reason regarding the alleged violation of due process:] The plea is rejected. By modifying the proven facts, the plaintiff seeks to reconstruct his own factual framework […][…] The foregoing summary undoubtedly confirms the defendant's participation in the facts; contrary to the complainant's assertion, the findings of the trial judges are clear, coherent and congruent with the evidence […]. [Appeal for cassation filed by [the] defense of the accused Rafael Rojas Madrigal: Sole reason for the alleged violation of due process and right of defense:] The claim cannot succeed. […] In the specific case, it was possible to determine the specific role played by [Rafael Rojas] and [another] subject […] in the execution of the prior plan, which involved the distribution of tasks for a common purpose: to defraud the victim." *Cf.* Decision No. 2012-00526 of the Third Chamber of the Supreme Court of Justice, of March 22, 2012. (evidence file, folios 33699, 33700, 33701, 33702 and 33704).

189. Mr. Rojas Madrigal filed a writ of *habeas corpus*[246] against that ruling, which the Constitutional Chamber declared inadmissible in decision No. 2012-012366 of September 4, 2012.[247] In dismissing the appeal, the Constitutional Chamber upheld the decision contained in judgment No. 2012-011508, and declared without merit an action of unconstitutionality filed against the Third Chamber's interpretation of transitory provision III of Law 8837.[248]

B.1.2.2. Other appeals filed by Rafael Rojas Madrigal

190. On January 6, 2008, Mr. Rojas filed a writ of *habeas corpus* against the Legislative Assembly, the President of the Supreme Court of Justice and the President of the Third Chamber of the same court requesting that "[…] the respondents be obliged [to] include in the legal system […] a remedy of appeal, in order to comply with the provisions of Article 8(2)(h) of the American Convention […]. He argued that Law No. 8503 did not comply with what was ordered in […] the [*Herrera Ulloa*] case […]." On January 30, 2009, the Constitutional Chamber considered that discussion of whether or not Law 8503 complied with the requirements of the Inter-American Court corresponded to this Court, and therefore declared the appeal inadmissible.[249]

191. On July 17, 2009, Mr. Rojas filed a writ of *habeas corpus* before the Constitutional Chamber against the Trial Court of the First Judicial Circuit of San José, arguing that "once the judgment was issued and read in its entirety, the Court told him that if he wanted a copy he had to send someone for the CD or else he could access [the] Judicial Branch data system […], [and he] has not been able to view the video to technically compare the judgment because in […]La Reforma prison [where he was incarcerated,] he was not allowed to bring in the CD […]."[250] On July 28, 2009, the Constitutional Chamber dismissed the appeal based on the statements of Judge IGR of the Criminal Court of the First Judicial Circuit of San José, who affirmed that "the judgment […] was heard in full by the defendant." In addition, the Chamber considered that "the appellant at no time stated that he had asked the prison authorities for the necessary means to hear [it]."[251]

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[246] This appeal is not contained in the case file.

[247] *Cf.* Decision No. 2012012366 of the Constitutional Chamber of the Supreme Court of Justice, of September 4, 2012. (evidence file, folio 1678).

[248] The action of unconstitutionality alleged that the phrase "Under penalty of inadmissibility the grievance must be specifically described" of Transitory Provision III of Law 8837 was unconstitutional. In this regard, the Chamber considered that "it is necessary to specify the injury suffered, and that all the intervening parties in the proceeding solidly substantiate their requests. The requirement contained in Transitory Provision III of Law 8837 is intended to avoid an empty and merely formal argument in which it was alleged that there was not a sufficient mechanism for a comprehensive review of the judgment, or to avoid the identification of alleged grievances without specifying their content. This purpose cannot be categorized as a requirement that violates the accessibility of such an important guarantee as the right to challenge." Cf. Decision No. 2012011508 of the Constitutional Chamber of the Supreme Court of Justice, of August 22, 2012. Available from the Costa Rican Legal Information System: http://jurisprudencia.poderjudicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&param2=1&tem1=003274&nValor1=1&nValor2=638424&param7=0&strTipM=T&lResultado=7&strLib=LIB.

[249] *Cf.* Decision No. 2009-001350 of the Constitutional Chamber of the Supreme Court of Justice, of January 30, 2009. (evidence file, folios 1700, 1702 and 1704).

[250] *Cf.* Decision No. 2009-011710 of the Constitutional Chamber of the Supreme Court of Justice, of July 28, 2009. (evidence file, folio 1482).

[251] *Cf.* Decision No. 2009-011710 of the Constitutional Chamber of the Supreme Court of Justice, of July 28, 2009. (evidence file, folio 1485).

192. Subsequently, in a writ of *habeas corpus* filed on October 30, 2012[252] and a motion for *amparo* on January 21, 2013,[253] Mr. Rojas explained that he did not file a motion for review against judgment No. 614-09 because he did not have access to the technology required to view the resolution, which was contained in a compact disc. This Court does not have information on the outcome of these appeals.

193. On May 4, 2011, Mr. Rojas filed another writ of *habeas corpus* in which he asked the court to define the scope of Law 8837 in relation to persons convicted prior to its entry into force.[254] Likewise, on June 13, 2012, he submitted to the General Secretariat of the Supreme Court of Justice a request for the application of the disciplinary regime to the members of the Third Chamber.[255] The file does not contain information on the outcome of these actions.

B.2. Group 3: Luis Archbold Jay and Enrique Floyd Archbold Jay

B.2.1. First judgment N° 76-2003 and motion for review

194. On August 20, 2003, the Trial Court of the Southern Zone of Golfito, in judgment No. 76-2003, found Luis Archbold Jay, Enrique Archbold Jay and three other persons, all of Colombian nationality, responsible for the crime of international drug transportation, to the detriment of public health, sentencing them to 12 years of imprisonment.[256] On October 31, 2003,[257] these individuals initiated a proceeding for review of judgment No. 76-2003.[258]

195. In decision No. 2004-0336 of April 15, 2004, the Court of Criminal Cassation of the Second Judicial Circuit of San José declared the review proceeding admissible,[259] annulled the judgment issued and ordered the case to be returned to the court for a new substantiation.

B.2.2. Second judgment N° 68-2004 and motions filed

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252 *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal to the Constitutional Chamber of the Supreme Court of Justice, of October 30, 2012. (evidence file, folio 1683).

253 *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal to the Constitutional Chamber of the Supreme Court of Justice, of January 21, 2013. (evidence file, folio 1692).

254 *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal addressed to the Constitutional Chamber of the Supreme Court of Justice, of May 4, 2011. (evidence file, folio 1707).

255 *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal addressed to the Secretariat of the Supreme Court of Justice, of June 13, 2012. (evidence file, folio 1713).

256 *Cf.* Judgment 76-2003 of the trial court of the Southern Zone, Golfito, of August 20, 2003 (evidence file, folio 33717). *Cf.* Official letter D.PCD-1509-2002, of the Anti-Drugs Police of Costa Rica, of November 19, 2002 (file evidence, folio 1891).

257 The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, said appeal was filed on October 31, 2003. *Cf.* Brief of the State of September 13, 2017 (merits file, folio 3395, table II).

258 They argued that: "[…]the judge omitted to refer to the evidence in order to consider [...the] proven facts of the judgment as established, especially since they accepted an abbreviated procedure, and this does not inhibit the judge from analyzing the evidence [.... and] making a reference to the location [where] according to naval reports […] the drug packages were thrown into the sea, since the application of national or international law depends on this, in addition to the fact that this situation also affects the chain of custody of the drugs […]".*Cf.* Decision 2004-0336 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of April 15, 2004, (evidence file, folio 33734).

259 It considered that: "the trial judge limited himself to citing the evidence that was admitted (descriptive substantiation) and mainly based on the defendants' acceptance of the charges; he did not provide an intellectual substantiation of the evidence [...] [and] the fact that Article 375 of the Criminal Code of Criminal Procedure states that the sentence must be succinct does not entitle the a quo to disregard the analysis of the evidence included in the proceedings in accordance with the rules of sound criticism." *Cf.* Decision 2004-0336 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of April 15, 2004, (evidence file, folio 33734).

196. On June 14, 2004, the Trial Court of the Southern Zone of Golfito issued the second judgment No. 68-2004, in which it declared Luis Archbold Jay, Enrique Archbold Jay and three other persons responsible for the crime of international drug transportation, to the detriment of public health, and sentenced them to 12 years of imprisonment.[260] They filed several appeals against this decision, which are summarized below.

197. On July 9, 2004,[261] they filed an appeal in cassation, presenting six arguments related to the grounds for the judgment and the sentence, as well as the improper use of "spurious" or "unusable" evidence, among others.[262] (*infra* para. 303).

198. In decision No. 2004-0924 of September 9, 2004, the Court of Criminal Cassation of the Second Judicial Circuit of San José declared that none of their claims were admissible because the defense had requested the application of an abbreviated procedure, which assumes that the defendants acknowledge the crimes attributed to them.[263]

199. On March 28, 2005,[264] they filed a motion for review against judgment No. 68-2004 and decision No. 2004-0924 (which dismissed the cassation appeal), arguing several procedural violations and various evidentiary flaws.

200. In decision No. 2005-0535, of June 10, 2005, the Court of Criminal Cassation of the Second Judicial Circuit of San José considered that the claim of the defendants was inadmissible, stating, in essence, that the issues raised had already been addressed in decision No. 2004-0924 which decided the first cassation appeal.[265]

201. On February 13, 2006, they initiated a second review proceeding, claiming that they were not aware of the implications of the abbreviated procedure, that other defendants "had been convicted and given the minimum 'sentence' established" and that there was no correlation between the charges and the sentence."[266]

202. In decision No. 2006-1107, of October 20, 2006, the Court of Criminal Cassation of the Second Judicial Circuit of San José declared the request for review unfounded, considering that it was not proven that the accused were unaware of the scope of the cassation or that the minimum sentence could have been applied to them.[267]

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[260] *Cf.* Judgment 68-2004 of the Trial Court of the Southern Zone of Golfito, of June 14, 2004 (evidence file, folio 33787).

[261] The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, it would have been filed on July 9, 2004. *Cf.* Brief of the State of September 13, 2017 (merits file, folio 3393, Table I).

[262] *Cf.* Decision 2004-0924 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of September 9, 2004, (evidence file, folio 1898).

[263] *Cf.* Decision 2004-0924 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of September 9, 2004, (evidence file, folio 1902).

[264] The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, it would have been filed on July 9, 2004. *Cf.* Brief of the State of September 13, 2017 (merits file, folio 3395, Table II).

[265] It stated that: "the aspects related to "the legitimacy of the evidence with which the defendants were convicted, as well as problems of correlation between indictment and sentence and violation of the rules of sound judgment", were known in resolution 2004-0924 which resolved the first cassation appeal filed, and therefore "in accordance with Article 411 of the Code of Criminal Procedure it is not admissible to raise by way of review, issues that have already been discussed and decided in cassation". *Cf.* Decision 2005-0535 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of June 10, 2005, (evidence file, folio 1929).

[266] *Cf.* Complaint of February 13, 2006 (evidence file, folios 4579 to 4589 and Decision 2006-1107 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of October 20, 2006 (evidence file, folio 1935).

[267] *Cf.* Decision 2006-1107 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of October 20, 2006, (evidence file, folio 1938).

203. On December 5, 2006,[268] they filed a third appeal for review, on the following grounds: i) that the evidence used to convict was illegitimate since it was generated in violation of the Cooperation Agreement between […] Costa Rica and […] the United States of America to suppress illegal trafficking; and ii) that there was a violation of the chain of custody. On April 19, 2007, through decision No. 2007-0389, the Court of Criminal Cassation of the Second Judicial Circuit of San José declared the petition for review inadmissible, considering, in general terms, that the alleged evidentiary violations were legally irrelevant, since the defendants had agreed to an abbreviated procedure, which implies waiving the holding of an oral and public trial and therefore, the right to discuss and examine the evidence offered."[269]

204. On May 22, 2007,[270] they filed a fourth motion for review, arguing that: i) they had been judged by a biased judge since, according to them, the judge who heard the request for pretrial detention against them was the same person who conducted the preliminary hearing in which the abbreviated procedure was decided; and ii) improper individualization of the sanction, since mitigating circumstances in their favor were not considered. On July 5, 2007, through decision No. 2007-0744, the Court of Criminal Cassation of the Second Judicial Circuit of San José dismissed both arguments: the first, because there was no prejudgment;[271] the second, because it was a previously raised issue that was addressed in decision No. 2004-0924.[272]

205. On March 9, 2009, for the fifth time, they filed a motion for review, under transitory provision I of Law 8503 arguing that: i) " the procedural stage of the preliminary investigation and notification of the charges […] against the five defendants […]was not carried out, […] and the extension of their preliminary statements requested [...] by the private defense counsel [...] was not granted [...]"; and ii) "the Public Prosecutor's Office omitted […] in the investigation and notification of the charges […], to appoint a translator and interpreter for the brothers Luis and Enrique Archbold Jay, since neither of the accused understand the official language of Costa Rica […]."[273] On July 10, 2009, in decision No. 2009-0191, the Court of Criminal Cassation of Cartago admitted the first motion for review, and ordered a hearing to be held. However, it dismissed the second motion, considering that the accused did not request a translator and that the need for one had not been established.[274]

206. The hearing to substantiate the grounds for review was held on August 25, 2009. On that same date, in decision No. 2009-0251, the Court of Criminal Cassation of Cartago declared the review procedure inadmissible. It considered that the case files contained the statements of the accused and, through their study, it was able to verify that these were provided with all the requirements established in the regulations. In addition, it noted that during the investigation, the defendants were accompanied by a public defense attorney who fulfilled the purpose of protecting their fundamental rights. Subsequently, their attorneys

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268 *Cf.* Complaint of December 5, 2006 (evidence file, folios 4596 to 4659).

269 *Cf.* Decision 2007-0389 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of April 19, 2007, (evidence file, folio 1943).

270 *Cf.* Demand of May 22, 2007 (evidence file, folios 4758 to 4786).

271 *Cf.* Decision 2007-0744 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of July 5, 2007, (evidence file, folio 1946).

272 *Cf.* Decision 2007-0744 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of July 5, 2007, (evidence file, folio 1946).

273 *Cf.* Brief submitting the motion for review, signed by Luis Archbold Jay and Enrique Archbold Jay, on March 9, 2009, (evidence file, folios 1952 to 1953 and 1977).

274 *Cf.* Decision 2009-0191 of the Court of Criminal Cassation of Cartago, of July 10, 2009, (evidence file, folio 1992).

were made aware that at any time they could request the extension of the investigation of the defendants and they did not do so.[275]

B.3. Group 4: Jorge Martínez Meléndez[276]

B.3.1. Jorge Martínez's responsibilities, first period of pretrial detention, request for asylum in Canada and extradition to Costa Rica

207. According to the facts established in judgment No. 680-2007 of the Criminal Court of the First Judicial Circuit of San José, Mr. Martínez acted as a representative of the Second Vice Presidency of the Republic of Costa Rica in charge of coordinating the Social Compensation and Land Titling Programs,[277] as of July 17, 1995.[278] At the same time, Mr. Martínez was hired to work on Project CAM/92/0009- Social Route of the United Nations Development Program (UNDP) from January 2 to June 30, 1997.[279] He was accused of having committed acts of embezzlement while working as coordinator of the Social Compensation Commission and, on August 21, 1998, the Prosecutor's Office for Economic Crimes submitted to the Special Duty Criminal Court a request to send Mr. Martínez Meléndez to pretrial detention.[280] On August 22, 1998, said court ordered him to be remanded in custody for a period of six months, which ended on February 22, 1999. According to information provided by the Prosecutor's Office, Mr. Martínez allegedly pressured a witness "so that he would not talk" and participated in the "theft of public documents [to] proceed with their destruction." Based on this, the court considered that Mr. Martínez could create a procedural obstacle by tampering with the missing evidence […] for the purpose of evading justice and his criminal liability."[281] On February 19, 1999, prior to the expiration of the period of his pretrial detention, the Criminal Court of the First Judicial Circuit of San José extended the custodial measure for a period of six months until August 18, 1999. However, considering that "there [were] no clear indications that the accused, if released, would hinder the investigation," the pretrial detention was replaced with other measures, such as bail for the sum of 30 million colones, the obligation to appear before the Prosecutor's Office for Economic Crimes to sign on every fifteen days, and the prohibition to leave the country.[282]

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275 *Cf.* Decision 2009-0251 of the Court of Criminal Cassation of Cartago, of August 25, 2010, (evidence file, folio 1997).

276 Jorge Martínez is a lawyer *Cf.* Certification of the Lawyers' Association of Costa Rica, of May 25, 2015 (evidence file, folio 25729).

277 According to the facts established in judgment No. 680-2007, the Social Compensation Program was created on July 7, 1995 by Decree 24478-MP. Its objective was to "provide economic support to eligible families […], to meet their debts and obligations related to their plots, parcels, housing and services […]". The Land Titling Program was established on April 4, 1995 through Executive Decree 24199-MP. The purpose of this institution was to "donate to the beneficiaries [...] the costs necessary to provide them with a registered property title, [...] the target population of this program being the consolidated holders of property belonging to public institutions. *Cf.* Judgment No. 680-2007 of the Criminal Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folios 34167 and 34170).

278 *Cf.* Judgment No. 680-2007 of the Criminal Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folio 34175).

279 *Cf.* Service contract between the Project CAM/92/0009-Ruta Social and Jorge Martínez Meléndez, of January 2, 1997, (evidence file, folio 25730).

280 *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of December 3, 2003 (evidence file, folio 2003).

281 *Cf.* Decision of the Special Duty Criminal Court of August 22, 1998, (evidence file, folio 26256).

282 *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of February 19, 1999 (evidence file, folios 2026 and 2040)

208. On November 26, 1999, Mr. Martínez traveled to Canada and requested refugee status in that country.[283] While he remained abroad, the criminal proceedings against him continued: on December 13, 1999, he was declared in contempt of court; on December 16, 1999, an international arrest warrant was issued; and on September 7, 2000, in view of the large number of documents that formed part of the indictment, the Criminal Court of the First Judicial Circuit of San José ordered the "complex processing" of the case file, in order to "facilitate the doubling of the deadlines established in favor of the parties to carry out the procedural actions."[284]

209. On March 26, 2003, the Federal Court of Canada denied Mr. Martínez's request for political asylum and on December 1, 2003, it rejected the appeal filed against this decision.[285] Consequently, on December 3, 2003, Mr. Martínez was extradited to Costa Rica.[286]

B.3.2. Subsequent periods of pretrial detention

210. On December 3, 2003, the Criminal Court of the First Judicial Circuit of San José ordered the pretrial detention of Mr. Martínez for one year, considering that: i) the expected prison sentence "would encourage […] the accused to evade justice"; ii) there was a danger of flight "which materialized" with his escape to Canada; iii) there was a danger of obstruction, considering that his participation "in the destruction of evidence […], and in the intimidation a witnesses […]" had been proven; and iv) the danger of reoffending because his involvement in another case was being investigated.[287]

211. From December 3, 2004, the pretrial detention measure decreed against Mr. Martínez Meléndez was extended three times by the Court of Criminal Cassation of the Second Judicial Circuit of San José, lasting from December 3, 2004 to June 3, 2006.

212. On June 2, 2006, the Trial Court of the First Judicial Circuit of San José "exceptionally" extended the pretrial detention from June 3, 2006 "until the operative part of the judgment is issued."[288] In response to this decision Mr. Martínez's defense filed a writ of *habeas corpus* requesting his release.[289] On June 23, 2006, the Constitutional Chamber denied the motion.[290]

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[283] Undisputed fact. *Cf.* Press report "Canada hands over fugitive Martínez", published in *La Nación* newspaper, December 3, 2003 (evidence file, folio 2042).

[284] *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of September 7, 2000 (evidence file, folio 2054). Article 376 of the Code of Criminal Procedure in force at that time established the procedure for processing complex matters: "Admissibility. When the processing is complex due to the multiplicity of facts, the large number of defendants or victims or when it involves cases related to the investigation of any form of organized crime, the court, *ex officio* or at the request of the Office of the Public Prosecutor, may authorize, through a reasoned decision, the application of the special rules provided for in this Title […]."

[285] *Cf.* Press report "Canadian justice determined that fugitive was not persecuted" published in *Diario Extra*, referring to decision No. 2003-IMM-4206-01 of the Federal Court of Canada of March 26, 2003. (evidence file, folio 2067) and Press report "Canada hands over fugitive Martínez", published in *La Nación* newspaper on December 3, 2003, which refers to Decision No. IMM-9118-03 of the Federal Court of Canada of December 2, 2003 (evidence file, folio 2043)

[286] *Cf.* Press report "Canada hands over fugitive Martínez", published in *La Nación* newspaper on December 3, 2003, which refers to Decision No. IMM-9118-03 of the Federal Court of Canada of December 2, 2003 (evidence file, folio 2043)

[287] *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of December 3, 2003 (evidence file, folio 2008).

[288] *Cf.* Decision of the Trial Court of the First Judicial Circuit of San José, of June 2, 2006 (evidence file, folio 26220).

[289] *Cf.* Habeas Corpus petition filed by Ricardo Barahona Montero on June 7, 2006(evidence file, folio 2112).

[290] *Cf.* Decision No. 2006-008979 of the Constitutional Chamber, of June 23, 2006 (evidence file, folio 2132).

B.3.3. Criminal conviction and appeals filed against judgment N° 680-2007

213. On July 17, 2007, the Trial Court of the First Judicial Circuit of San José, in judgment No. 680-2007, convicted Mr. Martínez of twelve counts of embezzlement in the modality of a continuous crime.[291] Subsequently, on August 23, 2007, it sentenced him to 19 years of imprisonment and disqualified him from holding or exercising public office for 12 years.[292] The trial court that issued this judgment included among others, Judge Sandí Murcia, who joined the trial court on May 15, 2007, to replace Judge Adela Sibaja Rodríguez.[293]

214. Mr. Martínez's public defender filed an appeal in cassation[294] against judgment No. 680-2007, arguing seven "formal"[295] and two "substantive"[296] grounds (*infra* para. 324). For his part, Mr. Martínez filed an appeal in cassation[297] against the aforementioned conviction, alleging 16 reasons[298] (*infra* para. 325).

215. Through decision No. 2008-0232 of March 11, 2008, the Third Chamber of the Supreme Court of Justice dismissed the appeals filed (*infra* para. 323).

216. Subsequently Mr. Martínez filed a motion for review against judgment No. 680-2007. The only reason he alleged was the supposed erroneous grounds for the sentence, arguing that: "i) the 19-year prison sentence imposed by the trial court is not consistent with the rehabilitative purpose of the penalty; ii) [The Court] overlooked the principle of proportionality of the sentence; iii) in setting the sentence, the court violated the right to asylum […]; iv) violation of the rules governing a continuing offense, especially Article 77 of the Criminal Code." On August 29, 2012, in decision No. 2012-001297, the Third Chamber declared this proceeding inadmissible, considering that the arguments put forward by Jorge Martínez "concerning the grounds for the sentence are based on personal assessments that do not establish the legal criteria to be considered." It also mentioned the arguments on the reasons for the sentence, contained in decision No. 2008-0232, in which it dismissed the cassation appeal filed by Mr. Martínez, considering that "the Court's reasoning […] follows the prevailing jurisprudential line, and [the] motion is manifestly inappropriate.[299]"

B.3.4 Appeals filed against the extension of pretrial detention ordered in judgment N° 680-2007

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[291] *Cf.* Judgment No. 680-2007 of the Trial Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folio 35361).

[292] *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of August 23, 2007 (evidence file, folio 2146).

[293] *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33986).

[294] In addition to his public defender, Jorge Martínez, the representative of the Attorney General's Office, the representative of the Public Prosecutor's Office, and the public defender of the co-defendant SMM Martínez Meléndez filed an appeal in cassation against that decision.

[295] *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33934).

[296] *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33950).

[297] The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, it was filed on September 28, 2007. *Cf.* Brief of the State of September 13, 2017 (merits file, folio 3394, Table I).

[298] *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33955).

[299] *Cf.* Decision No. 2012-001297 of the Third Chamber of the Supreme Court of Justice, of August 29, 2012 (evidence file, folio 34036).

217. The conviction judgement No. 680-2007 of July 17, 2007 extended Mr. Martínez's pretrial detention for six months, from "August 17, 2007 to February 17, 2008."[300] In view of this new extension, on August 28, 2007, Mr. Martínez's defense counsel filed a writ of *habeas corpus* alleging that "the pretrial detention of Jorge Martínez was due to expire on July 17, 2007, but it was extended for 6 months as of August 17, 2007, so that the defendant was deprived of his liberty for a period of one month without a judicial decision to justify it."[301] On September 7, 2007, through decision No. 2007-013057, the Constitutional Chamber declared the appeal inadmissible, stating that the calculation of the pretrial detention periods corresponded to a material error, and "therefore, the deprivation of liberty of the defendant was extended in a timely manner by the competent judicial authority, which is why it is duly justified in a judicial decision."[302]

218. On January 24, 2008, Mr. Martínez's defense filed another writ of *habeas corpus*, pointing out that although judgment No. 680-2007 ordered the extension of pretrial detention for six months until February 17, 2008, according to its date of issuance, the six-month term ended on January 17, 2008.[303] While this appeal was being processed, on January 29, 2008, the Court of the first Judicial Circuit of San José decided to extend the pretrial detention of Mr. Martínez for two more months, from January 17 to March 17, 2008.[304]

219. Subsequently, through decision No. 2008-01650 of February 1, 2008, the Constitutional Chamber of the Supreme Court of Justice admitted the writ of *habeas corpus*, considering that "the petitioner was detained without any ruling legitimately requiring his detention," and therefore ordered the State to pay damages, but without ordering the detainee's release (*infra* para. 374).[305] On April 2, 2008, Mr. Martínez was transferred to the CAI of San Rafael.[306] On March 30, 2011, Mr. Martínez was placed in the CAI San Agustín in Heredia.[307] On April 5, 2013, he was released from prison[308] on parole[309] as ordered in decision No. 191-2013 of the Sentence Execution Court of San José.[310]

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300 *Cf.* Judgment No. 680-2007 of the Trial Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folio 35363).

301 *Cf.* Habeas corpus filed by Ricardo Barahona Montero with the Constitutional Chamber of the Supreme Court of Justice, of August 28, 2007 (evidence file, folio 2156).

302 *Cf.* Decision No. 2007-013057 of the Constitutional Chamber of the Supreme Court of Justice, of September 7, 2007 (evidence file, folio 2162).

303 *Cf.* Habeas corpus filed by Ricardo Barahona Montero before the Constitutional Chamber of the Supreme Court of Justice, of January 24, 2008, (evidence file, folio 2165).

304 *Cf.* Decision No. 2008-01650 of the Constitutional Chamber of the Supreme Court of Justice, of February 1, 2008 (evidence file, folios 2174 and 2175).

305 *Cf.* Decision No. 2008-01650 of the Constitutional Chamber of the Supreme Court of Justice, of February 1, 2008 (evidence file, folio 2175).

306 *Cf.* Notification sent to Jorge Alberto Martínez Meléndez, from CAI San José, of April 2, 2008, (evidence file, folio 41052).

307 *Cf.* Motion for *amparo* filed by SMM against the Director of San Agustín Prison, of June 17, 2012, (evidence file, folio 41292).

308 *Cf.* Communication 2-2007 of the General Directorate of Social Adaptation, of April 5, 2013 (evidence file, folio 41509 Bis).

309 The conditions of his release were: "a: he must present himself […] at the San José Community Level Office, which […] will follow up on the prevention and release plan; b) he must maintain a fixed abode and work, according to the offer provided […]; c) he must maintain good social, family, personal and work relations; d) he must provide community or social service of at least 250 hours […]; e) he is prohibited from leaving the country and his impediment from doing so is ordered; f) he must indicate to this authority the place where he may receive summons and appear before any office that requires it […]; g) he must report to the office of the community level indicated […]; h) in the event that any anomalous situation is reported in relation to his compliance with this benefit, the precautionary measures established in the Regulation on the Rights and Duties of Persons Deprived of Liberty will be applied […]. Cf. Decision No. 191-2013 of the Sentence Execution Court of San José, of February 15, 2012 (evidence file, folio 41531 Bis).

310 *Cf.* Decision No. 191-2013 of the Sentence Execution Court of San José, of February 15, 2012 (evidence file, folio 41531 Bis).

B.3.5 Consolidation of convictions

220. On August 30, 2013, the Sentence Execution Court of San José merged two convictions issued against Mr. Martínez Meléndez: the first ordering 19 years of imprisonment for 12 counts of embezzlement in the modality of a continuous crime and the second ordering six years of imprisonment for the offense of libelous denunciation, for a total of 25 years.[311]

B.4. Group 7: Miguel Mora Calvo

221. Miguel Mora Calvo was convicted, along with five other persons, for the crime of organization for national and international drug trafficking to the detriment of public health and sentenced to seven and a half years imprisonment, in judgment No. 736-98 of September 24, 1998, issued by the Criminal Court of the first Judicial Circuit of Alajuela, in case 97-000061-301-PE.[312]

222. The judgment indicates that the Public Prosecutor's Office, the defense and the accused "submitted to an abbreviated procedure,"[313] in which they agreed the following:

> "1. The defendants expressly accept the charges brought against them in the indictment […][;] 2. […] [A] prison sentence of […] seven and a half years was requested for Miguel Mora Calvo […and] 3. […]The objects and assets seized from the accused [would be] subject to confiscation, since they are the proceeds of drug trafficking." Consequently, "[f]or the adjustment of the sentence, it was taken into consideration that the defendants, the defense and the Public Prosecutor's Office, at the time of discussing the sentence, set the custodial sentence […] at seven and a half years for Miguel Mora Calvo […] and therefore the Court set it at this level, given that there were no reasons to vary what had been agreed upon, nor was it even raised by the defendants or their defense attorneys."[314]

223. An appeal in cassation was filed against the conviction, which was declared inadmissible in decision No. 0649-99 of the Third Chamber of May 28, 1999.[315] As indicated in said ruling, it was alleged: i) that the *a-quo* did not duly substantiate the challenged judgment as to the sentence imposed, and ii) the invalidity of the sentence because the Court had not complied with the time limits established to issue it.[316] The Third Chamber analyzed both claims and determined that "they are not admissible."[317] (*infra* para. 333).

224. Subsequently five motions for review were filed against judgment No. 736-98 of September 24, 1998.

225. The first review procedure was declared inadmissible by the Third Chamber of the Supreme Court of Justice through decision No. 2000-00917 of August 11, 2000. Mr. Mora alleged the "violation of due process since, being an abbreviated procedure, they were not warned of the constitutional right not to testify against themselves." The Third Chamber made a mandatory consultation to the Constitutional Chamber, which, through decision No. 2000-

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311 *Cf.* Decision No. 1064-2013 of the Sentence Execution Court of San José, of August 30, 2013 (evidence file, folio 26244).

312 *Cf.* Judgment No. 736-98 of the Court of the First Judicial Circuit of Alajuela, of September 24, 1998 (evidence file, folios 35492, 35606 and 35607).

313 See, arts. 373-375 of the Code of Criminal Procedure, Law No.7594 of April 10, 1996, in force as of January 1, 1998 (evidence file, folios 28400 and 28401).

314 *Cf.* Judgment No 736-98 of the Court of the First Judicial Circuit of Alajuela, of September 24, 1998 (evidence file, folios 35582 to 35583 and 35603).

315 *Cf.* Decision No. 0649-99 of the Third Chamber of the Supreme Court of Justice of May 28, 1999 (evidence file, folio 35469).

316 Decision No. 0649-99 of the Third Chamber of the Supreme Court of Justice of May 28, 1999 (evidence file, folios 35471 and 35472).

317 *Cf.* Decision No. 0649-99 of the Third Chamber of the Supreme Court of Justice of May 28, 1999 (evidence file, folio 35473).

02567 of March 22, 2000, stated that "the lack of the warning contained in (sic) Article 36 of the Constitution by the sentencing court, regarding the abbreviated procedure, does not constitute an infringement of due process." Consequently, the Third Chamber dismissed the motion for review. [318]

226. The second motion for review was declared inadmissible by the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, Second Section, in decision 2007-00546 of October 5, 2007. Mr. Mora alleged "defective reasoning for the length of the sentence" on three grounds.[319] In this regard, the Court declared the motion inadmissible, considering that the Third Chamber had already ruled in cassation on the alleged defects pointed out.[320] (*infra* para. 335).

227. The third motion for review was declared inadmissible by the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, First Section, in decision No. 2008-00236 of May 28, 2008.[321] Mr. Mora requested the annulment of the conviction based on two claims: i) the abbreviated procedure was applied to him, pursuant to the CCP of 1996, even though the facts occurred prior to its enactment, and ii) he was not advised of his "right of abstention when accepting the facts for the application of the abbreviated procedure." Regarding this point, he indicated that "when the Third Chamber ruled on the motion for review in which he presented this grievance, the application of the CCP had just begun and his claim was declared inadmissible, although subsequently there have been rulings, which he cites, of the Third Chamber and the Court of Cassation that consider such warning pertinent."[322] In response, the Court of Criminal Cassation declared the claims inadmissible, considering that the first was manifestly unfounded and that the second had already been raised in the review procedure[323] (*infra* para. 336).

228. The fourth motion for review was declared inadmissible by the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, First Section, in decision No. 2008-00557 of November 25, 2008. Mr. Mora requested that the facts of which he was accused be referred for further examination in a new ordinary criminal trial, based on two claims: i) violation of the rules of due process and legality by giving retroactive effect to a procedural law, and ii) the abbreviated procedure "contemptuously disregarded the right to a second judicial hearing" because it did not allow him to exercise his defense by means of an appeal. In response, the Court of Criminal Cassation determined that the first claim was inadmissible because "it has already been heard and decided by this court (*cf*. ruling N° 2008-00236 of […] May 28, 2008), and therefore in accordance with the provisions of […the] Code of Criminal Procedure, it is inappropriate to attempt to reintroduce its discussion in this court," and transcribed the content of the aforementioned resolution (*infra* para. 337). In turn, it considered that the second claim was presented "outside of the assumptions that authorize it," as well as being manifestly unfounded (*infra* para. 339).[324]

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318 *Cf.* Decision No 2000-00917 of the Third Chamber of the Supreme Court of Justice of August 11, 2000 (evidence file, folios 35475 and 35477).

319 *Cf.* Decision No. 2007-00546 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela of October 5, 2007 (evidence file, folios 35466 to 35468).

320 *Cf.* Decision No. 2007-00546 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela of 5 October 2007 (evidence file, folios 35466 to 35468).

321 *Cf.* Decision No. 2008-00236 of the Court of Cassation of the Third Judicial Circuit of Alajuela, First Section, of May 28, 2008 (evidence file, folio 35483).

322 *Cf.* Decision No. 2008-00236 of the Court of Cassation of the Third Judicial Circuit of Alajuela, First Section, of May 28, 2008 (evidence file, folios 35482 and 35483).

323 *Cf.* Decision No. 2008-00236 of the Court of Cassation of the Third Judicial Circuit of Alajuela, First Section, of May 28, 2008 (evidence file, folios 35483).

324 *Cf.* Decision No. 2008-00557 of the Court of Cassation of the Third Judicial Circuit of Alajuela, First Section, of November 25, 2008(evidence file, folios 35485 to 35488).

229. The fifth motion for review was declared inadmissible by the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, Second Section, in decision No. 2009-00225 of June 12, 2009.[325] Mr. Mora again argued that the proceeding "contemptuously disregarded" his right to a second judicial hearing by encouraging him to challenge the decision through a cassation appeal and he requested the repeal of Law No. 8503 (Opening of Criminal Cassation) of 2006. In response, the Court of Criminal Cassation declared the reason manifestly unfounded for expressing disagreement with the Costa Rican appeals system and inadmissible because the same claim had been filed and decided previously in review proceedings.[326]

230. Separately from the aforementioned criminal proceeding, on May 23, 2005, Mr. Mora filed a petition for *amparo* before the Constitutional Chamber, requesting the annulment of three criminal convictions against him, including the one under study (para. 344), alleging that the right established in Article 8(2)(h) of the Convention and in the judgment in the case of *Herrera Ulloa v. Costa Rica*[327] had been violated. In decision No. 2005-06480 of May 31, 2005, the Chamber "flatly rejected" the motion for *amparo* because it was not its responsibility to supplement the criminal jurisdiction.[328]

231. In addition, Mr. Mora filed a writ of *habeas corpus* on December 28, 2005, "arguing that [he] was unlawfully deprived of liberty,"[329] because he had not received a full review of his conviction.[330] In decision No. 2006-000052 of January 6, 2006, the Constitutional Chamber rejected his appeal, considering that "the problem raised by the appellant has already been extensively analyzed by his Chamber, which has considered that the principle of double instance is satisfied with the special appeal in cassation," for which it cited and transcribed the content of various rulings.[331]

C. Regarding the CAI La Reforma

232. The *Centro de Atención Integral (CAI)* (Integral Care Center) La Reforma[332] (now called Jorge Arturo Montero Castro) is a prison facility located in the district of San Rafael, in the province of Alajuela. The prison has seven living areas (containing cell blocks), each with an Area Director and a technical and security team.[333] The organization of the CAI is headed by the Director of the facility, followed by the Deputy Director who is also the Technical Director. There are three collegiate decision-making bodies: i) the Technical Council, which manages the Annual Operating Plan and oversees the running of the prison, ii) the Security

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325 *Cf.* Decision No. 2009-00225 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, Section Second, of June 12, 2009 (evidence file, folios 35489 and 35491).

326 *Cf.* Decision No. 2009-00225 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, Section Second, of June 12, 2009 (evidence file, folios 35489, 35490 and 35491).

327 *Cf.* Motion for *amparo* filed on May 23, 2005 (evidence file, folios 20618, 20620 and 20622).

328 *Cf.* Decision No. 2005-06480 of the Constitutional Chamber of the Supreme Court of Justice, of May 31, 2005 (evidence file, folios 20625 and 20626).

329 *Cf.* Writ of habeas corpus of December 28, 2005 (evidence file, folio 20629).

330 *Cf.* Writ of habeas corpus of December 28, 2005 (evidence file, folios 20633, 20634 and 20637).

331 Referred to the Judgments number 2005-03619 of April 5, 2005, number 0282-1990 of March 13, 1990, number 719-1990 of June 26, 1990, number 0282-90 of March 13, 1990, No. 14715-04 of December 22, 2004. *Cf.* Constitutional Chamber of the Supreme Court of Justice, writ of habeas corpus 2006-000052 (evidence file, folios 20640 to 20643).

332 The CAI La Reforma opened in 1971 and is the largest prison in the country; it houses the largest number of persons deprived of liberty. *Cf.* Ombudsman's Office, Report with Recommendations, February 22, 2011 (evidence file, folio 43324).

333 In its answering brief, the State explained that the prison Areas are the units A to F, the Area of Industrial Workshops, and the so-called "Post Seven." According to the State, in 2001, Area A and Area B were combined to form a single unit called Area B; however, in 2013 the unit was divided once again. This was not disputed by the parties. *Cf.* Answering brief of the State (merits file, folios 1487).

Council and iii) the Interdisciplinary Technical Council, which evaluates the inmates' response to the Technical Assistance Plan.[334]

C.1. Regarding the alleged mistreatment of Damas Vega Atencio

233. Damas Vega and other inmates filed a complaint with the Ministry of Justice and the Office of the Comptroller of Services alleging that on July 20, 2006, a search was carried out in the prison during which they were subjected to cruel, inhuman and degrading treatment, as well as to acts of sexual violence by prison guards.[335] In his statement before this Court, Damas Vega explained that the complaints filed regarding the sexual abuse did not prosper before the administrative or judicial authorities. [336]

234. On July 24, 2006, Damas Vega and other inmates of the CAI La Reforma filed a complaint with the Ministry of Justice against the Security staff of Area B. They alleged that on July 20, 2006, they were "frisked" in the genital area by an officer. They also complained that their dormitories were searched and that they were not allowed to be present during the search, stressing the risk that the officers might unlawfully plant illegal substances in their absence.[337]

235. On September 29, 2006, the Comptroller of Services of the prison system issued a report on the facts described in the preceding paragraph. Based on interviews conducted with inmates on September 21, 2006, and on the report of the Security Supervisor of Area B, on September 20, 2006, the Comptroller's Office recommended that "because the incident denounced may constitute a violation of the principles established for search procedures, stipulated in Article 9 of the Regulations for the Search of Persons and Inspection of Property in the Costa Rican Penitentiary System, and the subsequent actions of some officers against the prison population may constitute a breach of the prison staff's duties, the complaint is brought to the attention of the Director General for the corresponding action." [338]

236. The file contains a document entitled "Notification of rights and reporting of a criminal act," based on which Mr. Damas Vega filed a criminal complaint on September 24, 2006, for the crime of sexual abuse and abuse of authority against officer "Reyes," in relation to the acts denounced on July 20, 2006.[339] On October 2, 2006, Mr. Vega requested before the Courts of Justice of Alajuela that the criminal case be extended to include Supervisor Antonio and Inspector Alen, superiors of Mr. Reyes, whom he considered to be the intellectual authors of the crime.[340]

237. On November 25, 2006, Mr. Vega filed a complaint with the Sentence Execution Court of Alajuela, against the Area B Security Department of the CAI La Reforma. He alleged that the prison officers used abusive search practices, including sexual touching, which provoked opposition from many inmates, in reference to the events that allegedly took place on July 20, 2006 (*infra* para. 461). He added that "many prison guards are not informed or aware of

[334] Undisputed facts in the State's answering brief of February 5, 2016 (merits file, folios 1486-1487).

[335] Pleadings and motions brief of the common intervenor SIPDH (merits file, folio 516) and IACHR Merits Report 33/14 (merits file, folio 51).

[336] Sworn statement of Damas Vega Atencio, of August 3, 2017 (evidence file, folio 44399 and folio 44400).

[337] Complaint of July 24, 2006 (evidence file, folios 20829-20833).

[338] Final Report and recommendation C.S. 403-06-Inf of September 29, 2006. Comptroller of Services of the Ministry of Justice (evidence file, folio 20839).

[339] Complaint of criminal act filed against Officer José Reyes for of sexual abuse and abuse of authority, of September 24, 2006 (evidence file, folios 20841-20842).

[340] Brief requesting that the case filed against José Reyes Carrillo also be extended to his supervisor called Antonio and Inspector Alen, of October 2, 2006 (evidence file, folio 20844).

the Search Regulations; other officers say that they follow orders from their superiors […]."[341] It is an undisputed fact that the Sentence Execution Court declared itself incompetent to address this matter on July 18, 2007, stating that the Legal Department of the Ministry of Justice had jurisdiction over such matters.[342]

238. In a decision dated May 7, 2009, the Department of Administrative Procedures of the Ministry of Justice stated that the Legal Department of said entity was instructed to carry out a preliminary investigation of the facts of July 20, 2006, alleged by Mr. Vega. However, it was unable to prove the responsibility of any prison officer and therefore it was not appropriate to apply any sanction.[343]

239. Mr. Damas Vega also filed a complaint with the Sentence Execution Court alleging that on September 28, 2008, he was locked up in maximum security for 72 hours, without receiving an explanation of the reasons for his transfer, and held incommunicado for more than 20 hours.[344] On November 21, 2008, the Sentence Execution Court declared the appeal admissible, ordering "the immediate restitution of his rights". It ordered the Director of Area B and the Director of Area F (maximum security), to take the necessary steps to ensure Mr. Vega's physical integrity and that of the rest of the prison population, and also to inform him of the possible consequences of his transfer to Area B and, if he did not accept and agree to a different location, to make the respective record.[345]

VIII. MERITS

240. The Court will now analyze the parties' arguments on the merits of the case in the following order: i) Right to appeal the judgment before a higher judge or court; ii) Right to personal liberty; iii) Right to judicial guarantees, and iv) Right to personal integrity.

VIII.I
RIGHT TO APPEAL THE JUDGMENT BEFORE A HIGHER JUDGE OR COURT (Article 8(2)(h)[346] of the Convention, in relation to Article 1(1) thereof)

A. Arguments of the Commission and the parties

[341] Complaint filed with the Sentence Execution Court of Alajuela, dated November 25, 2006 (evidence file, folios 20851-20854).

[342] Report of the Commission 33/14 of April 4, 2014 para. 177 (merits file, folio 51)

[343] Report of the Commission 33/14 of April 4, 2014 (merits file, folio 51), pleadings and motions brief of the common interveners *SPIDH* (merits file, folio 517) and Answering brief of the State (merits file, folio,1525).

[344] *Cf.* Decision of November 20, 2008 (evidence file, folio 3198).

[345] *Cf.* Decision of the Sentence Execution Court of Alajuela, of November 20, 2008 (evidence file, folios 20886 and 20887). See also Official letter No. 04088-2009-DHR-(AI) of the Ombudsman's Office of May 4, 2009 (evidence file, folio 20909). This document contained the version of events recounted by the Prison Director: "the placement of the protected persons in areas other than the one in which they were being held is a consequence of the application of a Precautionary Measure, for protection and to safeguard institutional purposes, since the Prison Administration, […] identifies the appellant as one of the main instigators of the hunger strike." However, the Ombudsman's Office pointed out that the prison authorities omitted references to the causes of the inmates' strike, namely, the alleged deficient outpatient care, authoritarian searches and poor food, and indicated that these causes were "totally acceptable since, in fact, complaints regarding deficient health care and poor preparation of food, are daily and reiterated before this Office." Regarding the precautionary measure, the Ombudsman's Office considered that since Mr. Damas Vega had been transferred to the CAI San Rafael on January 26, 2009, the Request for Intervention was closed.

[346] Article 8(2)(h) establishes that: "Every person accused of a criminal offense has the right to be presumed innocent as long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: […] h) the right to appeal the judgment to a higher court.

241. The ***Commission*** argued that Article 8(2)(h) of the Convention was violated at three different times: i) when the 1996 Code of Criminal Procedure was in force and before the legislative amendments of 2006 and 2010; ii) after the amendments of Law No. 8503 of 2006; and iii) as a result of the amendments of Law No. 8837 of 2010. It considered that the violation occurred at the three stages due to the fact that the review procedure contemplated under domestic legislation is exceptional and has a different purpose than the dual conformity of a conviction, since it only applies when the judgment is already final, in order to correct possible cases of judicial error on aspects that had not been incorporated in the ordinary appeal stage. It also presented the following arguments.

242. First, it argued that, prior to the legislative amendments, the only remedy available under the 1996 Code of Criminal Procedure against a conviction that had not become final was the remedy of cassation. It explained that in the *Herrera Ulloa* case, the Court considered that at the time this remedy did not meet the requirement of breadth because it imposed *a priori* restrictions that did not allow for a comprehensive review of the issues debated and analyzed by the lower court. This remedy was neither effective nor accessible to ensure the right to appeal the judgment, since its admissibility was conditional upon certain assumptions related to the application of the rule, excluding factual and evidentiary issues.[347] It stated that, taking into account that the limitation came from the text of the applicable law, it was not necessary to delve into the specific allegations that the alleged victims raised in the cassation appeals, or into the response they received.[348] Therefore, it concluded that the State violated Article 8(2)(h) of the ACHR, in relation to the obligations established in Articles 1(1) and 2 thereof, to the detriment of all the alleged victims, except Jorge Martínez Meléndez, since the latter's convictions were issued after the legislative reforms of 2006 and 2010.

243. Secondly, it argued that the only modification of Law 8503 of 2006 to the cassation appeal regime was contained in Article 369 of the CCP, which included new grounds for appeal in paragraph "j) when the sentence has not been issued through due process or with opportunity for defense." However, it explained that the inclusion of this reason failed to solve the central problem of the cassation appeal, that is, the exclusion of the possible assessment of factual and evidentiary issues analyzed by the trial court. According to the Commission, the rule did not modify in any way the rigorousness and formalism in the presentation of the challenge. Nor was the appeal for review modified in any essential way. Thus, it concluded that the State also violated Article 8(2)(h) of the Convention, in relation to Articles 1(1) and 2, to the detriment of Rafael Rojas Madrigal and Jorge Martínez Meléndez, who were convicted under Law 8503.

244. Third, it argued that Law 8837 of 2010 created the remedy of appeal of the judgment, among others, and its transitory provisions established two assumptions, namely: 1) for persons whose cassation appeals were rejected before the entry into force of the law, it was established that they could file, for one time only, review proceedings, and 2) for persons whose cassation appeals were pending resolution at the time of the entry into force of the law, it was established that they could request the conversion of the cassation appeal already

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[347] The Commission explained that under Article 443 of the Code of Criminal Procedure, an appeal in cassation could only proceed when the decision did not comply with or erroneously applied a legal precept, i.e., it was limited to the review of possible errors of law. In turn, Article 369 established a closed list of assumptions under which an appeal in cassation could proceed, which focused on the essential constituent elements of a sentence or on possible errors of law. In addition, Article 445 of the CCP required that at the time of filing the appeal, the legal provisions that were deemed to have been disregarded or erroneously applied must be precisely described.

[348] In its final written arguments, it argued that it is not evident from any of the decisions that resolved the appeals filed that the courts had made an autonomous assessment of the facts and the criminal liability of the alleged victims separately from that carried out by the court of first instance, as required under Article 8(2)(h) of the Convention to guarantee double judicial conformity.

filed to an appeal under the new law. In this case, most of the alleged victims were in scenario 1, that is, their only option under Law No. 8837 was to file a one-time motion for review of the judgment. On the other hand, Mr. Rojas Madrigal's case was in scenario 2; however, his request for conversion was rejected because "he did not explain the reasons that led him to consider that [...] the appeal of the judgment should be applied to him." Consequently, with respect to the victims in the instant case, the Commission concluded that the reform did not remedy the violation of the right established in Article 8(2)(h) of the Convention.

245. The ***Inter-American Defenders*** agreed with the Commission and added that in all the cases in which the alleged victims turned to the Judiciary, they encountered obstacles to obtaining adequate and effective access to the right to appeal the judgment, such as "excessive formalities and capricious and arbitrary interpretations." In addition, they argued that, since transitory provision III of Law 8837 required, under penalty of inadmissibility, that the grievance be specifically stated when requesting the conversion of the writ of cassation into the remedy of appeal, the Third Chamber rejected the conversions of the appeals. For the defense, this requirement "implied a mere formality that was totally unnecessary and contrary to the right to appeal." They also argued that by repealing the grounds of due process as a means to initiate the review procedure established in Law 8837, the essence of the institute of review was "normatively" removed, in violation of Articles 8(1), 8(2) and 25(1) of the Convention. They further alleged that in this case there was a failure on the part of the State to observe the control of conventionality.

246. With respect to Rafael Rojas (Group 2), they alleged that: (i) in the decision of the Third Chamber that heard the cassation appeal filed by the alleged victim against his conviction for use of false document against the public interest, as well as in the decision of October 19, 2007 that declared without merit an appeal for review, formalities prevailed over fundamental rights; ii) the fact that Rafael Rojas was not given a written copy of his conviction for embezzlement violates the right to a full review,[349] and iii) the request for the conversion of the writ of cassation into a motion for appeal was denied because the appellant did not explain the reasons that led him to consider that the appeal process should be applied to him, and thus the Third Chamber created new obstacles to access his rights, from a formalistic position.

247. With respect to Manuel Hernández Quesada (Group 6), they alleged that the writ of cassation filed by the alleged victim was heard before the judgment in the case of *Herrera Ulloa,* within a formalistic framework that did not allow for a comprehensive review of the conviction. They pointed out that Mr. Hernández even filed a writ of *habeas corpus* alleging the violation of Article 8(2)(h) of the Convention and a motion for *amparo* alleging the lack of formal charges, both of which were unsuccessful, since this was not the way to present such allegations in a criminal appeals system that would not allow for a comprehensive review of the conviction. They also pointed out that Mr. Hernández requested a review procedure in which he alleged the omission of formal charges, evidence and legal definitions of the criminal case; the Third Chamber declared that the review was inadmissible, stating that the acts for which he was accused and sentenced "were formally attributed to him," this being a way of resolving the case without further substantiation or sufficient motivation, and "far from carrying out a comprehensive review of the judgment." In this sense, they understood that a double violation occurred, since the full examination of the judgment was affected and the possibility of protecting due process through an appeal or review procedure devoid of rigorousness in its admission was rejected.

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[349] In relation to Mr. Rojas Madrigal, they alleged the violation of his rights to defense, due process and access to justice established in Articles 8(1), 8(2) and 25(1) of the Convention. These arguments are analyzed in Chapter VIII.III of this judgment.

248. The ***SIPDH*** representatives agreed with the Commission and explained how the appeals filed by their clients were resolved. They added, with respect to Luis Archbold Jay and Enrique Floyd Archbold Jay (Group 3) and Miguel Mora Calvo (Group 7), that they pursued numerous legal remedies, both in criminal and in constitutional proceedings. However, the responses they received from the Third Chamber or the Court of Cassation and the Constitutional Chamber indicated that they were not the competent bodies to decide these matters. They referred specifically to the responses received in the action of unconstitutionality, the appeal for cassation and the review procedures. Finally, they argued that the lack of a comprehensive remedy in criminal matters resulted in the violation of Article 8 of the Convention in relation to Article 25 thereof, regarding the general obligation to provide a simple, prompt and effective remedy.

249. The common interveners ***Factum Consorcio*** agreed with the Commission. They also pointed out that despite the entry into force of Law 8503 of 2006, the provision of Article 443 of the CCP excluded the possibility of reviewing factual or evidentiary aspects of the case, which continued to be governed by the so-called "principle of intangibility of the facts proven in the trial judgment," which was applied by the Third Chamber in the specific case of Mr. Martínez Meléndez through decision 232-2008, when hearing his cassation appeal against the conviction. They also cited examples of facts that were not reviewed and evidence offered to support the cassation appeal, which, nevertheless, was denied; all of which would violate the right to obtain and access evidence and information of a public nature.

250. The ***State*** pointed out that before and after the enactment of the 1996 CCP, Costa Rica enforced and implemented the right enshrined in Article 8(2)(h) of the Convention, and that the mere name assigned to the remedy could not be used to "automatically" establish the satisfaction or not of that right, but that it was necessary to analyze the specific case to determine whether all the arguments that, according to the petitioners, prejudiced them in the judgment were heard and decided in a comprehensive manner. In this regard, it argued that an analysis of the 1973 CCP and the 1996 CCP would show that, even with the evolution of case law, it was possible to evaluate facts and evidence through an appeal in cassation. Moreover, the reforms introduced in the CCP of 1996 tended to make the review procedure more effective, efficient and accessible, with few formalities, which could be presented in a written document that did not even require the authentication or the advice of legal counsel, and contemplated the possibility of offering evidence to support the arguments (art. 410). According to the State, in the *Herrera Ulloa* case*,* the Inter-American Court found that in that specific case, the cassation appeal did not allow for a comprehensive review of the victim's criminal conviction and ordered Costa Rica to adapt its domestic legal system, specifically with regard to the effective affirmation in the CCP of the guarantees contemplated in the right to a full review of the judgment. The objective of this legal reform was to eliminate the possibility of repeating isolated situations similar to the one in the case in question.

251. The State explained that long before the entry into force of Law 8837 of 2010, Costa Rica had adopted legislation and legal provisions aimed at addressing the violation of the right to appeal in criminal matters. This made it possible to hear and resolve a large number of cases involving this violation, through the cassation appeal regulated in Law 8503 of June 6, 2006, as well as the alleged violation of due process or opportunity of defense (Article 408 paragraph "g" of the CCP of 1996), an extremely broad basis for the admissibility of the review of a criminal conviction. The regulatory amendments introduced in Law 8503 of 2006 expressly included the possibility of presenting, in criminal cases in which a conviction has been handed down, all arguments relating to the assessment of the evidence and the determination of the facts (arts. 142, 184 and 363 of the CCP).

252. The State also argued that transitory provision I of Law 8503 constituted a special procedural instrument that only required for its filing and processing that the person who considered himself affected by the manner in which the cassation appeal was resolved, and that his right to appeal the judgment had been violated, to file a petition for review invoking such reason, without further formality, even being able to file more than one motion for review, as long as the claim was supported by new allegations. In this regard, it explained that the special review regulated in transitory provision I is not a rigid or exceptional procedure. These characteristics of the special review were maintained in Law 8937 of 2010, through which alleged victims were granted a legal period of 18 months, and in addition, 6 months from its entry into force, to claim the violation of Article 8(2)(h) and present all the arguments related to such situation through the procedural mechanism of review of the judgment.

253. In addition, the State pointed out that Law No. 8837 of 2010 essentially complements and expands the scope of Law No. 8503, and that transitory provision III of Law 8837 constituted a procedural mechanism that provided an effective means for those who considered that their right to appeal the judgment had been violated prior to its enactment to claim and demonstrate such a situation. With respect to the possibility of filing a single motion for review within the first six months of the enactment of Law 8837, it pointed out that this did not imply any restriction of the effective protection of the right to appeal the judgment, since it would not be feasible to review *ex officio* all final convictions prior to said law, and neither would the generic argument of the "non-existence of the appeal" prior to its enactment be sufficient.

254. Furthermore, the State emphasized that the appeals system provided for in the Costa Rican criminal procedure system reflects the best standards in the Latin American region.[350] According to the State, to consider that Costa Rica's criminal appeals system is contrary to the Convention would imply disqualifying one of the procedural systems in the region that has granted the most defense guarantees to the accused. This would also imply a setback to the processes of democratization of criminal justice in the Latin American region, and a return to inquisitorial systems of hierarchical control in the decisions of the sentencing judges, as well as a weakening of the oral trial as the central phase of the entire procedure. Finally, the State referred in detail to the situation of each group of alleged victims.

B. Considerations of the Court

255. In its constant case law, the Court has referred to the scope and content of Article 8(2)(h) of the Convention, as well as to the standards that should be observed to ensure the right to appeal the judgment before a higher judge or court. The Court considers that the right to appeal the judgment is an essential guarantee that "must be respected as part of due process of law, so that a party may turn to a higher court for review of a judgment that was unfavorable to that party's interests […]."[351] Bearing in mind that judicial guarantees seek to ensure that anyone involved in a judicial proceeding is not subject to arbitrary decisions, the Court interprets that the right to appeal a judgment cannot be effective unless it is guaranteed

[350] The State analyzed CCP of 1973, the CCP of 1996, the reform of Law 8503 of 2006 and the reform of Law 8837, comparing their norms with the codes of criminal procedure of Mexico, Chile and Argentina (merits file, folios 1158 to 1178).

[351] *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra,* para. 158, and *Case of Zegarra Marín v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 331, para. 170.

in respect of all those who are convicted,[352] the sentence being the manifestation of the exercise of the punitive power of the State.[353]

256. The Court has considered that the right to appeal the judgment is one of the basic guarantees enjoyed by every person who is subject to a criminal investigation and proceeding.[354] Consequently, the Court has emphasized that the main purpose of the right to challenge a judgment is to protect the right of defense, since it provides the opportunity to file an appeal to prevent a judicial decision from becoming final in the event that it has been adopted in a flawed procedure and contains errors or misinterpretations that would cause undue prejudice to the interests of the defendant. Thus, the appeal must be assured before the judgment becomes *res judicata*. This right makes it possible to correct errors or injustices that may have been committed in the first instance decisions, since a two-stage judicial ruling gives greater credibility to the State's judicial actions, while providing greater security and protection to the rights of the convicted person. Accordingly, in order for there to be a double judicial conformity, the Court has indicated that "what matters is that the remedy guarantees the possibility of a full review of the decision being challenged."[355]

257. Furthermore, the Court has held that Article 8(2)(h) of the Convention refers to an ordinary, accessible and effective remedy, that is, one that should not involve major complexities that make this right illusory. In this sense, the formalities required for the remedy to be admitted must be minimal and must not constitute an obstacle for it to fulfill its purpose of examining and resolving the grievances alleged by the appellant; in other words, it must seek results or answers to the purpose for which it was conceived. It should be understood that, regardless of the appeals regimen or system adopted by the States Parties and the designation given to the means of challenging the conviction, for it to be effective, it must constitute an adequate mechanism for seeking the correction of an erroneous conviction. This requires an analysis of the factual, evidentiary and legal issues on which the contested judgment is based, since in the judicial activity there is an interdependence between the factual determinations and the application of the law, in such a way that an erroneous determination of the facts implies an erroneous or improper application of law. Consequently, the grounds on which an appeal may be filed must allow for a broad review of the contested aspects of the conviction.[356]

258. Furthermore, in the regulations that States develop in their respective appeals systems, they must ensure that the appeal against a conviction respects the minimum procedural guarantees that, under Article 8 of the Convention, are relevant and necessary to resolve the grievances raised by the appellant.[357]

259. In this regard, the Court has established that Article 2 (Domestic Legal Effects)[358] of the American Convention establishes the general obligation of the State Parties to adapt their

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[352] *Cf. Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 23, 2012. Series C No. 255, paras. 92 and 93 and *Case of Zegarra Marín v. Peru*, *supra,* para. 170.

[353] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, Para. 107, and *Case of Zegarra Marín v. Peru*, *supra,* para. 170.

[354] The Court also applied Article 8(2)(h) in relation to the review of an administrative sanction that ordered a custodial sentence, noting that the right to appeal the decision enshrined a specific type of remedy that should be offered to any person sanctioned with a custodial sentence, as a guarantee of his or her right to defense. *Cf. Case of Zegarra Marín v. Peru*, *supra,* para. 171.

[355] *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra, para.* 165, and *Case of Zegarra Marín v. Peru, supra,* para. 171.

[356] *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, paras. 161, 164 and 165, and *Case of Zegarra Marín v. Peru*, *supra,* para. 172.

[357] *Cf. Case of Mohamed v. Argentina*, *supra,* para. 101, and *Case of Zegarra Marín v. Peru*, *supra,* para. 173.

[358] Article 2 of the Convention states: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in

domestic law to the provisions of the Convention in order to guarantee the rights recognized therein. This obligation implies the adoption of measures of two kinds. On the one hand, the elimination of norms and practices of any nature that involve the violation of the guarantees set forth in the Convention; on the other hand, the issuance of laws and the implementation of practices conducive to the effective observance of said guarantees.[359]

260. However, this Court is aware that, since the 1990s, the Constitutional Chamber of the Supreme Court of Justice had referred to the right to appeal a judicial decision established in Article 8(2)(h) of the Convention, indicating that this was a "parameter of constitutionality." In particular, in several rulings such as, for example, judgments 282-90 of March 13, 1990;[360] 719-90 of June 26, 1990;[361] 1998-00440 of January 27, 1998;[362] 2004-14715 of December 22, 2004;[363] 2005-03619 of April 5, 2005;[364] 1185-95 of March 2, 1995; and 1739-1992 of July 1, 1992, with *erga omnes* effects for the ordinary courts,[365] the Constitutional Chamber

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accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[359] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, para. 207, *and Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013. Series C No. 26, para. 293.

[360] Case 210-90, Judgments 282-90 of March 13, 1990 (evidence file, folios 42046 to 42049). In that judgment, the Constitutional Chamber states that: "this is a case of immediate application of the treaty, because Costa Rica has both the organ and the procedure for appealing the judgments in question, since the [...CCP] generally admits the appeal in cassation in favor of the accused against the conviction, only restricting it to cases of [low criminality...]. Therefore, [...] in order to comply with [Article 8(2)(h) of the American Convention], it is sufficient to disregard the aforementioned limitations, and to understand that the remedy of cassation referred to therein is legally granted in favor of the defendant, sentenced to any penalty in a judgment handed down in a criminal case for a crime. [In accordance with Article [8(2)(h) of the Convention], the appeal is declared admissible and the immediate release of the protected persons is ordered until the case is resolved by a final judgment, once they have been granted the opportunity to appeal the judgment in cassation [...]".

[361] *Cf.* Case 10-90, Judgment 719-90 of June 26, 1990 of the Constitutional Chamber of the Supreme Court of Justice (evidence file, folios 42050 to 42053). In that decision the Constitutional Chamber states: "Regarding this last point, the Chamber considers that the appeal in cassation satisfies the requirements of the Convention, as long as it is not regulated, interpreted or applied with formalistic rigor, but rather allows, with relative simplicity, the court of cassation to examine the validity of the appealed judgment, in general, as well as the respect due to the fundamental rights of the accused, especially the rights of defense and due process."

[362] Judgment 1998-00440 of January 27, 1998, of the Constitutional Chamber (evidence file, folio 42132).

[363] This judgment is cited in the 2006-0052 of January 6, 2006 (evidence file, folios 20640 to 20644), but is also publicly available, in full, in the Costa Rican Legal Information System, at: http://jurisprudence.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudence/jur_Document.aspx?param1=Ficha_Judgment&param2=1&nValor1=1&nValor2=305753&tem1=&param7=&strTipM=T&lResultado=1. In this decision it indicates that: "The right to appeal the judgment referred to in Article 8(2)(h) of the American Convention [...] is a right exclusively of the accused in any criminal case involving a crime; b) this right to appeal the judgment consists of the possibility for a higher court to correct serious errors in the trial, and is satisfied with the extraordinary remedy of cassation, provided that it is not regulated, interpreted or applied with formalistic criteria [...]."

[364] This judgment is cited in the 2006-0052 of January 6, 2006 (evidence file, folios 20640 to 20644), but is also published and available in full in the Costa Rican Legal Information System at: http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&param2=1&nValor1=1&nValor2=307236&tem1=&param7=&strTipM=T&lResultado=1. In that decision the Constitutional Chamber states: [...] in order to comply with [...] Article 8. 2(h) of the American Convention, it is sufficient to consider the aforementioned limitations as not having been imposed, and to understand that the remedy of cassation [...] is legally granted in favor of the defendant, sentenced to any penalty in a judgment handed down in a criminal case for an offense [...]. the Chamber considers that the remedy of cassation satisfies the requirements of the Convention, insofar as it is not regulated, interpreted or applied with formalistic rigor but rather allows the court of cassation to examine, with relative simplicity, to examine the validity of the appealed judgment in general, as well as the respect due to the fundamental rights of the accused, especially the rights of defense and due process."

[365] Pursuant to Article 13 of Law of the Constitutional Jurisdiction which states that: "The jurisprudence and precedents of the constitutional jurisdiction are binding *erga omnes*, except for itself;" as well as Article 107 for the case of consultation proceedings, which provides that "the decision of the Chamber shall be communicated to the consulting court, the Attorney General of the Republic and the parties appearing before it, shall have the same effects and shall be published in the same manner as the judgment issued in the unconstitutionality action, except that it shall not preclude the filing of the latter in the same proceeding, if applicable."

alluded to the right to appeal, excluding formalisms that would prevent the review of conviction judgments, in order to satisfy the provisions of Article 8(2)(h) of the Convention. In this regard, for example, in the last of the abovementioned judgments, the Constitutional Chamber indicated that the right to appeal the judgment "is satisfied with the exceptional appeal in cassation, provided that it is not regulated, interpreted or applied with formalistic criteria – those that convert procedural rites into ends in themselves and not instruments for the better administration of justice. And also, provided that the court of cassation has the power – and exercises it -to annul or correct wrongful rejections of relevant evidence, restrictions on the right of defense and the right to offer and present evidence by the accused, and serious errors of fact or law in its assessment, as well as the lack of reasoning that prevents the appellant from challenging the facts and reasons stated in the judgment."[366]

261. However, as already noted, on July 2, 2004, this Court ruled in the case of *Herrera Ulloa v. Costa Rica*, establishing that "the writs of cassation filed to challenge the November 12, 1999, conviction did not satisfy the requirement of a liberal remedy that would permit the higher court to do a thorough analysis or examination of all the issues debated and analyzed in the lower court."[367] Therefore, it declared that the State violated Article 8(2) (h) of the Convention in relation to Articles 1(1) and 2 of said treaty to the detriment of Mauricio Herrera Ulloa,[368] and ordered Costa Rica to "adapt its domestic legal system to conform to the provisions of Article 8(2) (h) of the Convention, in relation to Article 2 thereof."[369]

262. Approximately two years later, on June 6, 2006, the State of Costa Rica enacted Law 8503 "Law on the Opening of Criminal Cassation," which, in principle, would enable a person convicted of a criminal offense to challenge factual,[370] evidentiary[371] and legal issues before the corresponding Court of Cassation[372] by filing an appeal for cassation, before the criminal

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366 *Cf.* Judgment 1739-1992 of July 1, 1992 of the Constitutional Chamber (evidence file, folio 42077).

367 *Cf. Case of Herrera Ulloa v. Costa Rica, supra, para.* 167.

368 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra, para.* 168.

369 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra, para.* 198 and fifth operative paragraph.

370 Code of Criminal Procedure of Costa Rica of Costa Rica, Version 6 of 25, of 28/04/2006. Article 449 bis.- Examination by the Court of Cassation. The Court of Cassation shall assess the merits of the claims invoked in the appeal and the grounds thereof, by examining the proceedings and the records of the hearing, so that it may assess the manner in which the trial judges assessed the evidence and based their decision. If the Court does not have sufficient records to make this assessment, it may reproduce in cassation the oral evidence of the trial that, in its opinion, is necessary to examine the merits of the claim, and will evaluate it in relation to the rest of the proceedings. Likewise, it may directly evaluate the evidence that has been introduced in writing to the trial. *(Added by Article 3° of Law N° 8503 of April 28, 2006)*

371 Code of Criminal Procedure of Costa Rica, Version 6 of 25, of 28/04/2006. Article 449.-Evidence in Cassation. The parties may offer evidence when the appeal is based on a procedural defect and the manner in which an act was carried out is disputed, as opposed to what is indicated in the proceedings, in the minutes or records of the debate, or in the judgment.
Evidence proposed by or in favor of the accused is also admissible, including that related to the determination of the facts in dispute, when it is essential to support the claim being made and in the cases authorized in the review procedure.
The Public Prosecutor's Office, the plaintiff and the civil plaintiff may offer essential evidence to resolve the merits of the claim, only when it has been previously rejected, has not been previously known or is related to new facts. The Court of Cassation shall reject oral evidence that is manifestly improper or unnecessary; but, if it deems it indispensable, it may order it even *ex officio*.
When oral evidence has been received, those who have received it shall be part of the Court at the time of the final decision. *(Reformed by Article 1° of Law N° 8503 of the 28 April 2006)*

372 Code of Criminal Procedure of Costa Rica, Version 6 of 25, of 28/04/2006. Article 445. "Filing. The cassation appeal shall be filed before the court that issued the decision, within fifteen days of notification, by means of a well-founded document, in which the legal provisions that are considered to have been disregarded or erroneously applied shall be clearly cited and the claim shall be stated. Each reason and its grounds must be stated separately. No other plea may be raised outside this opportunity." Article 446 "Hearing. Once the appeal has been filed, the court that issued the judgment shall give a hearing to the interested parties for a period of five days, during which time they must indicate the place or manner of receiving notifications in the appeal, and they may also file additional pleadings. If there is any adhesion, the trial court will grant a new hearing to the parties

conviction becomes final.[373] In particular, the Court emphasizes that transitory provision I of said law provided that: "Persons convicted of a criminal act prior to this law, who have been prevented from filing an appeal in cassation against the judgment due to the rules that governed its admissibility at that time, may file a motion for review of that judgment before the competent court, invoking, in each case, the grievance and the factual and legal aspects that could not be heard in cassation.[374] Thus, the Court understands that, through the grounds for review created by transitory provision I, a person convicted of a criminal offense could, in principle, obtain a comprehensive review of the judgment, including the factual and legal aspects.

263. Furthermore, Law 8837, enacted on June 9, 2010 and in force as of December 9, 2011, created an appeal remedy that would allow for a comprehensive examination of the conviction.[375] In addition, transitory provision III of said law established that "[i]n cases that are pending adjudication and in which the violation of Article 8(2)(h) of the American Convention has been previously alleged, the appellant shall be granted a period of two months to convert his petition for writ of cassation into a motion for appeal, which shall be filed before the former Courts of Cassation or the Third Chamber, as appropriate, which shall forward the case files to the new Courts of Appeal. Under penalty of admissibility, the grievance must be specifically stated." In this way, individuals with pending appeals for cassation and review could have access to a comprehensive remedy.

264. In turn, Law 8837 limited the scope of the appeals for cassation[376] and review.[377] On this point, the Court notes that transitory provision III of this law establishes that "[i]n all cases that have a final judgment at the time of the entry into force of this law, and in which the violation of Article 8(2)(h) of the American Convention on Human Rights has been previously alleged, the convicted person shall have the right to file, once only, during the first six months, a review procedure that shall be heard according to the competencies established in this law, by the former Courts of Cassation or the Third Criminal Chamber." From the foregoing, it follows

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on this matter, for a term of five days. Once these periods have expired, it will send the file to the corresponding Court of Cassation."

Article 447. - Procedure. The Court of Cassation may declare the appeal inadmissible if it considers that the decision is not subject to appeal, that the appeal has been filed extemporaneously or that the party does not have the right to appeal, in which case it shall so declare and return the proceedings to the court of origin.

If the appeal is admissible, the Court shall substantiate it and rule on the merits, even if it considers that there are defects in its wording. If it considers that these absolutely prevent it from hearing the claim, it shall warn the party of its correction, in accordance with Article 15 of this Code, specifying the aspects that must be clarified and corrected. If the defects are not corrected, it shall decide the matter as appropriate.

If the appeal is admissible and an oral hearing does not have to be convened, nor the receipt of evidence ordered, the Court shall issue a judgment. Otherwise, the judgment shall be rendered after the hearing and after the evidence has been received. *(Reformed by Article 1° of Law N° 8503 of April 28, 2006)*"

[373] See Code of Criminal Procedure of Costa Rica, Version 6 of 25, of 28/04/2006. Article 148 "Final decision. Insofar as they are not appealed in due time, the judicial decisions shall be final and enforceable, without the need for any declaration whatsoever. Only a review of a final judgment may be made against it, in accordance with the provisions of this Code." See, also Decision of the Third Chamber no. 2007-01177 of October 19, 2007 (evidence file, folio 1047).

[374] *Cf.* Annexes to the Report of the State of Costa Rica to the Inter-American Court of Human Rights (evidence file, folios 28473 and 28477).

[375] Article 459. - "Admissibility of a motion to appeal. The motion to appeal judgment shall enable a comprehensive examination of the ruling, when the interested party claims to be in disagreement with the findings of fact, the introduction and evaluation of the evidence, the basis in law, or punishment established. The appeals court shall rule on any items that are expressly contested, but shall declare, *ex officio* on its own initiative, any absolute defects and infringements of due process that may be found in the judgment of conviction."

[376] Article 167- (Allows the cassation appeal to proceed against judgments issued by the appellate courts), and Article 468 (allows the cassation appeal to be based only on two grounds: a) When the existence of contradictory precedents issued by the appellate courts is alleged, or of the latter with precedents of the Criminal Cassation Chamber, and b) When the judgment does not observe or erroneously applies a substantive or procedural legal precept. The provisions of Article 178 of the Code, referring to absolute defects, are excepted).

[377] In particular, Law 8837 eliminated subparagraph g) of Article 408 in force at the time, which allowed the filing of an appeal for review when the judgment had not been issued through due process or opportunity for defense.

that, in principle, if a person was convicted of a criminal offense between June 6, 2006 and December 9, 2011, he or she could have filed a cassation appeal as amended by Law 8503 of 2006 in order to achieve a comprehensive review of the sentence and, failing this, transitory provision III of Law 8837 created the possibility for these persons to appeal possible violations of Article 8(2)(h) of the Convention by filing a motion for review.

265. In view of the foregoing, the Court considers that, in the instant case it is not appropriate to declare a violation of Article 2 of the American Convention because of the way in which the Costa Rican appeals system is regulated, or because of the manner in which the State addressed the situation of persons whose convictions were already final prior to the entry into force of Laws 8503 and 8837. This is because through said reforms, it remedied the deficiencies in the application of the appeal rules that remained after the decisions of the Constitutional Chamber, which since the 1990s indicated that the appeal in cassation should be applied in a way that guarantees the right to a second hearing (*supra* para. 260).[378]

266. Thus, what is required is a case-by-case analysis of the remedies actually filed by the alleged victims in order to determine whether the manner in which they were resolved in the Costa Rican appeals system, taking into account its reforms, respected their right to a comprehensive review of their convictions.

267. In this regard, this Court recalls that an effective remedy means that the analysis of a judicial remedy by the competent authority cannot be reduced to a mere formality, but must examine the reasons invoked by the plaintiff and expressly address these.[379]

268. This Court has also pointed out that "the obligation to provide grounds is one of the 'due guarantees' included in Article 8(1) to safeguard the right to due process."[380] The Court has indicated that the grounds "are the exteriorization of the reasoned justification that allows a conclusion to be reached"[381] and implies a rational explanation of the reasons that led the judge to adopt a decision. The importance of this guarantee is linked to the correct administration of justice and the prevention of arbitrary decisions. Likewise, the statement of reasons gives credibility to legal decisions within the framework of a democratic society and demonstrates to the parties that they have been heard.[382]

269. This is linked to another aspect that highlights the importance of the reasoning as a guarantee: it provides the possibility, in those cases in which decisions are subject to appeal, to criticize the ruling and obtain a new examination of the issue before a higher court. Thus, the Court has already pointed out that "the grounds for the judicial decision must be provided

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[378] In this regard, the Court notes that in its judgment in the case of *Mendoza et al. v. Argentina*, in which it declared a violation of Article 2 of the Convention, positively assessed the "Casal Judgment" of the Supreme Court of Justice in which "the limitation of the appeal in cassation to the so-called issues of law is discarded definitively." However, it noted that that the criteria evident from the Casal judgment were subsequent to the decisions taken on the appeals in cassation filed on behalf of the presumed victims in this case, which does not occur in this case. *Cf. Case of Mendoza et al. v. Argentina*, supra, paras. 254 and 255.

[379] *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Zegarra Marín*, para. 179

[380] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 78, and *Case of Zegarra Marín v. Peru*, supra, para. 146.

[381] *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. 107, and *Case Flor Freire v. Ecuador, supra,* para. 182.

[382] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra, para.* 78, and *Case of Zegarra Marín v. Peru, supra, para.* 146.

to be able to guarantee the right of defense."[383] However, the Court has also stated that the duty to provide grounds does not require a detailed response to every argument of the parties, but may vary according to the nature of the decision, and that it is necessary to analyze in each case whether this guarantee has been satisfied.[384]

270. In the criminal sphere, as a guarantee for the accused, it is also aimed at ensuring the principle of presumption of innocence, since it allows those who are subject to the punitive power of the State to understand the reasons why it was possible to obtain a conviction on the charge and criminal liability, as well as the assessment of the evidence to refute any presumption of innocence, and only then to be able to confirm or refute the incriminating hypothesis.[385] This would make it possible to rebut the presumption of innocence and determine criminal liability beyond reasonable doubt, as well as to enable the exercise of the defense through the right to appeal the conviction.

271. The Court emphasizes that in the instant case, the alleged victims Rafael Rojas (Group 2),[386] Luis and Enrique Archbold Jay (Group 3),[387] and Miguel Mora Calvo (Group 7)[388] received convictions prior to the entry into force of Law 8503 on June 6, 2006, and that the alleged victims Rafael Rojas (Group 2)[389] and Jorge Martínez Meléndez (Group 4),[390] received convictions after that date, but before the entry into force of Law 8837 on December 9, 2011. The Court will now analyze the responses to the cassation and review appeals filed by these individuals against their convictions.

B.1. Regarding Rafael Rojas Madrigal (Group 2)

B.1.1. In relation to file N° 99-000136-0065 (use of false document)

272. Rafael Rojas Madrigal and his defense counsel filed two appeals in cassation, respectively, against his conviction of November 22, 2000, after which the Third Chamber annulled the judgment in relation to the sentence and maintained the pretrial detention measure imposed on the alleged victim. Subsequently, after his second conviction, Mr. Rojas and his defense counsel filed two more appeals in cassation, after which the Third Chamber reduced the sentence imposed and granted him the benefit of conditional execution of the sentence, ordering his immediate release (*supra* para. 177). In addition, Mr. Rojas filed at least seven motions for review against his convictions.

273. First, this Court notes that the two cassation appeals filed by Mr. Rojas and his defense counsel, respectively, on December 18 and 21, 2000, against his first conviction, were resolved by The Third Chamber in decision No. 2001-000122 of February 2, 2001. In the appeal filed, Mr. Rojas stated, among other grievances, that: i) in his conclusions during the trial, the prosecutor alluded to his criminal record without a final conviction; ii) there was no handwriting evidence, contrary to what was stated by the representative of the Public

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383 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra, para.* 118, and *Case of Zegarra Marín v. Peru*, *supra, para.* 155.

384 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court) v. Venezuela*, *supra, para.* 90, and *Cf. Case of Zegarra Marín v. Peru, supra,* para. 178.

385 *Cf. Case of Zegarra Marín v. Peru*, *supra,* para. 147.

386 *Cf.* Conviction judgment 172-2000 of November 22, 2000 (evidence file, folios 33484 to 33555).

387 *Cf.* Conviction judgment 76-2003 of August 20, 2003 (evidence file, folios 33717 to 33731).

388 *Cf.* Conviction judgment 736-98 of September 24, 1998 (evidence file, folios 35492 to 35610).

389 *Cf.* Decision 2009-614 (oral judgment). Judgment 614-09 of the trial court of the First Judicial Circuit of San José of July 2, 2009, Annex 3.3 to the State's answering brief, and Decision 2009-614 cited in Decision No. 2012-00526 of the Third Chamber of the Supreme Court of March 22, 2012 (evidence file folio 33695).

390 *Cf.* Conviction judgment 680-2007 of July 17, 2007 (evidence file, folios 34053 to 35363).

Prosecutor's Office; iii) he was defenseless because he filed a statute of limitations appeal and did not obtain a response, and because his lawyer did not find him at the CAI of La Marina de San Carlos prison, since he was transferred without prior notice; iv) there was an incorrect characterization of the facts; v) the sentence imposed was in violation of due process; vi) the investigation was poor and careless, with specific actions not being completed, and vii) the witnesses incurred in contradictions.[391] In its decision, the Third Chamber outlined all the reasons for the grievances raised, without addressing the merits of the matter, stating only that "[t]he plea is inadmissible; not only does it not demonstrate the specific relevance of the alleged irregularities, but it also fails to separate the allegations and their regulatory support which, under penalty of rejection, is established in Article 445 of the 1996 Code of Criminal Procedure […]."[392] Thus, the Court ruled the appeal inadmissible based on a formalistic argument, leaving aside the legal, factual and evidentiary issues argued by Mr. Rojas.

274. For his part, Mr. Rojas' defense counsel argued, *inter alia*: i) illegitimate grounds for setting the sentence; ii) erroneous assessment of the evidence used to establish the sentence, and iii) lack of intellectual evidentiary grounds. The Third Chamber analyzed the first and second grounds,[393] declared the first admissible, annulled the judgment only with regard to the sentence, and returned the matter to the trial court to set the sentence according to law. However, with respect to the third claim, in response to the defense counsel's allegation that the trial court did not analyze the documentary and testimonial evidence, but only recounted the proven facts "without stating the reasons why it concluded that the version of the [witnesses] is credible" and why it "does not believe the statement made by the defendant," the Third Chamber dismissed the objection, stating that "the judges were careful to assess the evidence[, …] comparing it and finding the points of coincidence and divergence, in order finally arrive at their incriminating conclusions […]."[394]In this regard, it is not clear from the decision on what basis the Third Chamber reached these conclusions, since it does not indicate what these points of coincidence and divergence would be. Therefore, there is a lack of reasoning in the decision. In addition, the Third Chamber limited its review to the evaluation of the judges' actions, without making a substantial analysis of the documentary and testimonial evidence provided in the process, in order to reach its own conclusion on its evidentiary value. In view of the foregoing, the Court considers that, despite the fact that the cassation appeal of Mr. Rojas' defense counsel was declared partially admissible, the Third Chamber did not provide, in its Resolution No. 2001-000122, a comprehensive review of the factual and legal controversies raised before it.

275. Second, following the issuance of a new conviction No. 172-2000 on March 28, 2001, Mr. Rojas and his defense counsel, respectively, filed two new cassation appeals. The Court does not have the resolution whereby the cassation appeal filed by Mr. Rojas on April 2, 2001 was resolved, so it will not rule on the matter. In the appeal filed by Mr. Rojas' defense counsel on April 24, 2001, it was again alleged that, in imposing the sentence, the trial court took into account facts contrary to what was established in the conviction, in addition to the fact that said sentence was disproportionate and did not consider all the parameters established in the Criminal Code for its determination.[395] In this regard, in decision 00550-2001 of June 8, 2001, the Third Chamber analyzed the sentence imposed and confirmed that,

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391 *Cf.* Cassation appeal filed by Rafael Rojas Madrigal on December 18, 2000 (evidence file, folios 966 and ff).

392 *Cf.* Decision N° 2001-000122 of February 2, 2001 (evidence file, folio 1012).

393 It indicated that the trial court merely referred to "seriousness of the act without stating precisely what constituted such seriousness [, which] did not comply with the requirement to provide reasoning." It also criticized the fact that the sentence was based on the participation of two young people, when their actions "took place in the context of the fraud scheme [,] a prescribed crime and not the use of a false document, which is the punishable crime." *Cf.* (evidence file, folio 1012).

394 *Cf.* Decision N° 2001-000122 of February 2, 2001 (evidence file, folio 1013).

395 *Cf.* Cassation appeal of April 24, 2001 (evidence file, folios 1021 to 1031).

in effect, its *quantum* was based on erroneous facts. It also pointed out the aspects that the trial court omitted to consider, and therefore determined that the four-year sentence imposed was disproportionate, reduced it to three years, granted him the benefit of conditional discharge and ordered his immediate release.[396] Therefore, in view of the alleged inadequate reasoning of the court *a quo*, the Third Chamber addressed the claim by making its own assessment of the elements in the case file and justifying the imposition of a new sentence.

276. Third, faced with this new conviction, Mr. Rojas filed a motion for review of judgment in August 2001, in which he argued, among other reasons: i) improper criminal definition of the offense of use of a false document, given that it was an attempt; ii) failure to properly assess the testimonial evidence; iii) lack of correlation between indictment and judgment; iv) failure to notify him of the judgment, and v) and the trial court relied on false evidence and there is no handwriting evidence in the file.[397] In examining the matter, in decision 2001-00882 of September 14, 2001, the Third Chamber declared the proceeding inadmissible under a formalistic criterion and without considering the issues raised by the appellant, finding that "none of the grounds contained a single grievance, but several and of a diverse nature; [...] lacking an autonomous legal basis, [...] in violation of [...] Article 410 of the Code of Criminal Procedure, which requires specific reference to the grounds on which it is based."[398]

277. Subsequently, between July and August 2005, Mr. Rojas filed two other motions for review, in which he alleged, among other things: i) violation of due process for alleged failure to observe the principle of correlation between indictment and sentence, ii) that he was denied the opportunity to appeal the judgment in second instance, and iii) that his statement was not evaluated at trial (*supra* para. 180). On October 19, 2007, the Third Chamber dismissed the appeal through decision 2007-01177. Regarding the first point, it is clear that the court compared the facts presented both in the indictment and in the facts considered proven, finding consistency between them. Regarding the second and third points, the Third Chamber considered that the right to appeal the judgment was guaranteed through the cassation appeals declared partially admissible (supra para. 181). In this regard, as already stated, when deciding the appeal filed by Mr. Rojas' defense counsel in December 2000 (supra para. 173), the Third Chamber did not carry out a substantial analysis of the evidence offered in the proceedings in order to reach its own conclusion as to the reasons why the appellant's statement was not given evidentiary value. On this occasion, it merely reiterated that "a simple reading of the judgment shows that the evidence for the prosecution is so abundant and allows for a degree of certainty that even a hypothetical assessment [of his statement] would not modify or weaken the level of certainty that serves as a platform for the conviction."[399] The court did not specify the nature of the evidence or what its evidentiary value would be. Therefore, through this appeal, it failed to remedy the lack of a comprehensive review of this point.

278. However, and fourth, the case file clearly shows that between February and March 2007, Mr. Rojas filed two special motions for review against his conviction, based on transitory

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396 *Cf.* Decision N° 00550-2001 of June 8, 2001 (evidence file, folios 1035 to 1036).

397 "[…]the first plea alleges that the crime of use of false documents is mischaracterized; that it was only an attempt; that two hours had not elapsed since his action when the judicial police had seized the deposited check [therefore] the facts did not materialize [...]. The second plea alleges that there was no correlation between indictment and sentence; that due process was not respected [...].In the third plea he indicates that the court did not allow him to defend himself, because he was not notified of the ruling [...] [and] he appealed the sentence blindly. Finally, he claims that the court and the prosecutor relied on false evidence [...]; that a simple photocopy was taken into account, with no legal value because it was not certified [...]." (evidence file, folios 1039 and 1040).

398 *Cf.* Decision N° 2001-00882 of the Third Chamber of the Supreme Court of Justice, of September 14, 2001 (evidence file, folio 1040).

399 *Cf.* Decision N° 2007-01177 of October 19, 2007 (evidence file, folios 1046 to 1048 and 1050).

provision I of Law 8503. In these appeals he alleged, *inter alia*: i) lack of grounds as to why his account of the facts was not considered credible and why no handwriting analysis was performed on the victim; ii) it was considered proven that the accused impersonated another person based on a statement from which this fact could not be inferred; ii) failure to substantiate the version of the witness FM accepted by the trial court; iv) the same judges who issued the conviction had previously confirmed the pretrial detention of the accused, in violation of the principle of objectivity; and v) the judges who found the accused guilty and imposed the sentence that was later annulled, again served on the court to decide on the penalty. In the face of the new appeal against this decision, the Third Chamber directly established the sentence, preventing any possibility of appeal. In this regard, through decision No. 2010-00544 of May 28, 2010, the Third Chamber analyzed each of the grievances claimed through its own assessment of the evidence in the case file.[400] In particular, it referred to the reasons why Mr. Rojas' statement was not assessed and the fact that a handwriting analysis was not carried out. Regarding the latter, it upheld Mr. Rojas' claim, annulled the criminal conviction and set the sentence at one year, the minimum established for the unlawful act. Thus, the Third Chamber addressed the arguments raised previously by the appellant, in respect of which it had not received a duly substantiated response through its own analysis.

279. Fifth, it is on record that Mr. Rojas also filed two other motions for review on February 12, 2008 and January 21, 2013. It is clear from the analysis of the decisions that each of the grievances presented in said appeals was analyzed through a separate evaluation of the case file by the Third Chamber.[401]

280. In view of the foregoing, this Court concludes that, despite the fact that on two occasions the responses to Mr. Rojas' claims were based on formalistic criteria or lacked a

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[400] To refute the appellant's arguments as to why his statement was unreliable, as well as the fact that a handwriting analysis was not performed, the court analyzed the statements of the defendant, as well as four other testimonies and the forfeiture records of the check in question. As to the fact that the conclusion that Mr. Rojas allegedly impersonated another person was not derived from a statement, the court analyzed the relevant statement. As to the failure to substantiate why one version of a testimony was taken as valid over another, the court referred to the circumstances in which the statement taken as valid was given, and indicated that the latter was the one that coincided with that of another witness. Regarding the allegation that the same judges who issued the conviction judgment had previously confirmed the pretrial detention, the court indicated that "neither the criminal judge who ordered the pretrial detention and the subsequent precautionary measures, nor the members of the trial court that confirmed these decisions, issued the conviction judgment." Finally, regarding the last claim that the same court imposed the new penalty after the first conviction was annulled and that the Chamber of Cassation directly fixed the sentence, the Chamber of Cassation confirmed the allegations and upheld the appellant's claims. *Cf.* (evidence file, folios 1056, 1057, 1059, 1060 and 1061).

[401] In the appeal of February 12, 2008, Mr. Rojas Madrigal alleged that he was not informed of the facts to the detriment of the public interest and that if this had been the case, he would have requested a handwriting analysis. In decision No. 2010-01205 of October 29, 2010, the Third Chamber analyzed the file and determined that from the beginning of the investigation, the accused was made aware that a deposit was allegedly made with a check belonging to an account closed for theft. Likewise, it recalled that decision N° 2010-00544 of the same Chamber had already stated that such evidence was unnecessary to rule out that the offended party should have drawn the check with which the deposit was made. *Cf.* Decision 2010-01205 of October 29, 2010 (evidence file, folio 33590). In addition, through a special review proceeding filed on January 21, 2013, the appellant alleged: i) violation of due process because a judge had resolved a statute of limitations objection in the intermediate stage of the proceedings, which was presented again at the trial. In this regard, in decision N° 2014-01118 of July 2, 2014, the Third Chamber analyzed both decisions of the judge and determined that in the first one he made a calculation of the terms, while in the second he analyzed the merits of the case to establish the figure of the amount defrauded, to be considered as a minor fraud offense, a situation that would significantly vary the statute of limitations period, and therefore declared the claim without merit; ii) ii) omission of the investigative statement and notification of the charges made. The Third Chamber indicated that it had already ruled on the matter through decision N° 2010-01205, which is on record, and iii) introduction of illegal evidence into the proceedings because the check could only be seized with a judge's order. The Third Chamber pointed out that the check had already been reported as stolen, for which reason the judicial police seized it, which is fully valid. *Cf.* Decision N° 2014-01118 of July 2, 2014 (evidence file, folios 33593 to 33598).

proper assessment of the evidence on file, the Third Chamber itself corrected these defects in decision N° 2010-00544 of May 28, 2010.

281. In this regard, the Court recalls that the principle of complementarity permeates the inter-American system of human rights, which is, as stated in the Preamble to the American Convention, "reinforcing or complementing the protection provided by the domestic laws of the American states." The State "is the principal guarantor of human rights and, consequently, if a violation of said rights occurs, the State must resolve the issue in the domestic system and, if applicable, redress the victim before resorting to international forums such as the inter-American system for the protection of human rights, which derives from the subsidiary nature of the international system *vis-à-vis* the domestic systems for the protection of human rights." The aforementioned subsidiary nature of the international jurisdiction means that the system of protection established by the American Convention does not replace the national jurisdictions, but rather complements them.[402]

282. Thus, in application of this principle, this Court considers that it is not appropriate to declare a violation of Article 8(2)(h) of the Convention to the detriment of Mr. Rafael Rojas Madrigal, in relation to Case N° 99-000136-0065-PE, in which he was convicted of the crime of using a false document to the detriment of the public interest.

B.1.2. In relation to file N° 02-004656-0647-TP (embezzlement and use of a false document)

283. In the judgment issued on June 2, 2009, the Trial Court of the First Judicial Circuit of San José sentenced Mr. Rojas to a five-year prison term for the crimes of embezzlement and use of a false document.[403] Mr. Rojas and his defense counsel each filed cassation appeals against this judgment.

284. On January 9, 2012, during the processing of the appeals and based on transitory provision III of Law 8837, Mr. Rojas Madrigal filed a motion requesting the conversion of his petition for a writ of reversal on cassation into a motion of appeal, stating that the enjoyment of the guarantees provided for in Article 8(2)(h) of the Convention is only enhanced by the rules of an appeal. On February 20, 2012, Mr. Rojas submitted a new petition for conversion, requesting that this be referred to the court of appeals since he had requested it within the two-month period provided by law.

285. In decision No. 2012-00526 of March 22, 2012, the Third Chamber denied the petition stating that "it [did] not meet the legal requirements,"[404] since transitory provision III established that "under penalty of inadmissibility, the grievance must be specifically stated" (*supra* para.188). Interpreting this rule, the Third Chamber stated that "[…] the appellant must include a statement of the reasons that lead him to consider why the appeal filed against the judgment of the trial court should not be heard through the motion for cassation, but through the remedy of appeal" and that "[t]he appellant does not explain the reasons that

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402 *Cf. Case of Acevedo Jaramillo et al. v. Peru, supra, para.* 66*, and Case of the Peasant Community of Santa Bárbara v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 299, *supra,* para. 159.

403 *Cf.* Judgment No. 614-09 of the trial court of the First Judicial Circuit of San José of June 2, 2009, cited in Decision No. 2012-00526 of the Third Chamber of the Supreme Court of Justice of March 22, 2012 (evidence file, folio 33695).

404 *Cf.* Decision No. 2012-00526 of the Third Chamber of the Supreme Court, of March 22, 2012. (evidence file, folio 33695).

lead him to consider that, despite the fact that his petition was filed before the entry into force of Law 8837, the appeal procedure should be applied to him."[405]Mr. Rojas filed a writ of *habeas corpus* against that ruling, which the Constitutional Chamber rejected based on decision No. 2012-011508 in which it had previously declared without merit an action of unconstitutionality filed against the Third Chamber's interpretation of transitory provision III.[406]

286. This Court considers that the refusal to reconsider was based on a formalistic criterion that, in addition, expanded the requirement set forth in the law. That is to say, it is not clear from the regulatory text that, in fact, it was necessary to establish the reasons why the appropriate remedy would be an appeal and not the cassation appeal, but it only refers to "specifying the grievance," which could well be understood as the motive or claim that was being analyzed in the cassation appeal being processed. However, it is necessary to analyze the resolution of the cassation appeals referred to above (*supra* para. 283) to determine whether, despite the refusal to allow conversion, a full review of the judgment was carried out in accordance with the Convention.

287. On the one hand, in his cassation appeal, Mr. Rojas' defense counsel alleged violations of due process and of the right to defense owing to the lack of evidentiary and intellectual grounds and the rules of sound judgment in the conviction. He pointed out that the trial court considered that the defendant had participated as a co-perpetrator in the offense when he was at most an accomplice because he did not have control over the act of embezzlement, and therefore a lesser sentence should have been imposed. On the other hand, he pointed out that, according to the rules of sound judgment, the accused was not involved in the crime of using a false document.[407]

288. For his part, Mr. Rojas presented four arguments: i) violation of due process and the right to defense due to the statute of limitations for the criminal action and the failure by the Prosecutor's Office to present two pieces of evidence at trial; ii) that the testimony of witnesses who in his opinion were essential was disregarded, affecting his right of defense and allowing an arbitrary sentence to be handed down; iii) that the [trial] court manipulated the evidence received, did not analyze it objectively and only used the evidentiary elements that were useful to convict him; and iv) violation of due process inasmuch as proven fact number one, alleged by the Public Prosecutor's Office, was taken as proven in the judgment [...] from the testimonial evidence composed of only two witnesses N and E [...]. In the appellant's opinion, witness N did not establish that R [Rojas Madrigal] had identified himself as M [...]. In relation to proven fact number two […] they could not clearly determine that R [Rojas Madrigal] had any commercial relationship with the owner of the business or commercial premises where the merchandise was left or delivered [...]. As to fact number three [...] no report [...] was requested from the General Directorate of Taxation […]. With respect to fact number four […] the testimonial evidence was not sufficient to prove that the check […] was handed over as payment for the merchandise […]."[408]

289. The Third Chamber decided both appeals on March 22, 2012. Regarding the claim presented by the defense, the Chamber ruled that it could not succeed. To this end, it

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405 *Cf.* Decision No. 2012-00526 of the Third Chamber of the Supreme Court, of March 22, 2012. (evidence file, folio 33697).

406 *Cf.* Decision No. 2012012366 of the Constitutional Chamber of the Supreme Court, of September 4, 2012. (evidence file, folio 1678).

407 *Cf.* Writ of cassation cited in Judgment 2012-00526 by the Third Chamber of the Supreme Court of March 22, 2012 (evidence file, folios 33705).

408 *Cf.* Writ of cassation of July 22, 2009 cited in Judgment 2012-00526 by the Third Chamber of the Supreme Court of March 22, 2012 (evidence file, folios 33698 to 33703).

analyzed the facts presented before the trial court which determined that, effectively, it was not complicity but co-perpetration. In this regard, the Third Chamber concluded that "[...] it was possible to determine the specific role played by [Rafael Rojas...] in the execution of the prior plan, which involved the distribution of functions for a common purpose: to defraud the victim, which means that the accused and his companion retained functional control of the act in its execution [...] and were responsible for the overall criminal act. It is irrelevant at what stage of the *iter criminis* the actions of each of the parties involved took place." [409]

290. Furthermore, the Third Chamber dismissed the arguments put forward by Mr. Rojas based on the following reasons. First, it held that the alleged statute of limitations for the crime of embezzlement had not expired, but that it had expired for the crime of use of a false document. However "[…] in the intellectual analysis it indicated that, in the case of concurrent offenses, the penalty to be imposed was the one pertaining to the most serious offense, that is, embezzlement, leaving the crime of use of a false document[…] without penalty. Consequently, there is no harm to the accused." Regarding the failure of the prosecution to bring two pieces of evidence to trial, namely the order forms and the purchase and sale invoices issued by the affected company, the Chamber noted that "[…]their absence cannot be associated with the lack of objectivity of the Public Prosecutor's Office, even in his statement the [representative] of the injured party [...] indicated that he [did] not keep the documentation […]. Nevertheless, [the] Chamber, by hypothetically including this evidence, is able to determine that it would not be fundamental to change the direction of the judges' decision, since, as indicated by the lower court, the testimonial and documentary evidence gathered clearly determined [...] the dynamics developed by the accused [...]. In addition, the appellant does not demonstrate the harm caused to him, since there is conclusive proof that the offended parties delivered the merchandise against receipt of a check that was delivered by the defendant [...]."

291. Regarding the second and third arguments, the Chamber found that the alleged inconsistencies did not arise. It noted that "[w]ith regard to the witnesses that the complainant claims were not heard and were essential, neither the accused in his material defense nor his defense counsel objected to the rejection of the statements of F and M as stated in the order opening the trial [...] since they were rejected as surplus to requirements. Likewise, regarding K and S, the parties to the proceedings disregarded their statements [...]. [As for the omission of the order forms and purchase invoices [...] the Chamber considered that the defense expressly disregarded them when it indicated, at the beginning of the adversarial proceedings, that there were no objections to the evidence offered."

292. Finally, with respect to the fourth argument, the Chamber noted that "[…] [t]hrough a modification of the proven facts, the appellant seeks to reconstruct his own factual framework […] This Chamber, within the framework of its function of overseeing the legitimacy of the judgment and the correct application of the law to the proven facts, finds that the challenged ruling includes, both in its factual description and in its legal reasoning, accurate and sufficient elements of judgment, supported by legally valid evidence, which provide sufficient basis to classify the conduct of the accused within the provisions of Articles 216.2 and 365 of the Criminal Code […].The deceitful ploy of which the victim was the target [...], in order to achieve the delivery of the merchandise to the accused, was especially evident; part of the latter's scheme was precisely that he was recommended by a company to be present at the premises and to write the check […] and, using a false document, with the purpose of continuing his scheme, he handed the victim a check knowing that it was stolen [...]. The above summary undoubtedly confirms the defendant's participation in the facts, and, contrary to what the complainant claims, the conclusions of the judges are in

[409] *Cf.* Decision 2012-00526 of the Third Chamber of March 22, 2012 (evidence file, folios 33705 and 33706).

accordance with the truth of the facts and are clear, coherent and consistent with the evidence [...]."[410]

293. This Court notes that in its decision of March 22, 2012, the Third Chamber ruled on all the reasons invoked in the cassation appeals by Mr. Rojas Madrigal and his defense counsel. Moreover, in the cassation of the judgment it did not limit itself to reviewing the reasoning of the lower court, but made its own assessment of the factual and evidentiary elements contained in the record of the criminal proceedings, as well as those that emerged from the appellants' allegations. Therefore, this Court concludes that Article 8(2) (h) of the Convention was not violated to the detriment of Mr. Rafael Rojas Madrigal, with respect to Case No. 02-004656-0647-TP.

294. On July 17, 2009, Mr. Rojas filed a writ of *habeas corpus* alleging that his access to justice was restricted because "once the judgment [conviction] had been handed down and read out in its entirety, the court informed him that if he wanted a copy he should send someone to collect the CD [...]. However he [had] not been able to see the video [...] because in the [CAI] La Reforma they [did] not allow the entry of a CD." On July 28, 2009, the Constitutional Chamber declared the appeal inadmissible, since "the appellant at no time stated that he had asked the prison authorities for the necessary means to hear the judgment and that this was denied to him [...]."[411]

295. Mr. Rojas Madrigal also filed a writ of *habeas corpus* on October 30, 2012[412] and a writ of *amparo* on January 21, 2013,[413] in which he stated that he did not file a motion for review against judgment No. 614-2009 because he "lacked access to the technology to view the decision that was contained in a compact disk." The file does not contain information on the outcome of these writs of *habeas corpus* and *amparo*, and therefore this Court will not rule on the matter.

B.1.3. Conclusion

296. In view of the foregoing, the Court concludes that the State did not violate Article 8(2)(h) in relation to Article 8(1) of the American Convention to the detriment of Rafael Rojas Madrigal, since each of the claims filed through the appeals for cassation and motions for review were addressed by the Costa Rican courts that examined them through reasoned decisions.

B.2. Regarding Luis Archbold Jay and Enrique Floyd Archbold Jay (Group 3)

File 02-000759-455-PE (international transportation of drugs)

297. On August 20, 2003, the Trial Court of the Southern Zone, Golfito, Puntarenas, sentenced Luis Archbold Jay and his brother Enrique Floyd Archbold Jay to twelve years of imprisonment for the crime of international drug transportation (*supra* para. 194). This sentence was issued in connection with the processing of what Costa Rican legislation defines

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410 *Cf.* Decision No. 2012-00526 of the Third Chamber of the Supreme Court of Justice of March 22, 2012 (evidence file, folios 33699, 33700, 33701, 33702 and 33704).

411 *Cf.* Decision No. 2009-011710 of the Constitutional Chamber of the Supreme Court of Justice, of July 28, 2009 (evidence file, folios 1482 and 1485).

412 *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal addressed to the Constitutional Chamber of the Supreme Court of Justice, of October 30, 2012. (evidence file, folio 1683).

413 *Cf.* Brief submitted by Rafael Antonio Rojas Madrigal addressed to the Constitutional Chamber of the Supreme Court of Justice, of January 21, 2013. (evidence file, folio 1692).

as an "abbreviated procedure." According to the provisions of Article 373 of the Code of Criminal Procedure in force at that time, it was established that "at any time prior to the opening of the trial, the application of the abbreviated procedure may be proposed when: a) the accused acknowledges the act attributed to him and consents to the application of this procedure […]."[414] In this specific case, the alleged victims at the time agreed to the abbreviated procedure of their "own free and spontaneous will," accepted the description of the facts provided by the Public Prosecutor's Office and agreed to a 12-year sentence, as shown in the record of the respective preliminary hearing.[415]

298. On October 31, 2003, Luis Archbold Jay and Enrique Floyd Archbold Jay initiated a process to review their conviction arguing that: "the judgment lacks logical consistency, there [was] no correlation between the accusation and the evidence gathered, […] inasmuch as […] the alleged facts […] occurred on the high seas and the judge omitted to refer to the evidence in order to consider [these] proven facts in the judgment as accredited, […] the fact that they availed themselves of an abbreviated process does not prevent the judge from analyzing the evidence […] [and] making reference to the location [where] according to the naval reports […] drug packages were thrown into the sea, since this determines whether national or international legislation is applied and, in addition, this situation affects the chain of custody of the drugs […]."[416]

299. On April 15, 2004, the Court of Criminal Cassation of the Second Judicial Circuit of San José, through decision No. 2004-0336, declared the motion for review admissible, considering that "the trial judge simply cited the elements of evidence that were admitted (descriptive substantiation) and mainly based on the acceptance of the charges by the defendants; he did not make the intellectual substantiation of the evidence, [...] [and] the fact that Article 375 of the Code of Criminal Procedure states that the judgment must be succinct does not entitle the lower court to disregard the analysis of the evidence included in the proceedings in accordance with the rules of sound judgment."[417] For these reasons, it annulled the judgment of first instance and ordered that it be re-issued. Thus, this Court concludes that, on this occasion, the review procedure was an effective means to review the criminal conviction.

300. On June 14, 2004, the Trial Court of the Southern Zone issued a new judgment[418] in which it again convicted the defendants and sentenced them to a 12-year prison term for the crime of international transportation of drugs. The court considered proven the prosecution's

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[414] Article 373 of the Code of Criminal Procedure of Costa Rica. Likewise, Article 374 of said Code provides that: "the Public Prosecutor's Office, the complainant and the accused […] shall express their desire to apply the abbreviated procedure and shall demonstrate compliance with the requirements of the law. The Public Prosecutor's Office and the complainant, if applicable, shall formulate the accusation if they have not already done so, which shall contain a description of the conduct attributed and its legal classification; and they shall request the penalty to be imposed. For such purposes, the minimum penalty established for the criminal offense may be reduced by up to one third." Finally, section 375 of the Code establishes that: "Once the proceedings have been completed, the court will issue a sentence, unless it previously deems it appropriate to hear the parties and the victim of known domicile in an oral hearing. In its decision, the court may reject the abbreviated procedure and, in this case, resubmit the case for ordinary proceedings or issue the appropriate ruling. […] if convicted, the sentence imposed may not exceed that required by the prosecution. The sentence shall contain the requirements set forth in the Code, in a succinct manner, and may be appealed in cassation."
Version available in the Costa Rican Legal Information System at: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_text_completo.aspx?param1=NRTC&nValor1=1&nValor2=41297&nValor3=107536&param2=2&strTipM=TC&lResultado=14&strSim=simp

[415] *Cf.* Judgment 2006-1107 of October 20, 2006 (evidence file, folios 33759 to 33760).

[416] *Cf.* Decision No. 2004-0336 (file 03-000021-0008-PE) of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of April 15, 2004, (evidence file, folios 33732 to 33735).

[417] *Cf.* Decision No. 2004-0336 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of April 15, 2004, (evidence file, folios 33732 to 33735).

[418] *Cf.* Judgment No. 68-2004, issued by the Trial Court of the Southern Zone, Golfito, on June 14, 2004 (evidence file, folios 33774 to 33787).

hypothesis that on November 18, 2002, the Costa Rican Drug Control Police arrested Luis Archbold Jay, Enrique Archbold Jay and three other crew members, all Colombian nationals, for "apparent [commission of] international drug-trafficking," after a joint patrol operation between Costa Rica and the United States reported that a speed boat "threw packages that apparently contain[ed] cocaine into the sea and headed towards Costa Rican territory."[419] The Archbold Jay brothers filed an appeal in cassation against this judgment as well as five motions for review between 2004 and 2009. The rulings issued in these defense proceedings are analyzed below to determine whether the alleged victims were able to obtain a full review of the conviction, in accordance with Article 8(2)(h) of the Convention.

B.2.1. Petition for writ of cassation

301. On July 9, 2004, Luis Archbold Jay and Enrique Archbold Jay filed a writ of cassation against the second conviction, stating:

> "[In relation to abbreviated procedure, that the judge's task should be] to prevent the parties from making a pact against the Constitution and imposing a sanction that goes against the guarantees of the accused. [They also stated] 1. Failure to observe the rules of substantiation because in order to support its conclusions [...] the court [...] used evidence that was neither obtained in accordance with the law nor legally incorporated into the proceedings [...]; 2. [T]here is no correlation between indictment, evidence, and sentence [since] [...] [...] the alleged statements made by several members of the United States armed forces should have been disregarded because they were not submitted in advance of the trial [...][;furthermore...] it affects the chain of custody of the evidence [...] that the Public Prosecutor's Office did not seize the totality of the evidence; 3. That the sentence is essentially based on spurious and unusable evidence [...] [since] the evidentiary activity involving the inspection of the drugs aboard the John Hall ship, was carried out by the prosecution behind the backs of the accused and their legal representatives; 4[...] [T]he evidence of decisive value was assessed and evaluated without taking into account the rules of sound judgment [...].5 The trial court ordered the imposition of a prison sentence without stating the grounds for such decision [...]; 6[...] the trial court [relied on] evidence illegally obtained and introduced into the proceedings, as a consequence of the violation of the essential chain of custody in relation to the supposed drugs seized on the high seas and the sample that was handed over to the Costa Rican Prosecutor's Office by the U.S. authorities."[420]

302. As noted, the appellants' arguments can be grouped into three issues: i) the claims that the abbreviated procedure was agreed upon against the guarantees of the accused; ii) the statements that alluded to the alleged illegality of the evidence, as well as to the inadequate assessment of the evidence, and iii) the lack of grounds to justify the sanction imposed.

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419 *Cf.* Official communication D.PCD-1509-2002 of the Anti-Drug Police of Costa Rica, of November 19, 2000 (file evidence, folio 1891) and Judgment 68-2004 Trial Court of the Southern Zone Sur, Golfito, of June 14, 2004 (evidence file, folios 33779 to 33786). To support its decision, the court considered that: i) the existence of the illegal substance transported (cocaine) was established based on the analysis that the Analytical Chemistry Section of the Judicial Investigation Agency of Costa Rica performed on the packages recovered after the aforementioned pursuit (which culminated with the arrest of the defendants), and ii) the participation of the defendants was confirmed in a report of the prosecutor that refers to their arrest. This coincides with the "discovery record" which reports that officers of the Anti-Drugs Police, the preventive police and anti-narcotics agents, arrived at the place where "officers of MINAE" were guarding the boat in which the defendants were traveling; another police report describing the arrest of the defendants and stating that they were the ones operating the seized vessel; a note from the Embassy of the United States of America confirming the arrest of the defendants and the seizure of the drugs, accompanied by three photographs showing five people in a boat; translations of documents in English describing the pursuit and the coordinates where the event occurred; as well as the defendants' acceptance of the facts of which they were accused made freely, spontaneously and with the advice of the corresponding defense counsel. For all these reasons, it accepted the request for abbreviated proceedings and imposed a sentence of twelve years imprisonment on the grounds that the defendants formed a gang; they transported a large quantity of drugs; they tried to evade justice and to erase the evidence by throwing the drugs into the sea; and being foreigners, they chose Costa Rican territory to carry out illicit activities.

420 *Cf.* Decision No. 2004-0924 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of September 9, 2004, (evidence file, folios 33738 and 33739).

303. In response to these arguments, on September 9, 2004, the Court of Criminal Cassation of the Second Judicial Circuit of San José decided the following (decision No. 2004-0924):[421] i) regarding the use of the abbreviated procedure, the judicial authority pointed out that it was the defendants who requested this procedure, so that if they considered that there was no legitimate evidence of the facts indicated "it is not understandable why" they proposed it; furthermore, citing the record of the preliminary hearing (supra para. 198), it stated that there is no evidence that the defendants chose to use the abbreviated procedure "by mistake or against their will"; ii) in relation to the evidentiary matters, the Court of Cassation, in principle, did not analyze the particular issues raised, but reasoned that, in its opinion, the facts (in the terms described by the Public Prosecutor's Office) were proven because the defendants acknowledged them. In this sense, it explained that the nature of the abbreviated procedure is precisely to dispense with the adversarial proceedings, taking into account that the likely perpetrator decides to accept the charges before the trial begins, which does not imply that the criminal guarantees cease to exist, but that the accused decides not to exercise them in order to achieve a reduction, in principle, of the sentence that could be imposed. Nevertheless, the review court cited the reasoning of the trial court regarding the analysis of the evidence and explained that the participation of the accused was proven by "the facts that they freely admitted […] which were confirmed by other elements of evidence", and iii) finally, regarding the determination of the penalty, the Court of Cassation cited the reasoning of the trial court and concluded that it was sufficient to justify the sentence. Therefore, this Court considers that the Court of Cassation addressed the issues raised by the appellants and provided reasons for its decisions.

B.2.2. First motion for review

304. On March 28, 2005,[422] the Archbold Jay brothers initiated a review proceeding against judgment No. 68-2004 and cassation ruling No. 2004-0924, expressing similar points to those asserted in the latter appeal.[423] They only added the argument that it was incorrect that, in deciding the appeal, the respective court essentially based its decision "on the defendants' acceptance or admission of facts made at the time, conferring on the abbreviated procedure consequences that it does not have."[424]

305. In this regard, on June 10, 2005, the Court of Criminal Cassation of the Second Judicial Circuit of San José issued judgment No. 2005-0535. In response to the arguments reiterated

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421 *Cf.* Judgment No. 2004-0924 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of September 9, 2004, (evidence file, folios 33736 to 33750).

422 The date on which the appeal was filed is not recorded in the evidence. However, information provided by the State shows that it was filed on March 28, 2005. *Cf.* Brief of the State of September 13, 2017 (merits file, folio 3395).

423 *Cf.* Judgment No. 2005-0535 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of June 10, 2005 (evidence file, folios 33752 to 33755). The appellants alleged: "Violation of due process, […] because they consider that the Court of Cassation essentially based its decision in the cassation appeal on the acceptance or admission of facts that the defendants made at the time, conferring on the abbreviated procedure consequences that it does not have; as a second reason, they claim[ed] a lack of sufficient grounds because the judgement was based on evidence not obtained in accordance with the law or not legally incorporated into the proceedings [;] as the third reason, they claim[ed] violation of the rules of due substantiation, because the judgment was based on spurious and unusable evidence [;] as the fourth reason they point[ed] to a failure to provide a proper justification because the court assessed decisive evidence or proof without following the rules of sound judgment[;] [i]n the fifth plea they claim[ed] that there was no due justification for the sanction imposed[;] [i]n the sixth argument […]they allege[d] a violation of the indispensable chain of custody[;] […] [i]n the seventh plea they argue[d] that the sentence did not comply with the principle of correlation between the accusation, evidence and sentence."

424 *Cf.* Decision No. 2005-0535 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of June 10, 2005, (evidence file, folio 33752).

by the appellants, said court held that the claim was a copy of the cassation appeal that it had already resolved previously (*supra* para. 200), and therefore dismissed it, explaining that is was not feasible to resubmit questions to review that had already been judged in cassation, in accordance with Article 411 of the CCP. Likewise, it considered that it was inadmissible to object to how that Chamber decided the aforementioned cassation appeal, because "in reality, what this conceals is an appeal to revoke the decision taken by this court."[425] Thus, it is evident that the Chamber analyzed and provided reasons for its considerations regarding the issues raised in this appeal.

B.2.3. Second motion for review

306. On February 13, 2006 the Archbold Jay brothers filed a new motion for review,[426] stating that:

> "a) At the time they were offered [it], they did not have the slightest idea of what an abbreviated process meant [,] […] both have reached the conclusion that something they were offered was not complied with, that is, that they would be given the most favorable sentence; (b) Despite being foreigners, they deserve to be treated the same as Costa Ricans [because] a large number of defendants who have gone through the abbreviated process, have been convicted with the minimum "sentence"; c) There [was] no correlation between indictment and sentence, since Article 77 of the Law on Psychotropic Drugs […] has nothing to do with it, as it establishes a minimum sentence of three years and not the 12 years that were imposed."[427]

307. On October 20, 2006, through decision No. 2006-1107, the Court of Criminal Cassation of the Second Judicial Circuit of San José declared the motion for review without merit. As for the argument that the defendants did not receive the sentence that they claim they were promised, the judicial authority pointed out that the appellants did not prove this situation and that, on the contrary, the record of the preliminary hearing shows that the sentence they negotiated was twelve years. The Court of Cassation transcribed the contents of that record (*supra* para. 202) and stated that there is no evidence to reasonably suggest that the defendants consented to the application of the abbreviated procedure "by mistake or against their will." Nor is there evidence that the sentence was imposed without granting them the opportunity to exercise their defense or obviating the necessary demonstration of their guilt.[428]

308. With regard to the alleged infringement of the principle of equality because, according to the appellants, they were not granted the minimum sentence because they are not Costa Ricans, but Colombians, as well as in relation to the alleged lack of grounds for the imposition of the 12-year sentence, the review court indicated that this was due to the agreement that the defendants themselves made by accepting the abbreviated procedure, taking into account that "the parties freely negotiated the application of the abbreviated process on the basis of a 12-year prison sentence and not […] on the promise that they would receive the minimum sentence possible."[429]

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425 *Cf.* Decision No. 2005-0535 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of June 10, 2005 (evidence file, folios 33751 to 33756).

426 *Cf.* Brief of interposition of proceeding of review, signed by Luis Archbold Jay and Enrique Archbold of February 13, 2006 (evidence file, folios 4579 a 4589).

427 *Cf.* Decision No. 2006-1107 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of October 20, 2006 (evidence file, folios 33757 to 33761).

428 *Cf.* Decision No. 2006-1107 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of October 20, 2006 (evidence file, folio 33759).

429 *Cf.* Decision No. 2006-1107 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of October 20, 2006 (evidence file, folio 33759).

309. From the analysis of the answers provided on the issues raised about the sentence, this Court notes that, in response to each of the matters raised, the review court stated the reasons that supported its conclusions.

B.2.4. Third motion for review

310. On December 5, 2006,[430] the defense of the Archbold Jay brothers initiated a third review procedure, based on the following reasons:

> "As a first reason […] they alleged the violation of due process because the judgment on which the conviction was based [...] relied on illegitimate evidence […]; second, they claimed a violation of due process owing to a breach of the chain of custody from the time the packages were located at sea until their arrival in Costa Rica[;] third, they alleged the violation of due process owing to the lack of a chain of custody of the evidence provided by the United States Government […]."[431]

311. On April 19, 2007, through decision No. 2007-0389, the Court of Criminal Cassation of the Second Judicial Circuit of San José declared the petition for review inadmissible. The Court of Cassation considered that there was a close link between the alleged reasons and decided to address them jointly, considering that the arguments of the convicted parties "[had] already been the subject of other review proceedings […] and [had] been declared inadmissible not only for reiterating arguments but also for being untenable." In particular, it noted that "the defendants agreed to [the abbreviated procedure…] were duly informed of its nature and consequences, […] were aware that they were waiving the right to an oral and public trial and, therefore, the right to discuss and examine the evidence offered."[432]

312. In this regard, this Court considers that the Court of Cassation addressed the matters raised by the appellant and gave reasons for its decision.

B.2.5. Fourth motion for review

313. On May 22, 2007, the Archbold Jay brothers filed a fourth motion for review arguing the following:

> "First […] the defendants allege a violation of due process, arguing that their right to a hearing by an impartial and independent judge or court was impaired [,] [since a judge] first examined […] a request for pretrial detention against them, in which […] [she allegedly] expressed a finding of certainty […]. Subsequently, in a preliminary hearing, the same judge considered the application for an abbreviated procedure […] regarding which, despite having ruled on the merits, she again issued an opinion […]; second […]they allege that the [court] did not take into account, when reaching its conclusions [,] that they are persons with families, that they have no criminal record, and that they have cooperated with the justice system by submitting to the abbreviated procedure […];"[433] [also] the lower court [did] not provide reasons to explain why they were not […] granted the minimum [sentence] nor the one-third reduction [of the minimum sentence as the benefit derived from the abbreviated process].[434]

314. On July 5, 2007, in decision No. 2007-0744, the Criminal Cassation Court of the Second Judicial Circuit of San José declared the first argument inadmissible, noting that

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430 *Cf.* Brief filing the motion for review, of December 5, 2006 (evidence file, folios 4596 to 4659).

431 *Cf.* Decision No. 2007-0389 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of April 19, 2007, (evidence file, folios 4753, 4755 and 4756).

432 *Cf.* Decision No. 2007-0389 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of April 19, 2007, (evidence file, folios 4753 to 4757).

433 *Cf.* Decision No. 2007-0744 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of July 5, 2007, (evidence file, folios 33767 to 33768).

434 *Cf.* Brief filing the motion for review, of May 22, 2007 (evidence file, folios 4782 to 4784).

although the judge who had issued precautionary measure of pretrial detention against the accused was the same judge who participated in the preliminary hearing of the abbreviated procedure, her intervention was limited to "verifying the existence of the requirements established in […] the Code of Criminal Procedure […], without [said] judge […] having issued any decision on the merits [,] [and it was] the sentencing court that was responsible for assessing the evidence received, the acceptance of the charges by the accused, and thus determining the existence of the facts […]." The court declared inadmissible the second reason for review regarding the lack of grounds given for the sentence, considering that this argument was identical to another one contained in the cassation appeal resolved in decision No. 2004-0924 (*supra* para. 204) and, therefore, "it [was] not admissible to raise, by way of the review procedure, matters that were already discussed in cassation, unless they are based on new reasons or new evidence."[435]

315. In this regard, this Court considers that the review court ruled on both issues raised and stated the reasons for its conclusions.

B.2.6. Fifth motion for review

316. On March 9, 2009, the Archbold Jay brothers filed a fifth motion for review of their conviction, pursuant to transitory provision I of Law 8503[436] arguing:

> "As a first reason […]the violation of due process […] and the right of defense on the grounds of failure to arraign them and take their initial statement […] this against the five defendants involved in this case […], [and also] the private defense attorneys […] requested the extension of the [preliminary] statement of the five defendants without obtaining an effective response; second, [they] alleged the violation of due process […] because, in the investigation and notification of the charges in this criminal proceeding, the Public Prosecutor's Office omitted to appoint a translator and interpreter for the Archbold Jay brothers, since […] they do not understand the official language of Costa Rica […]."[437]

317. On July 10, 2009, in decision No. 2009-0191, the Court of Criminal Cassation of Cartago: i) admitted the first reason for review, considering that it "fulfilled the admissibility requirements," and ordered a hearing to be held, and (ii) rejected the second reason for review, considering that "in the different proceedings and procedural acts that have been carried out, both in the preparatory and intermediate stages, and subsequently in relation to the cassation appeals and the review actions[,] […] […] [Luis and Enrique Archbold Jay] have never requested the appointment of a translator […] [and] had they actually done so, it would have been established from the beginning of this proceeding and not seven years after it began […]."[438]

318. The hearing to substantiate the admitted grounds for the review took place on August 25, 2009. On that same date, in decision No. 2009-0251, the Court of Criminal Cassation of Cartago declared the review proceeding inadmissible because it considered that the records contained the preliminary statements of the defendants and through their study, it was clear that these were provided in accordance with all the requirements established in the regulations; additionally, it noted that during the interviews the defendants were accompanied by a public defender who fulfilled the purpose of protecting their fundamental

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435 *Cf.* Decision No. 2007-0744 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of July 5, 2007, (evidence file, folios 1946 to 1950 and 33766 to 33769).

436 *Cf.* Motion for review filed on March 9, 2009, (evidence file, folios 1952 and 1990).

437 *Cf.* Motion for review filed on March 9, 2009, (evidence file, folios 1952, 1953, 1968, 1969 and 1977).

438 *Cf.* Decision No. 2009-0191 of the Cassation Criminal Court of Cartago, of July 10, 2009, (evidence file, folios 1992 to 1995).

rights, and subsequently their lawyers were made aware that at any time they could request the extension of the investigation of the accused, and they did not do so.[439]

319. In this regard, this Court considers that the domestic courts based their conclusions on each of the appellants' arguments.

B.2.7. Conclusion

320. In view of the foregoing, the Court finds no grounds to declare a violation of Article 8(2) (h) in relation to Article 8(1) of the American Convention with respect to Luis Archbold Jay and Enrique Floyd Archbold Jay, since each of the claims filed by them throughout the appeals for cassation and review were addressed by the Costa Rican courts that heard them through reasoned decisions.

B.3. Regarding Jorge Martinez Meléndez (Group 4)

File No. 03-000082-016-TP (conviction for 12 counts of embezzlement as a continuous crime)

B.3.1. Cassation appeals

321. On July 17, 2007, the Criminal Court of the First Judicial Circuit of San José convicted Jorge Martínez Meléndez of twelve counts of embezzlement of public funds as an ongoing or continuous crime.[440] Mr. Martínez and his public defender each filed a cassation appeal against that judgment. The Third Chamber declared both appeals inadmissible in decision No. 2008-0232 of March 11, 2008.[441]

322. The public defender of Mr. Martínez Meléndez argued seven reasons defined by the Third Chamber as matters "of form": i) violation of due process due to the inclusion and assessment of spurious evidence or evidence in violation of banking secrecy;[442] ii) lack of grounds for declaring the illegality of the alternative method of payment;[443] iii) violation of

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439 *Cf.* Decision No. 2009-0251 of the Court of Criminal Cassation of Cartago, of August 25, 2010, (evidence file, folio 1997).

440 *Cf.* Judgment No. 680-2007 of the Criminal Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folio 35361).

441 *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33874).

442 i) According to the appellant, the violation occurred "because the legal requirements for the seizure and confiscation of checks were not observed, and the handover of checks by the bank was in breach of banking secrecy […]."The Third Chamber stated: "As indicated in the ruling, although the surrender of the checks was based on a judicial authorization that is questionable, since it does not have the name of the Criminal Judge who signed the request, nor any justification, […] when the owners of those checks allowed the Court and the parties to become aware of them, they thereby lifted the bank secrecy, and it is valid for this evidence to be analyzed and used for the purposes of the judgment. The initial defect pointed out by the appellant was rectified […].These authorizations are derived from the witness statements […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33936).

443 ii) According to the appellant, "In its conclusions, the defense presented and evidentiary elements that proved the existence of the legal permit that at that time authorized the transfer of FODESAF resources to the associations. However, the judges omitted any consideration in this regard […]." The Third Chamber stated that "[it] does not agree […] with the interpretations of the above rules made by the defense, especially since it is certain that the unlawful approval occurred, thanks to the actions of the accused Jorge Martínez […], as well as his way of proposing and implementing the alternative method of payment, which finally led the Social Compensation Commission to be deceived. This Chamber also notes that, regardless of the legal or illegal nature of the alternative method of payment, […] the funds were diverted under a scheme conceived and created by the

the rules of sound judgment regarding Mr. Martínez's status as a public official;[444] iv) lack of intellectual grounds in the assessment of the exculpatory evidence;[445] v) arbitrary rejection of evidence for the defense;[446] vi) failure to substantiate the sentence imposed;[447] and vii) lack of grounds for the penalty, in terms of the difference between the *quantum* of the sentence imposed on Martínez Meléndez and the rest of the defendants.[448] He also mentioned two additional reasons characterized as "substantive" by the Third Chamber: i) erroneous

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defendants […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33939).

444 iii) According to the appellant, "[t]here is no […] valid act of appointment that proves that Jorge Martínez was a public official or, failing that, that he exercised any public function […]". The Chamber declared the argument inadmissible, since "[t]he appellant is mistaken in considering that the accused […] by virtue of the clause […] that establishes that he would not be an employee of the central government or of any autonomous institution and that he would not receive salaries or wages of any kind from the Government of Costa Rica, did not have the status of a public official, since his status as a public official stems from the function he performed as coordinator of the Land Titling and Social Compensation Programs, which worked with public funds, without the origin of the remuneration he received for such work being of any interest whatsoever[…]. Regarding the term of the appointment […] on October 1, [1995], […] the defendant was hired to provide professional services to the National Plan to Combat Poverty, acting as coordinator of the two Local Development Area Commissions, […] and he participated, in session 2-97 held on February 4, 1997, in which he proposed the so-called 'alternative method of payment', still participating extensively in the administration of the funds in that year. [His] presence in the Social Compensation activities, even in 1997, is evidenced in his statement, in which he even claims to have resigned as advisor to join the political pre-campaign of the National Liberation Party in September of that year." *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33944).

445 iv) According to the appellant, "the exculpatory evidence […] demonstrates that the money that is alleged to have been stolen or misappropriated was in fact earmarked for the payment of debts and obligations of the beneficiaries of the Social Compensation Program […]." The Chamber dismissed the argument and submitted to analysis a similar plea filed by the public defender of co-defendant in which he describes the elements of conviction that gave rise to the appealed judgment. In this regard, it stated: "[c]ontrary to what the defense attorney alleges […] the Court of merit undertook an extensive analysis of the statements made by Jorge Martínez Meléndez throughout the debate, contrasting them with the evidence already in the case file and the evidence specifically referred to by the accused in his statement. […] In the ruling, the court found a lack of correspondence between the statements of the accused and the documentary evidence provided, without it being possible to consider that the exculpatory evidence had been disregarded. Thus, after the trial was completed, it was determined that the funds […] had been stolen and diverted through the generation of the checks cited by the defense itself […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33946).

446 v) According to the appellant, the "rejection of this evidence, based on its untimely submission, is extremely formal, and […] the defense is left at a clear disadvantage for the purposes of assessing the sentence to be imposed […]." The Chamber rejected the reasoning and argued that "[d]espite the fact that […] the evidence mentioned was not admitted because it was time-barred, this situation has not caused any disadvantage to the accused in the imposition of the sanction because, as stipulated in the grounds for the sentence, the trial court did not overlook the family situation or the conduct of Mr. Martínez Meléndez in the prison environment […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33947).

447 vi) According to the appellant, "the trial court, [in] upholding the 19-year prison sentence against Jorge Martínez, takes up the arguments of the Public Prosecutor's Office without giving any importance to the criteria of the technical and material defense […]". The Chamber stated that "the sentencing court establishes the grounds for the penalty imposed […]: the financial losses suffered by the Costa Rican State, […] that the accused failed in his duty of probity in public office […], the clear use of people who trusted the accused and his reputation, to divert the funds without using his name […], the lack of social conscience, since he would have been in contact with the most needy social groups and become aware of their situation. […]Despite the judges' rejection of the evidence offered by the defense, they took into account that Jorge Martínez has no previous convictions, has a stable family and during the period of his incarceration has displayed good behavior at the prison facility. […] This Chamber does not find that aspects that the defense has considered important for the determination of the sanction have in any way been disregarded […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33949).

448 vii) The Chamber declared "the claim unfounded. […The] penalty imposed on Jorge Martínez is based on substantive aspects that specifically concern him, such as the position he held, his influence in national politics, the trust of the central government in him, the economic advantage he obtained, and his attempt to evade national justice […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33950).

application of Article 354 of the Criminal Code regarding the administration of public funds,[449] and ii) erroneous application of Article 77 of the Criminal Code, which provides for the concept of an ongoing or continuing offense.[450]

323. For his part, Mr. Martínez, listed 16 grounds in his cassation appeal against the aforementioned conviction: i) and ii) were related to several violations of constitutional due

[449] i) The appellant alleged that "the action for which he is investigated […] does not fall under the assumption […] of a public official who steals or misappropriates money or goods whose administration, collection or custody has been entrusted to him by reason of his position […]." The Chamber stated that "the claim is inadmissible […] the trial court states the basis for determining that the funds of the Social Compensation Commissions and the Land Titling Program were public funds and their administrator was Jorge Martínez, criteria with which this Chamber agrees […].Indeed, he turned out to be a public official, since he was appointed to the Interinstitutional Commission that executed and coordinated the Social Compensation Program, as a representative of the Second Vice-Presidency […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 33951 and 33952).

[450] ii) The appellant alleged that "the duty of probity in public office, a public good that is protected against the crime of embezzlement, was violated with the implementation of the new alternative system of payments, which is a single action, but not with the release of the checks […]." The Chamber stated that "[t]he claim is unsustainable. Although the imposition of the so-called 'alternative method of payment' is a single act, […] the damage to state assets resulting from this method of payment occurs through the drawing of each of the twelve known checks, a situation that allows for the application of the continuous crime modality […] since it is evident that these actions pursued a single objective: the diversion of the final amount already indicated, which was carried out by means of transfers at different times, all approved and followed by the defendant […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33955).

process; [451] iii) violation of the principle of concentration and continuity of the proceedings;[452] iv) violation of the chain of custody of photocopy files;[453] v) violation of the principle of oral

[451] The appellant alleged that i) "they were not given a copy of the judgment, […] despite the fact that they subsequently obtained digital copies of the judgment […]. [The first part of the sentence was not read, and at the beginning of the reading, his defense attorney was not present. [D]uring the trial, they were denied the possibility of exercising their material defense, as they were prevented from intervening personally […]. [T]he appellants were subjected to suffering, exhaustion, coercion and psychological pressure during the trial […].On other occasions, unjustified restrictions were imposed on him during his statement […]. On several occasions he was denied helpful evidence without justification [for example,] he offered the testimony of the beneficiaries who would confirm directly received the benefits […]. The prejudice is aggravated because the documentary evidence of the payments in the liquidations was not taken into account by the court. […] Similarly, it refused a document that he offered to refute that Mr. [JJML] worked under a special regimen with the Ministry of Housing and Human Settlements and was not his personal driver […].They claim that they were not allowed direct access to the evidence, nor to photocopy it, but that it was only made available to their defense counsel, […] a situation that had occurred during the investigation since it was determined in a previous trial that the Public Prosecutor's Office had never made a warehouse with documents available to the defense, evidence that to date neither they nor their defense counsel have been able to examine, which they also offered as helpful evidence, but without success. His defense attorney was prohibited from challenging the prosecutor's questions and his time for cross-examination was limited […]Jorge Martínez Meléndez adds that, in addition to rejecting the evidence he offered to facilitate adjudication, which did not occur with other parties[,] the court rejected vital evidence offered during his statement, concerning the National Plan to Combat Poverty, which authorized the execution of the programs whose funds were being investigated with the participation of private entities […]. The court did not refer to his claims set forth in his final statement", and ii) the court "heard evidence in his absence […],despite the fact that they had at all times expressed their refusal to proceed in this manner […]." Regarding the first and second reasons, the Third Chamber the declared them "without merit. […]As for the failure to provide proper notification of the judgment and the failure to deliver copies of it […] the appellants themselves state that they were provided with the digital file […] […] [The CPC] does not allude to the nature of the copy that must be delivered to the parties. …] [I]t is noted in the minutes that the reading […] of the judgment was read […], which] did not begin until their [defense counsel] was present. Moreover, with respect to the exercise of the right to material defense, inasmuch as they could only intervene through their defense counsel and were victims of mistreatment by the Court, […] it should be noted that, in proceedings of this magnitude, characterized by the participation of numerous persons, it is essential that the process be conducted correctly, so as to achieve its goals without violating the rights of the parties. […] [N]o testimonial evidence was taken without the presence of the defendants, nor were any decisions made in this regard […] During the trial, evidence was rejected and admitted equally among the parties, according to the needs of the proceeding […].The appellant alleges] the rejection of[:] the testimonies of the beneficiaries that he offered during his deposition; […] a note demonstrating that [JML] was not his personal driver […][;] a warehouse with documents, which was discovered and inventoried in a previous trial; a document referring to the National Plan to Combat Poverty [and…] a series of liquidations demonstrating the final destination of the funds, which, although admitted, were not subject to any ruling […].In this sense, it is evident […] that the commission of the crime by the accused was considered to be proven beyond any doubt. In order to [do so…], the Court used not only the official documentation […] that […] gave an account of each situation, […] but also analyzed the various testimonies of public officials, representatives of the associations, and employees […].[T]here is no significance to the whole of the rejected evidence […]. The issue of the rejection of the testimonies of the beneficiaries […] is related to the liquidations on which the defendant has insisted […] that were not evaluated in the judgment. However, […], both elements depart from of the *thema probandum,* because they do not refer to the same funds under investigation, and the final destination of these, clearly illicit, has been proven, so that their receipt and study in the judgment, as well as the liquidations […], do not become important. […] The same must be said with respect to the offer of a warehouse with documents […]. [This evidence was offered by the defendants' counsel […], who stated that the documentation was related to the programs and consisted of the beneficiaries' files, payment receipts and others. However, [such evidence did not have…] a close link […] with the alleged facts […][.] [The Chamber described the content of the documentation and pointed out that…] it is useless and irrelevant evidence. The most important thing is that its existence does not exclude the transfer of the funds under investigation to private accounts and purchases of foreign currency […]. [It is also alleged that […] a note demonstrating that [JML] was not Jorge Martínez Meléndez's personal driver was rejected. […]In any case, the matter in question is proven in the judgment on the basis of multiple evidentiary elements […which he listed]. The refusal to receive a document referring to the National Plan to Combat Poverty, which authorizes, according to the plaintiffs, the inclusion of private entities in the programs, is claimed. In […] the contested judgment, the Court reached the opposite conclusion on the basis of the regulations in force […], which is why the inclusion of the contents of a simple document, without the force of law, would not have contributed to changing the state of the matter. Finally, with regard to the lack of assessment of his final statements, based on a comprehensive reading of the judgment, it is understood […] that that the arguments of the defense were rejected as certain hypotheses, in the light of the evidence received, and therefore an express ruling on these assertions was not required […]". *Cf.* Decision No. 2008-00232 of the Third Chamber of the

proceedings;[454] vi) violation of the right of defense due to the refusal to admit and examine helpful evidence arising from the evidence presented by the Public Prosecutor's Office;[455] vii) violation of the principle of objectivity and impartiality of the judge;[456] viii) violation of the

Supreme Court of Justice, of March 11, 2008, (evidence file, folios 33956, 33957, 33959, 33965, 33966, 33967, 33968 and 33969)

[452] iii) "The appellants alleged that […] the sentencing court failed to comply with the order issued by this same Chamber in decision 2005-878 […] of August 12, 2005, according to which, the trial was to be held without interruptions and by a court appointed solely for that purpose. […] The appellants list each of the suspensions made […] for personal reasons of the defense counsel or the judges […]. They refer to occasions when the members of the court received documents or files to study or sign without the trial being suspended for that purpose [,] [which] led the judges to commit serious errors in the assessment of the evidence […]." The Chamber dismissed the claims, pointing out that "from the trial records, it may be concluded with complete certainty that the court devoted itself exclusively to hearing this matter, and, only exceptionally, its members attended to what they called '*desk work*', extradition proceedings, pretrial detention hearings or conciliation hearings. […] Likewise, there were circumstances that merited short suspensions or recesses, in all cases, never for more than ten days, as in the previous cases, and which correspond to situations that cannot be avoided, typical of social coexistence and the organization of the Judiciary […]. Bearing in mind that it was a trial [lasting] about 16 months, in which fifteen people participated, [it] took place with reasonable normality and regularity, with the aforementioned exceptions […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 33970, 33974 and 33975).

[453] iv) The Third Chamber held that "held that "[t]he objection cannot be accepted. [...] the complainants rely on the simple description of the alleged error without specifying, in each case, the harm caused, in view of the body of evidence […] in any case, the documents in question were used at the time the expert accounting report was prepared, and therefore their identity was assured despite the loss of the originals. […]" *Cf.* (evidence file, folio 33976).

[454] v) According to the appellant, "[d]uring the trial the court reversed the principle of orality, establishing that the documentary evidence would not be read in its entirety, but only reviewed, unless the interested party expressly requested otherwise. However, they had been prohibited from addressing the court in person […]. In some cases, the reading of documentary evidence was denied despite the defense's request […]." The Chamber rejected the claim, pointing out that, after "studying the minutes of the proceedings, it could not detect a single occasion in which the defendants or their counsel had been denied their request for the reading of any document […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33977).

[455] vi) In addition, according to the appellant, the admission of his evidence by the judge in the preparatory stage was partially and arbitrarily revoked. The Chamber referred to the study of the first reason alleged by Mr. Martínez and had already analyzed, and rejected the argument, stating that "having determined that the already sentenced [HDBH] was a public official, [...] the aforementioned document [...] is irrelevant [...]. On the other hand, as regards the plea bargain (*criterio de oportunidad*) signed by the defendant [WRA], the court's decision to reject it has no bearing [...] on the decision, since the purpose of the document was to demonstrate that the witness had a motive to lie [...]."Regarding the alleged partial revocation, in an arbitrary manner, of the admission of his evidence in the preparatory stage, the Chamber found that "what the court did on that occasion was to order part of the evidence that had been admitted and to correct the work of the Judge in the intermediate stage who had admitted evidence that had not been determined, for example, referring to a plastic bag or an unnamed file. Moreover, the judges described as unfair the conduct of the [...] public defender of the defendant Jorge Martínez Meléndez, who continually gave different content to the evidence, to documents that had already been incorporated. Thus, this was not an illegitimate action by the Court, but rather derived from a detailed study of the evidence offered. Finally, regarding the rejection of the list of persons registered in the Civil Registry under the name [CM...] at this stage of the proceedings it is not reasonable to carry out the procedures of location and summons to trial […]. The same is true of the missing certifications or accounting documents that are also referred to, since, in all cases, they even refer to individual facts that, even if one were to resort to an exercise of hypothetical suppression in the universe of proven facts, [...] the mechanism would remain unchanged." *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33981).

[456] vii) The appellant alleged the lack of impartiality of Judge MMN, for "having participated in stages prior to the debate and having issued evaluative criteria on the guilt of the convicted person." The Chamber pointed out that "[t]hese arguments cannot be considered. [...] On that occasion, the judges did no more than analyze the existence of the conditions that would justify the continuation of the pretrial detention of the co-defendant [MMM…] based on the conviction issued against him, without resorting to value phrases or assumptions. […The assertion] that the judgment found that the transfer of money to the accounts of the Martínez brothers [...] was a conclusion of the conviction that had just been handed down and not the court's own invention. Thus […] the prior knowledge that [Judge MMN] had of this matter did not imply the formation of an opinion that would subsequently compromise her impartiality […].[T]he rest of the situations denounced do not constitute a violation of the principle of impartiality [...] and, rather, correspond to speculation of the appellants […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33982).

principle of a natural (impartial) judge;[457] ix) lack of justification for the sentence;[458] x) violation of the principle of legality and criminal classification;[459] xi) lack of substantiation and erroneous application of the legal norms applicable to the purposes of the program;[460] xii)

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[457] viii) The appellant alleged that Judge MSM "was not appointed as a judge in the Criminal Trial Court of San José, of the First Judicial Circuit, was on paid leave and was not duly sworn in for the position of Judge, in addition to the fact that, in accordance with [...] the Organic Law of the Judiciary, there was no reason for said Judge to act as substitute in this case". The Chamber declared the claim inadmissible. It stated that MSM "was a member of the Court in her capacity as fourth judge, [...] for which reason she had been participating in all the trial hearings. Thus, this was not a mere substitution. [Said] judge is a professional attached to the San José Criminal Court, Desamparados Section, which is a section of the San José Criminal Court, in accordance with [...] the Organic Law of the Judiciary and was sworn in from the moment she was appointed to the position, so it is not true that she was not qualified to hear this matter. Regarding the fact that she was assigned to the trial while on paid leave , [...] this is a way in which the Administration of Justice resolves its problems of lack of placements, or lack of personnel, the important thing being that, for all purposes, the judge meets the requirements stipulated for a member of the Costa Rican judiciary and was assigned to the competent jurisdiction to hear the case." *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 33985 and 33986).

[458] ix) The appellant alleged that "the court disregarded the rehabilitative function of the sentence by imposing [19...] years of imprisonment [...]. The court relied on the same factual elements that it used to establish his guilt, decided the sentence should be exemplary, did not take into account his status as a first-time offender or his psychosocial characteristics, and it rejected all the evidence offered in that regard [...]. [...]. The court committed [several errors and contradictions in] its analysis of his guilt, in which it considered that all the defendants had participated in the same way, without any hierarchical relationship [...]. [T]he court ignored [the principle] of sound judgment when analyzing the statement of the witness [ZCC], who claimed to have been intimidated by the defendant [,] [...] considering that by that time he was in prison and his file was at a stage in which no witness had to testify [...]."The Chamber referred to the sixth and seventh grounds of the cassation appeal by Mr. Martínez' public defender, already analyzed, and stated that although "the complainants disagree that their level of participation was taken into account in the imposition of the different penalties, this Chamber does not find any contradiction whatsoever, since [...] the fact that all the accused have complete ownership of unlawful act, with different essential functions, does not necessarily imply that they should be subject to the same level of reproach, but rather that the greater the participation, the greater the penalty, and that is the reasoning used by the judges [...]. As for the assessment made regarding the intimidation of a witness, the defendant Jorge forgets that this situation was proven in the judgment, as his himself mentions, so this Chamber is unable to rule otherwise. It is understood that, having established the circumstance, its use for purposes of assessing the amount of the sanction to be imposed is appropriate [...]." *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 33988, 33990, 33991 and 33992).

[459] x) The appellant alleged that the "Criminal Code establishes imprisonment as the only sanction for the crime of embezzlement; therefore, the penalty of disqualification from holding public office is not applicable [...],furthermore, by making compliance with the latter subject to the prison sentence, they were prohibited from practicing their profession as attorneys, thus violating their right to work [...]."The Chamber referred to the analysis of the same argument raised by the public defender of the co-defendant and indicated that "the claim cannot be upheld [.] [The] Criminal Code, establishes the legal possibility of communicating the personal circumstance of being a public official [...] and, consequently, that his conviction for the crime of embezzlement is legally valid and effective. [...The] conduct of this defendant affected the protected legal interests, undermined probity in exercise of public office [...]which legally determines the possibility of being punished concomitantly with the penalty of deprivation of liberty, and a penalty of disqualification for the exercise, functions, and performance of public office. [...]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 33992).

[460] xi) According to the appellant, it was "stated that the funds were not used for the purposes of the program, but were diverted [...]. The adoption of the alternative payment methodology was attributed to him, when according to the documentary evidence, it originated from a collegiate decision of seven persons and several institutions [...]. [N]o appointment [...] to a public office [...] was accredited. [T]he sentencing Court distorted the concept of administrative expense, contemplated in [...] Law 5662 [and...] the Court violated the duty of objectivity and the principle of substantiation in the analysis of the evidence [...]," in particular of testimonies. The Chamber dismissed these arguments. "[A]s for the objectives of the programs and the definition of administrative costs, in light of the regulations, it was determined that these did not include any type of debt accumulated by the beneficiaries, either for payment of professional services or social studies [...]. The situation becomes even clearer if we take into account that it was finally demonstrated that the public funds did not reach the hands of those beneficiaries for their housing solutions, but ended up in the hands of the defendants, who, in order to justify many of the disbursements, resorted to the payment of such professional services, as was proven in the sentence, charging the State highly lucrative sums. [...] [I]t was also demonstrated that the accused Martínez Meléndez and the defendant already sentenced, manipulated the institutions, making their members believe that the alternative method of payment was intended to democratize the system [...].The other major issue that arises refers to the legal possibility of including private entities in the programs, an aspect that was

erroneous application of the criminal definition to the proven facts;[461] xiii) violation of the rules governing the time limits for deliberation of the judgment and sentencing;[462] xiv) erroneous application of Article 106 of the Criminal Code and violation of Articles 649, 647, 803 and 826 of the Code Civil, regarding joint and several civil liability;[463] xv) violation of the rules of sound judgment in the assessment of evidence and erroneous application of the rules regarding civil action for compensation and the existence of pecuniary damage to the detriment of the State;[464] and xvi) alleged erroneous application of Law 5662 and the Organic Law of the National Institute of Housing and Urban Development and its reforms, with respect to the alleged legal personality of said Institute.[465]

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also discussed in depth in the ruling [and] the court's reading of the regulatory provisions does not allow for any other objective interpretation [...]." *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 33992.33993, 34000 and 34001).

[461] xii) The appellant alleged that "the court determined the existence of twelve crimes of embezzlement that are differentiated by the actions carried out by the affected institution, when issuing each of the checks, and not by the actions of the active subject. In reality, the defendants participated in a single action, so that it is a single offense of embezzlement [...] [In addition] there is an apparent concurrence of rules [...] in Article 325 of the Criminal Code [and] in Article 10 of Law 5662 [...], which is special and should have been applied in this case because it was the rule that most favored him [...]."The Chamber referred to the analysis of a plea made by the public defender of the co-defendant. It stated that "since [Martínez] held the position of Coordinator of the Social Compensation and Land Titling Programs, and administered the public resources assigned to him by virtue of the INVU-DESAF Agreement, and this administration was carried out fraudulently and illegally, with the intervention of [his co-defendant], who executed the acts necessary for the full completion of the action defined as a criminal offense, which determines the configuration […] of the crime of embezzlement, and consequently, it is proven that the decision of the Criminal Court derives from the correct application of substantive criminal law." Regarding the apparent concurrence of norms, it indicated that "according to the same rule, it is about establishing an administrative and independent responsibility for actions that correspond to the Criminal Code" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 33893, 34003).

[462] xiii) According to the appellant, this would result in the annulment of the judgment. The Chamber indicated that "the arguments cannot be admitted. Article 378 of the [CCP] stipulates the consequences of the declaration of complex proceedings […]. [S]aid rule establishes that the time periods for deliberation and drafting of the judgment will be different according to the duration of the trial. Thus, if the trial lasts less than thirty days, the deliberation period is extended to five days, and, if it lasts more than one month, that same period is extended to ten days. […]In the case under study, the proceedings concluded on June 26, 2007, and the operative part was issued on July 17 of the same year [...] Nevertheless, […]the ten working days were not exceeded, since [... the] Superior Council of the Judicial Branch [...] approved the collective vacation plan for the Judicial Branch 2006-2007, granting as such from Monday, July 9 to Friday, July 13, 2007, five days, which are included within the term indicated in the appeal." *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 34004).

[463] xiv) According to the appellant, "in accordance with these rules [in his case] the discharge based on solidarity operated and he could not be subject to civil conviction." The Chamber declared the claim inadmissible, since the aforementioned civil rules apply "only in the event that the payment of the obligation has been made and only with respect to the debtor who has already paid, since, otherwise, an unjust enrichment would occur. In this case, although the State has proceeded individually against the defendants, it has not succeeded in enforcing any conviction […]" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 34004 and 34005).

[464] xv) According to the appellant, "having verified that the different payments were made in the proper manner, there is no amount to be compensated as pecuniary damage […]. Likewise, the law was breached by declaring the objection of lack of legality and others in relation to all the monies paid for professional services, which, as it has been which, as has been argued, are also legitimate." The Chamber dismissed the complaint, stating that the defendant "deviated, once again, from the principle of intangibility of the facts proven in the judgment, which are contrary to what is being claimed. Therefore, having determined the existence of the unlawful action, the declaration of civil liability against him was appropriate" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folio 34006).

[465] xvi) According to the appellant, "[T]he regulations establish that the INVU is an autonomous institution, with its own legal personality, with its own legal personality, and therefore the money drawn by it was not part of the State's assets. Therefore, it was not appropriate for the Public Prosecutor's Office of the Republic to represent it in this lawsuit". The Chamber rejected the argument. It indicated that, "[a]s demonstrated in the judgment, the Social Compensation and Land Titling Programs […] were under the responsibility of […] a permanent technical unit of the Ministry of Labor and Social Security […].Thus, as the Public Prosecutor's Office of the Republic is the representative of the State, in its Central Administration, it is entitled to act in this case" *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008, (evidence file, folios 34006 and 34007).

324. From the analysis of decision No. 2008-00232, it is clear that the Third Chamber conducted a detailed analysis of the factual and legal arguments made by the appellant, inasmuch as it compared the facts invoked by that party against those taken as proven by the trial court, and analyzed the sufficiency of the evidence and the correct application of the law by the latter.

B.3.2. Motion for review

325. Subsequently, Mr. Martínez filed a motion for review of his conviction of July 17, 2007. In the sole plea, he alleged that the reasons given for his sentence were flawed, inasmuch as: "a) the 19-year prison term imposed by the trial court is not consistent with the rehabilitative objective of the sanction; b) the principle of proportionality, reasonableness, equality and suitability of the punishment was overlooked […] and, based on assessments made of him at the prison where he [is] being held, the purpose [of the sentence] has already been achieved, after eight years of imprisonment, and therefore [...] it is disproportionate; c) in determining the sentence, the [trial] court violated the right to asylum [...], and d) [...] violation of the rules governing continuing offenses, specifically Article 77 of the Criminal Code [...which] states that the sentence imposed, in the case of a continuing offense, may be increased by a further amount, which does not imply that the minimum and maximum sentences are doubled, as erroneously interpreted [and he] thus requests [...] that a lower sentence be imposed on him. [466]

326. On August 29, 2012, in decision No. 2012-001297,[467] the Third Chamber declared the said proceeding inadmissible, stating in relation to points a), b) and c) that, according to Article 411 of the CCP: "When the claim has been filed outside the hypotheses that authorize it or is manifestly unfounded, the court, *ex officio*, shall declare it inadmissible. [...] It shall not be admissible to raise, by way of review, matter that have already been discussed and settled through an appeal or in cassation […]. The arguments made by Jorge Martínez Meléndez, referring to the grounds for the sentence, are based on personal assessments that do not contain legal criteria to be considered, since aspects such as the fact that the sentence has already served its rehabilitative purpose, that he was given a longer sentence than other persons tried for the same crime, […] are aspects that have no place in this venue, since they do not fall within the scope of the review proceeding. [...] In addition, the grounds for the penalty issued by the trial court were already known and assessed by this Chamber [in cassation], in the decision [...] of March 11, 2008."

327. Regarding the way in which the trial court applied the penalty for the continuing offense, that is, paragraph d) of the sole ground, the Third Chamber indicated that: "the claim is manifestly inadmissible, since the constant jurisprudence of this Chamber has indicated that […] Article 77 of the Criminal Code establishes that when concurrent crimes are of the same type and affect patrimonial legal assets, provided that the agent pursues the same purpose, the penalty established for the most serious offense shall be applied, increased by up to the same amount. In various rulings of this Chamber, it has been stated that the correct way to set the penalty when the existence of a continuing offense has been previously established is as follows: the abstract penalty is taken as a parameter (in its lower and upper limits) and doubled, and once this operation has been carried out, the Court sets the

[466] *Cf*. Decision No. 2012-001297 of the Third Chamber of the Supreme Court of Justice of August 29, 2012 (evidence file, folio 34036).

[467] *Cf.* Decision No. 2012-001297 of the Third Chamber of the Supreme Court of Justice of August 29, 2012 (evidence file, folios 34034 to 34044).

corresponding penalty, placing it in the new scale. Therefore, the Court's reasoning [...] is consistent with the prevailing jurisprudential line [...]"

328. In this regard, this Court considers that the Third Chamber decided the inadmissibility of the motion for review filed by Mr. Martínez Meléndez by evaluating each aspect of the single argument raised, in accordance with the applicable legislation and jurisprudence. This analysis shows that these grievances were indeed raised and duly studied in the cassation appeals resolved by the Third Chamber itself, or that they were pleas alleging the incorrect application of a rule whose jurisprudential application allowed the Third Chamber to rule out, *prima facie* or without entering into a substantive study, an error in the grounds for the sentence. Therefore, it is not appropriate to declare, with respect to this appeal, a violation of Article 8(2)(h) of the Convention.

B.3.3. Conclusion

329. In view of the foregoing, the Court concludes that the State did not violate Article 8(2)(h) of the American Convention, to the detriment of Jorge Martínez Meléndez.

B.4. Regarding Miguel Mora Calvo (Group 7)

File 97-000061-301-PE (organization for international and domestic drug trafficking to the detriment of public health)

B.4.1. Appeal in cassation

330. Miguel Mora Calvo and his defense counsel filed an appeal in cassation against his criminal conviction of September 24, 1998, which the Third Chamber declared inadmissible. Subsequently, Mr. Mora and his defense counsel filed five motions for review, which were declared inadmissible by the Third Chamber and by the Court of Criminal Cassation, respectively. Mr. Mora also filed a writ of *amparo* and a writ of *habeas corpus*.

331. First, this Court notes that the cassation appeal filed was resolved by the Third Chamber through decision No. 0649-99 of May 28, 1999. In this appeal, it was argued that: i) the lower court did not duly substantiate the contested judgment as to the sentences imposed on the convicted defendants Mora Calvo and LC, and ii) "the judgment should be annulled for the untimely deliberation and sentencing in the abbreviated procedure [...]," since it considered that the trial court did not comply with the time limits established for issuing the judgment.[468] In its decision, the Third Chamber considered each of the points raised and determined that "the claims [were] untenable." With respect to the first argument, it listed the factors taken into consideration by the trial court in setting the sentence and, in addition, considered "the information offered as evidence [at the time]" by the appellants, in order to establish that these would not affect the sentence.[469] As to the second argument, it

[468] *Cf.* Decision No. 0649-99 of the Third Chamber of the Supreme Court of Justice, of May 28, 1999 (evidence file, folio 35471).

[469] The Third Chamber stated that: "Regarding the lack of grounds for the punishment, it should be noted that, considered as an integral structure, the sentence provides the necessary support to impose the sanction, since the a-quo not only considered the free and spontaneous manifestation of those who sought the abbreviated procedure, but also and with respect to each defendant, supported the decision regarding the telephone tapping, the seizure of the contents of the communications made via radio-locators ("beepers"), police reports and

explained the options available to the trial court as to how to read the judgment, reviewed the trial court's approach and specified the reasons why it considered that there was no prejudice to the interests of the parties.[470]

B.4.2. Motions for review

332. Mr. Mora subsequently filed five motions for review at different times against judgment No. 736-98 of September 24, 1998. In the first motion for review, he alleged the "violation of due process since, being an abbreviated procedure, they were not advised of their constitutional right not to testify against themselves."[471] In this regard, in decision No. 2000-00917 of August 11, 2000, the Third Chamber stated that due to the alleged violation of due process, the corresponding legal consultation was made and was evaluated by the Constitutional Chamber, which declared that "the lack of the warning contained in (sic) Article 36 of the Constitution by the sentencing court, in abbreviated proceedings, does not constitute an infringement of due process." Accordingly, the Third Chamber concluded that since "the purpose of the review proceeding was limited to the alleged breach of the fundamental right of the defendant not to testify against himself and that in the case of abbreviated procedures, such a warning does not apply, it is appropriate to declare the motion for review inadmissible."[472] In this regard, this Court notes that the petitioners did not submit the aforementioned decision of the Constitutional Chamber, and therefore it is not known whether it was explained to the appellant why the lack of warning does not constitute a violation of due process. Thus, this Court does not have sufficient elements to determine whether the response provided by the Third Chamber lacked sufficient grounds.

333. In his second motion for review, Mr. Mora again argued "the flawed reasoning for the amount of the sentence." In decision No. 2007-00546 of October 5, 2007, the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela declared the motion inadmissible because it considered that the argument of "the alleged existence of flaws in the grounds for the *quantum* of the sentence had already been heard and decided by the Third Chamber […]

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monitoring, movements of money and transfers, as well as the seizure of drugs. Undoubtedly, the guilt established with such a body of evidence was the basis not only for declaring the guilt of the convicted persons, but also served as support for imposing the prison sentences. As can be seen, the defendants and their defense attorneys agreed both with the procedural alternative proposed and with the prosecutor as to the length of the sentence to be imposed: seven years and six months in prison for Miguel Mora Calvo […]. The information they now offer as trial elements simply describes the personal data of their clients, which by itself, hypothetically included in the reasoning of the judge, would not change the sentence imposed, Thus, since the claim lacks merits, it is dismissed." *Cf.* Decision No. 0649-99 of the Third Chamber of the Supreme Court of Justice, of 28 May 1999, (evidence file, folio 35473).

[470] The Third Chamber established: "[…] In the case at hand, the alleged flaw is not apparent. First, because at the time the request for an abbreviated procedure was accepted, the parties were warned by the court that the full reading of the judgment would be notified at the end of the common trial against the other defendants […] and none of them objected to the procedure. This suggests that they accepted the scope of the ruling. As stated, it is true that the court deferred the full reading of the judgment of the abbreviated procedure and it is also true that it immediately proceeded with the hearings necessary to complete the trial with respect to the defendants who did not agree with the abbreviated procedure. From the record of the proceedings, it cannot be deduced that the Court disregarded the rules of deliberation, drafting and reading of the judgment. In view of the request to abbreviate the proceeding, the a-quo could have ordered its complete resolution immediately or resolve it - as it did in this case - together with the decision of the common trial, or reserve the request to define it after having heard the ordinary proceeding. In this way, no prejudice is caused to the interests of the parties." *Cf.* Decision No. 0649-99 of the Third Chamber of the Supreme Court of Justice, of May 28, 1999, (evidence file, folio 35473).

[471] *Cf.* Decision No. 2000-00917 of the Third Chamber of the Supreme Court of Justice, of August 11, 2000, (evidence file, folio 35477).

[472] *Cf.* Decision No. 2000-00917 of the Third Chamber of the Supreme Court of Justice, of August 11, 2000 (evidence file, folio 35477).

when it declared the cassation appeal inadmissible […]."[473] From the foregoing, it is clear that the judge did not examine this argument, because he considered that it had already been examined in cassation.

334. The third motion for review was declared inadmissible by the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela in decision No. 2008-00236 of May 28, 2008. In that motion, Mr. Mora requested the annulment of his conviction based on two specific claims: i) in relation to the abbreviated procedure, "neither the CCP of 1996 nor the alternative measures regulated therein can be considered as a more favorable law for the purposes of applying them to events that occurred prior to its entry into force, and ii) he was not advised of his right to abstain when accepting the facts for the application of the abbreviated [procedure]." Regarding the second point, the appellant "indicated that when the Third Chamber resolved the appeal for review in which this grievance was raised, the application of the CCP had just begun and the claim was declared inadmissible, although subsequently there have been rulings (which he cites) by the Third Chamber and the Court of Cassation that consider such warning pertinent."[474] In this regard, the Court of Criminal Cassation ruled that the first grievance "is manifestly unfounded," considering that "[t]he plaintiff's argument confuses the criminal action for which he was convicted, a substantive issue, with the application of the abbreviated procedure, evidently a procedural matter; demanding that the procedural rules in force at the time of the commission of the act be applicable to him, a clearly inappropriate issue." As for the second claim, it pointed out that "[…] as the plaintiff himself admits, it was previously raised in a motion for review and declared inadmissible." Furthermore, it indicated that [t]he existence of contradictory resolutions on theoretical issues is not, for the time being, grounds for a review."[475]

335. With respect to the fourth motion for review, the Court of Criminal Cassation declared it inadmissible in decision No. 2008-00557 of November 25, 2008. Mr. Mora requested that his conviction be annulled based on two arguments. First, he alleged that the conviction was flawed *in iudicando*, in violation of due process and the principle of opportunity of defense. He indicated that the facts alleged in his case occurred prior to the enactment of the CCP and for this reason it cannot be applied retroactively since this has been established by the Constitutional Chamber in its jurisprudence.[476] In addition, he argued that the principle of legality was violated by giving retroactive effect to procedural law. Secondly, he alleged another error *in iudicando* to the detriment of Articles 39[477] and 41[478] of the Constitution, inasmuch as the abbreviated procedure circumvented the right to double judicial instance. He argued that there had been a breach of the principle of opportunity of defense and requested that the case files be returned to the moment the sentence was issued so that he could exercise the opportunity of defense through an appeal or, failing that, that the authority submit a judicial critique on the unconstitutionality of the CCP for not allowing ordinary

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[473] *Cf.* Decision No. 2007-00546 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, of October 5, 2007, (evidence file, folio 35466).

[474] *Cf.* Decision No. 2008-00236 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, of May 28, 2008, (evidence file, folio 35483).

[475] *Cf.* Decision No. 2008-00236 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, of May 28, 2008, (evidence file, folio 35483).

[476] *Cf.* Motion for review of September 5, 2008 (evidence file, folios 6221 to 6223).

[477] Article 39. - No one shall be punished except for a crime, wrongful act or misdemeanor, punishable by prior law and by virtue of a final judgment rendered by a competent authority, after the defendant has been given the opportunity to exercise his defense and by means of the necessary proof of guilt.
In civil or labor matters, corporal constraint or detentions that may be decreed in insolvencies, bankruptcies or creditors' meetings shall not constitute a violation of this article or of the two preceding articles.

[478] Article 41. - Obeying the laws, everyone shall find redress for the injuries or damages they have received in their person, property or moral interests. Justice must be rendered promptly, complied with, without denial and in strict conformity with the laws.

appeals with respect to convictions. Thus, he requested that a remand be ordered for a new substantiation of the accused facts in a new ordinary criminal trial.

336. In this regard, the Court of Criminal Cassation considered that the first claim was inadmissible for the following reasons:

> "Pursuant to the provisions of [the CCP], it is inappropriate to attempt to reintroduce its discussion in this venue [...].It should be noted that in that decision, this Court pointed out that when the application of the abbreviated procedure was agreed upon and a sentence was handed down under it, transitory provision IV of the Judicial Reorganization Law was in force, which allowed the rules regarding the abbreviated procedure to be applied to those cases that were in the trial phase and were being processed in accordance with the 1973 Code of Criminal Procedure."[479]

337. Regarding the second claim that the abbreviated procedure in which he was sentenced disregards the right to a second hearing, the Court of Criminal Cassation considered that it was inadmissible, taking into account the following:

> It is clear that the complaint is presented outside the hypotheses that authorize it, in addition to being manifestly unfounded [...]. What the plaintiff is claiming is a remedy not provided for in the rules in force to challenge the conviction (motion for appeal), which is beyond the jurisdiction of this Court [...].There is a clear difference in doctrine between the appeal and the appeal in cassation, especially in terms of scope. Suffice it for the purposes of this resolution to mention that in an appeal there is a "trial on the facts," with the possibility of a new evaluation of the evidence, while in cassation what takes place is a "trial on the judgment" [...]. In accordance with the object and purpose of the American Convention, which is the effective protection of human rights, it must be understood that the remedy provided for in Article 8(2)(h) of that treaty must be an effective ordinary remedy through which a higher judge or court seeks to correct judicial decisions that are contrary to law [...].Following the notion of the margin of appreciation, the legislator has opted to comply with the requirements of the Inter-American Court by allowing the review of the sentence via cassation or revision of the sentence in terms of its considerations on the factual and evidentiary basis, but not by renewing the oral and public trial.[480]

338. Thus, the Court of Criminal Cassation explained the reasons why it considered that the grievances cited by the appellant were inadmissible; on the one hand, it clearly and precisely indicated the reasons why the rules relating to the abbreviated procedure were applied to the specific case and, on the other, it provided a reasoning on how, in its opinion, the Costa Rican appeals system would comply with the requirements of Article 8(2)(h) of the Convention. It should be noted that the appellant did not indicate, on that occasion, the aspects of his conviction that were not reviewed due to the non-existence at that time of an appeal in criminal matters.

339. In the fifth motion for review, Mr. Mora argued that "there are clear *'in-iudicando'* defects to the detriment of Articles 39 and 41 of the Constitution, inasmuch as this judicial procedure pejoratively circumvents the right to a double judicial instance [...]. [That] he was forcibly compelled to challenge the sentence with an appeal in cassation full of formalities and conditions, contrary to what is considered an ordinary appeal [.] He invoked the judgment [...in *Herrera Ulloa,* among others], seeking the admissibility of his claim, based on new evidence [...]. He also requested [that] the *'automatic repeal*' of the Law on Opening Criminal Cassation Nº 8503, since it is contrary to the American Convention [...], Article 8(2)(h) [and] the annulment of the judgment [...]."[481]

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[479] *Cf.* Decision No. 2008-00557 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, of November 25, 2008, (evidence file, folios 35485 and 35486).

[480] *Cf.* Decision No. 2008-00557 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, of November 25, 2008, (evidence file, folios 35486 to 35488).

[481] *Cf.* Decision No. 2009-00225 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, of June 12, 2009, (evidence file, folio 35489).

340. The Court of Criminal Cassation, through decision No. 2009-00225 of June 12, 2009, determined that "[t]he attempted motion for review is manifestly unfounded" and declared it inadmissible, based on the following:

> "What is expressed therein is an open disagreement with the system of challenges established by our [CCP] against convictions, a matter that is outside the grounds that, pursuant to Article 408 ibid, allows this Court of Criminal Cassation to review convictions that have already become final. This same issue had already been the subject of another motion for review filed by the accused […], which was decided in ruling N° 2008-00557 by the First Section of this same Court of Cassation. [Transcribed what was resolved in the aforementioned decision (*supra* para. 229)]. The appellant seeks a review of the conviction […], based on the same arguments […], but alleging new evidence; however, what he offers as new evidence (documentary and testimonial […]) is not really evidence that would be relevant in relation to any of the grounds for review established in the aforementioned Article 408, but rather refers to the allegation that was already considered manifestly unfounded […]."[482]

341. As can be seen, the Court of Cassation analyzed the arguments submitted by the appellant, and indicated the reasons for which it considered that the motion was inadmissible. It also analyzed the evidence provided by the appellant and decided that it was related to his alleged disagreement with the appeals system, and therefore considered that there were no new relevant facts. Thus, this Court considers that it is not appropriate to declare a violation of the Convention in relation to the fourth and fifth motions mentioned above.

342. Now, separately from the aforementioned criminal proceeding, Mr. Mora filed a writ of *amparo* on May 23, 2005, challenging three judgments issued against him in three different criminal cases, including the judgment of September 24, 1998, which is before this Court. Among other reasons, Mr. Mora argued that his right to appeal the judgment before a higher judge or court was violated, "since, according to the judgment […in the case of] *Herrera Ulloa* […] a judgment that is final without the benefit of a remedy of Article 8(2) (h) of the [Convention], violates a norm of constitutional rank […]."[483]

343. In this regard, through decision No. 2005-06480 of May 31, 2005, the Constitutional Chamber "flatly reject[ed]" the writ of *amparo*, with the following arguments:

> "[I]t is not for this specialized Court […] to act as an appellate court in this matter, to assess the terms of the judgments in question, or to analyze the appraisal of the evidence that the trial judge may have made in order to consider the existence of the crime charged and his participation therein as proven, since this would imply encroaching on the jurisdiction of the criminal courts, which is constitutionally reserved to the corresponding judges […]. If the appellant believes that during the processing of said criminal proceedings or in the issuance of the criminal conviction against him, there were violations of due process, such issues must be raised […] through the process of review of judgment, which (sic) must be filed before the competent judicial authority, […] without prejudice to this Chamber defining the content, conditions, and scope of said principle, by means of the mandatory judicial consultation […]."[484]

344. Finally, Mr. Mora filed a writ of *habeas corpus* on December 28, 2005, "on the grounds that [he was] being illegally deprived of his liberty," because his convictions had not been subject to a full review, since the cassation appeal to which he had access did not meet the requirements of Article 8(2)(h) of the Convention.[485] The Constitutional Chamber, through decision No. 2006-000052 of January 6, 2006, rejected the motion considering that: "[t]he problem raised by the appellant has already been extensively analyzed by this Chamber,

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[482] *Cf.* Decision No. 2009-00225 of the Court of Criminal Cassation of the Third Judicial Circuit of Alajuela, of June 12, 2009 (evidence file, folios 35490 and 35491).

[483] *Cf.* Writ of amparo of May 23, 2005 (evidence file, folio 20620).

[484] *Cf.* Decision No. 2005-06480 of the Constitutional Chamber of the Supreme Court of Justice, of May 31, 2005, (evidence file, folios 20625 and 20626).

[485] *Cf.* Writ of *habeas corpus* of December 28, 2005 (evidence file, folio 20629)

which has considered that the principle of double instance is satisfied with the special appeal in cassation," for which it cited and transcribed the decisions issued in previous rulings.[486]

B.4.3. Conclusion

345. Based on the foregoing, the Court finds no grounds to declare a violation of Article 8(2)(h) in relation to Article 8(1) of the American Convention with respect to Miguel Mora Calvo, since each of the claims made in the appeals for cassation and review analyzed were addressed by the Costa Rican courts that heard them through well-reasoned decisions.

VIII.II
RIGHT TO PERSONAL LIBERTY
(Article 7 of the American Convention)

A. Arguments of the parties and the Commission

346. The ***Commission*** argued that Jorge Martínez Meléndez was subject to pretrial detention for a total period of 4 years and 9 months, and that the court that extended the pretrial detention acknowledged that the legal term had been exceeded, although it should be "exceptionally extended," a situation that was later endorsed by the Constitutional Chamber. Consequently, the failure to observe the legal time limit established in the Code of Criminal Procedure as the maximum for pretrial detention constituted, in addition to a violation of the legality of the deprivation of liberty contained in Article 7(2) of the Convention, an indicator that the pretrial detention was excessive and, therefore, in violation of Article 7(5) thereof. The Commission pointed out that the judicial authorities who endorsed such non-compliance with the legal time limit did not provide arguments to explain the procedural objectives pursued by continuing the pretrial detention during the trial stage. Thus, it concluded that the State violated the right to personal liberty established in Articles 7(1), 7(2) and 7(5) of the American Convention.

347. The ***Factum Consorcio*** representatives argued that the State violated Article 7(2) and 7(3) of the Convention, to the detriment of Mr. Martínez, by extending the term of his pretrial detention beyond the limits permitted by its own legislation and in a highly exceptional manner. This was based on an irregular interpretation of Article 258 of the CCP and on the grounds that this was a complex case. In this regard, they argued that the alternative measure of imprisonment that the State imposed on Mr. Martínez on February 23, 1999 was never breached, since when he applied for political asylum in Canada that measure would have expired. Thus, his request for political asylum in Canada cannot be considered as an act of escape or evasion and, therefore the indefinite pretrial detention applied to him would not be justified. They also indicated that the State violated Article 7(5) of the Convention because the criminal proceedings against Mr. Martínez lasted for more than 10 years, most of which he spent in pretrial detention.

348. According to the representatives, the State also violated Article 7(6) of the Convention by maintaining the detention, even though it was illegal. They pointed out two situations in which the *habeas corpus* remedy was ineffective. The first, because decision No. 2005-01667 of the Constitutional Chamber stipulated a maximum term of 36 months of pretrial detention for Mr. Martínez, yet the State extended it to 57 months, which they considered to be in breach of domestic law and excessive. The second, in relation to a writ of *habeas corpus* declared admissible on February 1, 2008, in which the Constitutional Chamber justified Mr.

[486] *Cf.* Decision No. 2006-000052 of the Constitutional Chamber of the Supreme Court of Justice, of January 6, 2006, (evidence file, folio 20640).

Martínez's detention, despite noting errors and irregularities in his period of imprisonment and without an order from a criminal judge. Thus, between January 17 and 29, 2008, the State kept the alleged victim in detention without a written or oral order from a criminal judge.

349. The ***State*** argued that on February 19, 1999, a precautionary measure was applied to Mr. Martínez as an alternative to pretrial detention, releasing him by means of: a) a sum of money as a guarantee that he would not evade justice, b) an impediment to leave the country without an expiration date, and c) an order to sign in every 15 days. It pointed out that this precautionary measure was issued to Mr. Martinez on February 22, 1999; however, the accused left Costa Rica on November 26, 1999, with said measure in force, and was a fugitive for 4 years and 7 days, until he returned after being extradited. It added that the Canadian State rejected the existence of any situation that would justify granting him political asylum and, instead, extradited him by virtue of the international arrest warrant issued against him. Similarly, taking into account the complexity of the criminal case, the application of the complex procedure of the Costa Rican criminal system was justified. According to the State, based on Article 329 of the CCP, the trial court may extend the pretrial detention to ensure the holding of the oral and public trial, in which case the time restrictions of Articles 258 and 376 to 379 of said Code do not apply. In this regard, given that the only purpose of the extension in question was to ensure the holding of the trial, preventive detention was a reasonable and proportional measure in view of the proven danger of flight, the danger of obstructing the proceedings - inasmuch as his participation in the destruction of evidence was proven- and his necessary presence during the oral and public trial. Moreover, the deprivation of liberty was always subject to periodic review by the judicial authorities. Finally, the State pointed out that after being convicted, Mr. Martínez was held in pretrial detention for 11 days between January 17 and 29, 2008- without any resolution due to a material error in the indication of the dates in the corresponding document. The Constitutional Chamber recognized the violation of the right to personal liberty and ordered the State to pay damages; however, it did not order his immediate release because there was a lawful ruling that applied pretrial detention from January 29, 2008 (once the error was noticed, a new ruling was issued).

B. Considerations of the Court

350. In the instant case, the dispute consists of determining whether the pretrial detention of Mr. Martínez during the processing of his criminal case was unlawful, arbitrary or unreasonable, taking into account the applicable norms, as well as the grounds and reasons of the judicial authorities for extending the precautionary measure beyond the ordinary period. The Court will first analyze Articles 7(1), 7(2), 7(3) and 7(5) of the Convention and, separately, Article 7(6).

351. This Court recalls that Article 7 of the Convention contains two distinct types of rules: one general, the other specific. The general rule is established in the first subparagraph: "[e]very person has the right to personal liberty and security;" the specific rule consists of a series of guarantees that protect a person's right not to be deprived of liberty unlawfully (Art. 7(2)) or in an arbitrary manner (Art. 7(3)), to be informed of the reasons for his detention and the charges against him (Art. 7(4)), to judicial control of the deprivation of liberty and the reasonable length of time in custody (Art. 7(5)), to contest the lawfulness of the arrest (Art. 7(6)), and not to be detained for debt (Art. 7(7)).[487]

[487] *Cf. Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador, supra, para.* 51, and *Case of Yarce et al. v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2016. Series C No. 325, para. 138.

352. The Court emphasizes that any violation of Article 7(2) to (7) of the Convention will necessarily entail the violation of Article 7(1) thereof, since the failure to respect the guarantees of the person deprived of liberty implies, in short, a lack of protection of that person's right to liberty.[488]

B.1. Articles 7(1), 7(2), 7(3) and 7(5) of the Convention

353. The Court recalls the principle of liberty of the defendant while his criminal responsibility is being determined. In accordance with this Court's jurisprudence, pretrial detention is the most severe measure that can be applied to a person accused of a crime, and therefore its application must be exceptional, since it is limited by the principles of legality, presumption of innocence, necessity, and proportionality, which are indispensable in a democratic society.[489] Furthermore, the judicial decision that restricts the personal liberty of a person by means of pretrial detention must be justified and proven, in the specific case, through the existence of sufficient evidence to reasonably assume the criminal conduct of the person and that the detention is strictly necessary. Consequently, it cannot be based on mere suspicion or personal perceptions that the accused belongs to an illegal group or gang.[490] In any case, the deprivation of liberty of the accused must only have the legitimate purpose of ensuring that he or she will not impede the development of the proceedings or evade the action of justice.[491]

354. Article 7(2) of the American Convention states that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." This Court has pointed out that by referring to the Constitution and laws established "therein", the study of the observance of Article 7(2) of the Convention obliges the States to establish, as specifically as possible and "beforehand," the "reasons" and "conditions" for the deprivation of physical liberty. If domestic legislation, both in the material and the formal aspects, is not observed when depriving a person of his or her liberty, such deprivation shall be unlawful and contrary to the American Convention.[492]

355. With regard to the arbitrariness referred to in Article 7(3) of the Convention, the Court has established that no one shall be subject to arbitrary arrest or imprisonment for reasons and by methods which, although classified as legal, may be considered incompatible with respect for the fundamental rights of the individual because, among other things, they are unreasonable, unpredictable or lacking in proportionality.[493] In this sense, the arbitrariness mentioned in Article 7(3) of the Convention has its own legal content, the analysis of which is only necessary in the case of detentions considered unlawful.[494] However, this means that domestic law, the applicable procedures and the corresponding general principles, expressed or tacit, must also be compatible with the Convention. Thus, the concept of "arbitrariness" is

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488 *Cf. Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, *supra, para.* 54, and *Case of Yarce et al. v. Colombia, supra, para. 138*.

489 *Cf. Case of Tibi v. Ecuador, Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 106, and *Case of Herrera Espinoza et al. v. Ecuador*, *supra,* para. 143.

490 *Cf. Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 241, para. 106, and *Case of Herrera Espinoza et al. v. Ecuador*, *supra,* para. 143.

491 *Cf. Case of Servellón García et al. v. Honduras.* Judgment of September 21, 2006. Series C No. 152, Para. 90, and *Case of Herrera Espinoza et al. v. Ecuador*, *supra,* para. 143.

492 *Cf. Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, *supra,* para. 57, and *Case of Yarce et al. v. Colombia, supra,* para. 139.

493 *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, Para. 47, and *Case of Yarce et al. v. Colombia, supra,* para. 140.

494 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra, para.* 96, and *Case of Yarce et al. v. Colombia, supra,* para. 140.

not to be equated with "contrary to the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[495]

356. The Inter-American Court has indicated that, without prejudice to the legality of a detention, in each case an analysis must be made of the compatibility of the legislation with the Convention, on the understanding that the law and its application must respect the requirements listed below to ensure that the deprivation of liberty is not arbitrary:[496] i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention; ii) that the measures adopted are suitable to achieve the desired purpose; iii) that they are necessary, in the sense that they are absolutely essential to achieve the desired purpose and that, among all possible measures, there is no less burdensome measure in relation to the right involved, that would be as suitable to achieve the proposed objective; for this reason, the Court has indicated that the right to personal liberty means that any limitation of this right must be exceptional,[497] and iv) that the measures are strictly proportionate,[498] so that the sacrifice inherent to the restriction of the right to liberty is not exaggerated or excessive in relation to the advantages obtained by such restriction and the fulfilment of the purpose pursued.[499] Any restriction of liberty that is not based on a sufficient justification that meets the above criteria will be arbitrary and will therefore violate Article 7(3) of the Convention.[500]

357. In cases involving pretrial detention within a criminal proceeding, the Court has indicated that the decision to deprive the defendant of his liberty cannot be based on 'general-preventive or special-preventive' objectives attributable to the penalty, but can only be based on a legitimate purpose, namely: to ensure that the accused does not interfere with the development of the proceedings or evade the action of justice.[501] It has also emphasized that procedural risk cannot be presumed, but must be verified in each case, based on the objective and proven circumstances of the specific case.

358. The Court has likewise established that the unpredictability of deprivation of liberty may make it arbitrary (*supra* para. 355). On this point, the Court has indicated that the law on which the deprivation of personal liberty is based must establish as specifically as possible and "beforehand" the "reasons" for and "conditions" of the deprivation of physical liberty.[502] Compliance with these requirements is designed to protect the individual from arbitrary detention.[503] Among the conditions stated for deprivation of liberty, the applicable law should

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[495] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra, para.* 92, and *Case of Yarce et al. v. Colombia, supra, para.* 140.

[496] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra, para.* 93, and *Case of Wong Ho Wing v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 30, 2015 Series C No. 297, para. 248.

[497] *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, Para. 129, and *Case of Wong Ho Wing v. Peru, supra,* para. 248.

[498] *Cf. Case of Ricardo Canese v. Paraguay, supra,* para. 129, and *Case of Wong Ho Wing v. Peru,* para. 248.

[499] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador, supra, para.* 93, and *Case of Wong Ho Wing v. Peru*, *supra, para.* 248.

[500] *Cf. Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137*,* para. 128, and *Case of Yarce et al. v. Colombia,* para. 158.

[501] *Cf. Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997, para. 77, and *Case of Wong Ho Wing v. Peru*, *supra, para.* 250.

[502] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra, para.* 57, and *Case of Wong Ho Wing v. Peru, supra, para.* 254.

[503] *Cf. Case of Wong Ho Wing v. Peru, supra, para.* 254. Similarly, the European Court has established that the protection of the individual from arbitrariness implies that the application of the law must be sufficiently precise and predictable. *Cf.* ECHR, *Case Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 127; *Case Baranowski v. Poland,* No. 28358/95. Judgment of March 28, 2000, paras. 50 to 52; *Case of Khudoyorov v. Russia*, No. 6847/02. Judgment of November 8, 2005, para. 125; *Case of Calovskis v. Latvia*, No. 22205/13. Judgment of July 24, 2014, para. 182; *Case of L.M. v. Slovenia*, No. 32863/05. Judgment of June 12, 2014, paras. 121 and 122.

include criteria concerning the limits to its duration.[504] This Court considers that the inclusion of time limits for a detention is a safeguard against the arbitrariness of the deprivation of liberty.[505]

359. For its part, Article 7(5) of the Convention establishes that "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

360. In this regard, the Court recalls that the right to personal liberty "is accompanied by a judicial obligation to process the criminal proceedings during which the accused is deprived of his liberty with greater diligence and promptness."[506]

361. In cases involving pretrial detention in the context of criminal proceedings, the Court has pointed out that this rule imposes time limits on the duration of such detention and, consequently, on the powers of the State to ensure the purposes of the proceedings through this precautionary measure. When the term of pretrial detention exceeds what is reasonable, the State may limit the freedom of the accused with other less harmful measures that ensure his appearance at trial, other than deprivation of liberty.[507]

362. In other words, even when there are reasons to keep a person in pretrial detention, Article 7(5) guarantees that he or she will be released if the period of detention has exceeded a reasonable time.[508] Likewise, a detention or remand in custody must be subject to periodic review, so that it is not prolonged when the reasons for its adoption no longer exist. In this order of ideas, the judge does not have to wait until the moment of acquittal for a detained person to regain his freedom, but must periodically assess whether the causes, necessity and proportionality of the measure persist, and whether the period of detention has exceeded the limits imposed by law and reason. Whenever it appears that the preventive detention does not satisfy these conditions, release must be decreed, without prejudice to the continuation of the respective process.[509]

363. In the instant case, the Court notes that, based on Article 376 of the CCP,[510] the Criminal Court of the First Judicial Circuit of San José ordered on September 7, 2000, the

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504 In this regard, the European Court has indicated that: "The Court observes that the domestic law regulated in detail 'detention pending investigation' in ordinary criminal proceedings and set specific time-limits for the pretrial detention of criminal defendants. However, no provision was made in domestic law for a time-limit specifically applied to detention 'with a view to extradition'. The Court notes that in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to extradition and setting time-limits for such detention, the deprivation of liberty to which the applicant was subjected was not circumscribed by adequate safeguards against arbitrariness". ECHR, *Case of Garayev v. Azerbaijan*, No. 53688/08. Judgment of June 10, 2010, Para. 99. See also, ECHR, *Case Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 129.

505 *Cf. Case of Wong Ho Wing v. Peru*, *supra*, para. 255.

506 *Cf. Case of Bayarri v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 70, and *Case of Wong Ho Wing v. Peru, supra,* para. 268.

507 *Cf. Case of Bayarri v. Argentina*, supra, para. 70, and *Case of Wong Ho Wing v. Peru, supra,* para. 268.

508 *Cf. Case of Bayarri v. Argentina*, *supra,* para. 74, and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 122.

509 *Cf. Case of Bayarri v. Argentina, supra,* para. 76, and *Case of Argüelles et al. v. Argentina*, *supra,* para. 121.

510 Article 376 of the Code of Criminal Procedure in force at the time established a procedure for processing complex matters: "Admissibility. When the processing is complex due to the multiplicity of facts, the large number of defendants or victims, or when it involves cases related to the investigation of any form of organized crime, the court, *ex officio* or at the request of the Office of the Public Prosecutor, may authorize, through a reasoned decision, the application of the special rules provided for in this Title […]." *Cf.* CCP Law No. 7594 (evidence file, folio 28401).

complex processing of the case file, in view of the number of documents that formed part of the indictment.[511] This processing had the effect - in accordance with Article 378 of the CCP- of establishing the term of pretrial detention at a maximum of 18 months, with the possibility of extending it for a further 18 months, that is, a total term of 36 months before the conviction, after which the detention could be extended for a further eight months.[512]

364. In the instant case, the Special Duty Criminal Court of San José ordered the first period of pretrial detention of Mr. Martínez for 6 months, from August 22, 1998 until February 22, 1999.[513] After leaving the country for more than four years and returning, following his extradition on December 3, 2003, his pretrial detention was ordered for a period of 12 months. As of December 3, 2004, the remand measure was extended three times by the Court of Cassation, as follows: i) for 8 months, from December 3, 2004, to August 3, 2005, according to the ruling of November 30, 2004;[514] ii) for six months, during the period from August 3, 2005 to February 3, 2006, according to the ruling of August 3, 2005,[515] and iii) for 4 months, during the period from February 3 to June 3, 2006, according to the ruling of February 2, 2006.[516] On that date, the maximum period of 36 months established in Article 378 of the CCP was completed.

365. Despite the fact that the 36-month term established in Article 378 of the CCP had expired, on June 2, 2006, the Criminal Court of the First Judicial Circuit of San José extended

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511 *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of September 7, 2000. (evidence file, folio 2054).

512 Article 378 of the Code of Criminal Procedure at that time established: "Time limits. Once this procedure is authorized, it shall produce the following effects:
a) The ordinary term of preventive detention shall be set at a maximum of eighteen months, which may be extended for an additional 18 months and, in the event of a conviction, for a further 8 months.
b) The term agreed by the court to conclude the preparatory investigation shall be one year.
c) In the intermediate and trial stage, the time limits established in favor of the parties to carry out any action and those that establish a certain time to hold hearings shall be doubled.
d) When the duration of the trial is less than thirty days, the maximum time limit for deliberation shall be five days and the time to issue the sentence shall be ten days. When the duration of the trial is greater, these periods shall be ten and twenty days respectively.
e) The time limits for filing and processing appeals shall be doubled.
In any case, the rules on delay of justice shall apply.
(Emphasis added) *Cf.* CCP Law No. 7594 (evidence file, folio 28402).

513 *Cf.* Decision of the Special Duty Criminal Court of August 22, 1998, (evidence file, folio 26263). The order of pretrial detention was based on Articles 238, 239 and 241 of the Code of Criminal Procedure, which established: ARTICLE 238.- Application of preventive detention. Pretrial detention may only be granted in accordance with the provisions of this Code, by means of a well-founded judicial resolution, within the limits indispensable to ensure the discovery of the truth and the enforcement of the law. It shall be executed in such a way as to cause the least possible harm to the persons concerned. The deprivation of liberty during the proceedings shall be proportionate to the penalty that may be imposed in the case.
ARTICLE 239.- Reasons for pretrial detention. The court shall order the preventive detention of the accused, provided that the following circumstances are met: a) There are sufficient elements of conviction to reasonably believe that the accused is, with probability, the author of a punishable act or participant in it. b) There is a reasonable presumption, based on an assessment of the circumstances of the particular case, that the accused will not submit to the proceedings (danger of flight); will obstruct the investigation of the truth (danger of obstruction); or will continue the criminal activity. c) The crime attributed to him/her is punishable by imprisonment.
ARTICLE 241.-Danger of obstruction. In order to decide on the danger of obstruction to ascertain the truth, due consideration shall be given to the serious suspicion that the accused will: a) Destroy, modify, conceal or falsify evidence. b) Influence co-defendants, witnesses or experts to report falsely or behave in a dishonest or reticent manner, or induce others to engage in such behavior.
Imprisonment may be based on this reason only until the conclusion of the trial.

514 *Cf.* Decision No. 2004-1233 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of November 30, 2004 (evidence file, folio 25897).

515 *Cf.* Decision No. 2005-0731 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of August 3, 2005 (evidence file, folios 26264 to 26270).

516 *Cf.* Decision No. 2006-0060 of the Court of Criminal Cassation of the Second Judicial Circuit of San José, of February 2, 2006 (evidence file, folio 27326).

the pretrial detention from June 3, 2006, and "until the ruling on the operative part of the judgment."[517] In its decision, it pointed out that as a sentencing court, it had the power to extend the period of pretrial detention beyond the ordinary terms, as established in the case law of the Constitutional Chamber.[518] Therefore, it stated that it was authorized to deprive the defendant of his liberty to ensure the continuance of the trial, without exceeding the time absolutely necessary to accomplish that purpose. In addition, it justified this extension by pointing out that the danger of flight was still latent and that the crime of which he was accused was subject to severe prison sentences. In this case, the period was extended for approximately 13 more months, until July 17, 2007, the date on which the conviction was handed down.

366. In response to this decision, Mr. Martínez's defense filed a writ of *habeas corpus* requesting his release and arguing that "the legal term for which the appellant could be held in pretrial detention [had] expired and [had] exceeded the reasonable time limits […]."[519] In a decision issued on June 23, 2006, the Constitutional Chamber ruled that the trial court acted in the exercise of its jurisdiction "expressly conferred under paragraph 329 of the Code of Criminal Procedure" and declared the action inadmissible, since "[…]although the exact duration of the measure adopted by the court is not established, this is not deemed unreasonable or contrary to the principle of proportionality, considering that the trial is in the plenary phase of the proceedings […] and that the purpose of the measure is to ensure that the objectives of the proceeding are met […]." Thus, it confirmed its jurisprudence to the effect that "the purpose of imprisonment […] is to ensure the realization of the trial, for which the time limits set by the Code of Criminal Procedure (Article 258) do not apply."[520]

367. In this regard, the Court notes, first of all, that the extension of Mr. Martínez's pretrial detention by the trial court may have been legal,[521] since, apparently the case law of the Constitutional Chamber allowed the extension of pretrial detention based on Article 329 of the CCP, ignoring the requirement contained in said article for such purposes, that the accused be at liberty at the time of ordering the precautionary measure.[522] However, by broadening the assumptions and conditions of infringement of liberty, this case law contravened the *pro homine* principle. Moreover, by allowing the measure of pretrial detention to be imposed without establishing a specific time limit, the Chamber's decision of June 23, 2006 disregarded the requirement to justify the necessity and proportionality of the measure, as well as its predictability (*supra* para. 356). In this regard, the Court has indicated that, as a general rule, the accused should be free while his criminal responsibility is being determined,[523] because the latter enjoys the legal status of innocence. This means that he or she should be treated by the State in a manner consistent with the status of a person who has not been convicted.[524] The Court has also pointed out that the State has the obligation to not restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he does

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[517] *Cf.* Decision of the trial court of the First Judicial Circuit of San José, of June 2, 2006 (evidence file, folio 26220).

[518] Citing Ruling No. 6718-06 of the Constitutional Chamber, of May 18, 2006 (evidence file, folio 26236).

[519] *Cf.* Writ of habeas corpus of June 7, 2006, (evidence file, folio 2129).

[520] *Cf.* Decision No. 2006-008979 of the Constitutional Chamber, of June 23, 2006, (evidence file, folios 2138 and 2139).

[521] It should be noted that Article 258 "Extension of pretrial detention" mentioned by the Constitutional Chamber refers to the periods of pretrial detention applicable to the processing of non-complex matters.

[522] ARTICLE 329. - Restrictions on the freedom of the accused.
If the accused is at liberty, the court may, in order to ensure the holding of the hearing, order his arrest by the police to be remanded in custody; it may likewise vary the conditions under which he enjoys his liberty or impose some of the other precautionary measures provided for in this Code. (Emphasis added)

[523] *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs, supra,* para. 67, and *Case of Argüelles et al. v. Argentina*, *supra,* para. 130.

[524] *Cf. Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 157, and *Case of Argüelles et al. v. Argentina*, *supra, para.* 130.

not interfere with the proceedings or evade the action of justice.[525] Because the Constitutional Chamber did not ensure that this measure was subject to these purposes, but rather to the duration of the proceedings, pretrial detention became the rule for Mr. Martinez. Therefore, his detention became arbitrary.

368. Finally, this Court notes that in the conviction, Mr. Martínez's pretrial detention was extended for another six months[526] and that, in a ruling of February 29, 2008,[527] it was extended for a further two months, which was permitted by Article 378 of the CCP. Thus, Mr. Martínez's pretrial detention lasted a total of four years and nine months. Regarding the alleged unreasonableness of this period, the Court notes that, in the present case, the time limits of the preventive detention were set based on a certain procedural act, i.e. the imminent holding of the trial and issuance of the judgment. However, the judgment was not issued until 13 months later, and there is no evidence that the need for Mr. Martinez to continue in preventive detention was reviewed during that period. Therefore, this preventive measure also exceeded the limits of reasonableness.

369. In view of the foregoing, this Court considers that the State violated Articles 7(1), 7(3) and 7(5) of the Convention, to the detriment of Jorge Martínez Meléndez.

B.2. Article 7(6) of the Convention

370. Article 7(6) of the Convention protects the right of all persons deprived of liberty to challenge the legality of their detention before a competent judge or court, so that the latter may decide, without delay, on the lawfulness of their arrest or detention and, if necessary, order their release.[528] The Court has emphasized that that the authority that must decide on the legality of the arrest or detention must be a judge or court. Thus, the Convention ensures that the deprivation of liberty is under judicial control. It has also stated that the means to challenge a detention "must not only exist formally in law, but must also be effective, that is, they must fulfill the objective of obtaining without delay a decision on the legality of the arrest or detention."[529]

371. First, as already noted, in the instant case Mr. Martínez filed a writ of *habeas corpus* against his pretrial detention, which was resolved by the Constitutional Chamber on June 23, 2006. The Court has already analyzed the actions of the Constitutional Chamber in relation to Articles 7(1), 7(3) and 7(5) and does not have other elements to assess the alleged ineffectiveness of the remedy, beyond the fact that its outcome did not comply with the aforementioned parameters of the Convention.

372. Second, in decision No. 2008-01650 of February 1, 2008, the Constitutional Chamber declared admissible the writ of *habeas corpus* filed by Mr. Martínez's defense on January 24, 2008, and ruled that "the appellant was detained without any resolution legitimately ordering his deprivation of liberty" between January 17 and 29, 2008. Therefore, it ordered the State

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525 *Cf. Case of Suarez Rosero v. Ecuador*, para. 77, and *Case of Argüelles et al. v. Argentina*, *supra,* para. 130.

526 *Cf.* Judgment No. 680-2007 of the Trial Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folio 35363).

527 This decision is not included in the case file, but is mentioned in decision No. 2008-01650 of the Constitutional Chamber, of February 1, 2008 (evidence file, folio 2174).

528 *Cf. Habeas Corpus under Suspension of Guarantees (Arts. 27.2, 25(1) and 7(6) of the American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987, para. 33; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 124, and *Case of Pollo Rivera et al. v. Peru, supra,* para. 130.

529 *Cf. Case of Acosta Calderón v. Ecuador. Merits, reparations and costs.* Judgment of June 24, 2005. Series C No.129, para. 97, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of October 2, 2015. Series C No. 301, para. 218.

to pay damages, but without ordering his release, since by that date the Court of the First Judicial Circuit of San José had ordered a two-month extension of the pretrial detention.[530] Thus, in application of the principle of complementarity, the Court will not rule on the alleged violation of Article 7(6) of the Convention, given that the responsibility of the State was determined through its own domestic mechanisms, and, consequently, it was ordered to pay damages to Mr. Martínez as compensation for his illegal detention in preventive custody for a period of 12 days.

VIII.III
RIGHT TO JUDICIAL GUARANTEES
(Articles 8(1) and 8(2) of the Convention, in relation to Article 1(1) thereof)

373. The Court will now analyze the violations of the right to judicial guarantees alleged by the parties: first, with respect to the right to be heard by a competent, independent and impartial judge or court in the cases of Rafael Rojas Madrigal (Group 2), Jorge Martínez Meléndez (Group 4) and Miguel Mora Calvo (Group 7); secondly, in relation to the alleged violation of the right to be tried within a reasonable time to the detriment of Jorge Martínez Meléndez; and third, in relation to the alleged violation of the right to defense in the cases of Jorge Martínez Meléndez and Luis and Enrique Archbold Jay (Group 3).

A. Right to be heard by a competent, independent and impartial judge

A.1. Arguments of the Commission and the parties

374. With respect to Rafael Rojas Madrigal (Group 2) the ***Commission*** argued that the fact that the same judges were members of the Third Chamber that heard more than one appeal related to the same criminal proceeding, and that they analyzed the merits and not only questions of form, violated the requirement of impartiality established in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to his detriment.

375. However, the Commission did not find that the involvement of a judicial authority in determining the pretrial detention and later in the trial was, in itself, incompatible with the right to an impartial judge. It emphasized that it did not have sufficient elements to determine whether in the cases of Rafael Rojas (Group 2) and Jorge Martínez Meléndez (Group 4), this guarantee was affected by such a situation.

376. The ***Inter-American Defenders*** argued with respect to Group 2, Rafael Rojas Madrigal, that he filed several appeals for cassation and review, but did not have the guarantee of an impartial judge because in several of these challenges, the judges who heard the appeal had already heard the facts beforehand.

377. The ***Factum Consorcio*** representatives alleged, with respect to Group 4, Jorge Martínez Meléndez, the violation of Article 8(1) of the Convention due to the lack of impartiality and objectivity of the judge, as well as the violation of the territorial jurisdiction of the criminal judges, for three different reasons. First, because Judge Adela Sibaja Rodríguez was replaced due to incapacity shortly before the ruling was issued, even though the period of 20 working days established by law for the suspension of hearings, due to the incapacity of a judge, had not elapsed. They explained that this judge was replaced by Judge Miriam

[530] *Cf.* Decision No. 2008-01650 of the Constitutional Chamber of the Supreme Court of Justice, of February 1, 2008 (evidence file, folio 2175).

Sandí Murcia, who, in addition to not having the respective appointment as a Judge of the Republic, did not have territorial jurisdiction, since she exercised her functions in another jurisdiction. In this regard, they alleged that there was a loss of impartiality and objectivity due to the absence of immediacy of the evidence, since it is impossible for a person to issue a guilty verdict if she did not actively participate in the cross-examination of the witnesses, nor in the questions and answers given by the parties. They indicated that, in accordance with national and international legislation, a new trial should be initiated to guarantee the immediacy of the evidence.

378. Secondly, because the President of the Court, Marco Mairena Navarro, responsible for trying Mr. Martínez, already had a previous subjective opinion on the facts and the criminal liability of the alleged victim, having expressed his opinion on the matter three years before the Criminal Court that convicted him was established, that is, during the intermediate stage of the proceedings in the ruling of July 30, 2004, in which the pretrial detention of one of the defendants was decided.

379. Third, because Judge Ligia Arias Céspedes of the criminal court that tried Mr. Martínez expressed an interest and showed that she had information and knowledge about the case not permitted by law, and that she guided the witnesses in the hearings held on July 17 and 20, 2006.

380. With respect to Group 7, Miguel Mora Calvo, the ***SIPDH*** representatives alleged that Judge Javier Llobet who decided to extend his precautionary measure of pretrial detention, later formed part of the Court of Appeal that convicted him, thus compromising his impartiality and losing objectivity, as this could imply a preconceived opinion.

381. The ***State*** acknowledged, with respect to Group 2, Rafael Rojas, that there was a formal violation of the principle of judicial impartiality, since in case 99-000136-065-PE, the Third Chamber heard two appeals in cassation. However, no harm was caused because, although in the cassation filed against the resubmission trial the regular and alternate judges participated again, in their decision they fully accepted the claims raised by the plaintiff and reduced his sentence from 4 years in prison to 3 years for the offense of using a false document. In addition, the matter was resolved internally through decision No. 2010-00544, which handed down the minimum sentence of one year (*supra* para. 183). Finally, it argued that in cases such as that of Rafael Rojas, in which more than five motions for review were filed, it was impossible not to require the participation of judges who had already heard the case previously.

382. With respect to Group 4, Jorge Martínez Meléndez, the State indicated that the representative's arguments are speculative and do not prove this violation. Finally, with respect to Group 7, Miguel Mora Calvo, it pointed out that the alleged victim did not specify which particular aspects constituted the alleged violation of Article 8(1), that is to say, in what way Judge Llobet expressed preconceived criteria or views on the merits of the case when considering the extension of the precautionary measure of imprisonment against him. It argued that for a judicial authority to participate in the determination of preventive detention and subsequently in the trial is not incompatible with the right to an impartial judge.

A.2. Considerations of the Court

383. Article 8(1) of the Convention guarantees every person the right to a hearing by "a competent […] tribunal, previously established by law," a provision that is related to the concept of a natural judge, one of the guarantees of the due process of law, which has even been accepted by certain sectors of the doctrine, as a condition of such article. This implies

that, in general, people have the right to be tried by a competent tribunal, in accordance with legally established procedures.[531]

384. The existence and jurisdiction of a competent court or judge derives from the law, which has been defined by the Court as the "general legal norm tied to the general welfare, approved by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose."[532] Consequently, in a State governed by the rule of law, only the legislative branch is able to regulate, by means of laws, the jurisdiction of the courts.[533]

385. The Court also recalls that the right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the assurance that the judge or court presiding over his case brings to it the utmost objectivity. This Court has established that impartiality requires that the judge who intervenes in a particular dispute should approach the facts of the case lacking any subjective prejudice and, likewise, offering sufficient guarantees of an objective nature that inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.[534] The impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the dispute.[535] This means that the judge must act without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect,[536] acting only and exclusively on the basis of – and guided by – the law.[537]

386. The Court also reiterates that the personal impartiality of a judge must be presumed, unless there is evidence to the contrary.[538] For the analysis of subjective impartiality, the Court must attempt to ascertain the personal interests or motivations of the judge in a particular case.[539] As to the type of evidence required to prove subjective impartiality, it is necessary to determine whether a judge has shown hostility or if he has arranged for the case to be assigned to him for personal reasons.[540] In turn, the so-called objective approach test

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[531] *Cf. Case of Barreto Leiva v. Venezuela*. *Merits, reparations and costs*. Judgment of November 17, 2009. Series C No. 206, para. 75.

[532] *Cf. The Expression "Laws" in Article 30 of the American Convention on Human Rights.* Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 38, and *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 56, and *Case of Barreto Leiva v. Venezuela, supra,* para. 76.

[533] *Cf. Case of Barreto Leiva v. Venezuela, supra,* para. 76.

[534] *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 171, and *Case of the Dismissed Workers of PetroPerú et al. v. Peru, supra,* para. 160.

[535] *Cf. Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, Para. 146, and *Case of the Dismissed Workers of PetroPerú et al. v. Peru, supra*, para. 160.

[536] *Cf.* Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary.

[537] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court) v. Venezuela*, *supra,* para. 56, and *Case of the Dismissed Workers of PetroPerú et al. v. Peru, supra,* para. 160.

[538] *Cf. Case of Apitz Barbera et al, ("First Contentious Administrative Court) v. Venezuela, supra,* para. 56, *and 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. 208.

[539] *Cf. Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs. Judgment of February 24, 2012. Series C No. 239*, Para. 234, and Case of Duque v. Colombia, supra, para. 163.

[540] *Cf. Case of Atala Riffo and Daughters v. Chile*, *supra, para.* 234, and *Case of Duque v. Colombia*, *supra, para.* 163, citing: ECHR, *Case of Kyprianou v. Cyprus*, No. 73797/01, Judgment of December 15, 2005, para. 119 ("As regards the type of prof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal" reasons). See also, ECHR, *Case of Bellizzi v. Malta*, No. 46575/09, Judgment of June 21, 2011, para. 52 and end of November 28, 2011, para. 52, and *Case of Cubber v. Belgium*, No. 9186/80, Judgment of October 26, 1996, para. 25. In addition, the Court noted that the subjective impartiality of a judge may be determined, depending on the specific circumstances of the case, based on the judge's conduct during the proceedings, the content, arguments and language used in the decision, or the reasons for conducting the investigation, which indicate a lack of professional

consists in determining whether the judge in question offered sufficient elements of conviction to exclude any legitimate misgivings or well-grounded suspicion of partiality regarding his or her person.[541]

387. Article 8(2) of the Convention establishes that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to the law." Thus, the Court is of the view that the principle of presumption of innocence is founded upon the existence of judicial guarantees.[542]

388. The Court has also pointed out that the principle of presumption of innocence implies that judges should not start a proceeding with a preconceived idea that the accused has committed the crime as charged.[543] In turn, the State should not convict an individual informally or issue an opinion in public that contributes to forming public opinion, while the criminal responsibility of that individual has not been proven.[544]

A.2.1 Situation of Jorge Martínez Meléndez (Group 4)

A.2.1.1. Alleged lack of impartiality of Judge Marco Mairena

389. In the instant case, on July 30, 2004, the Trial Court of the First Judicial Circuit of San José ruled by majority vote that the pretrial detention of Marvin Martínez Meléndez, brother of the alleged victim Jorge Martínez Meléndez, should be maintained. Judge Marco Mairena was a member of the trial court that issued the pretrial detention order and was part of the majority vote. Although the alleged victim was not a party to the case, the trial court did mention him in the following terms:[545]

> […] the judgment [conviction] issued [against Marvin Martínez] shows that nearly four hundred million colones were diverted in various ways, much of which ended up in the accounts of the companies managed by the Martínez Meléndez brothers. This money – the final destination of which is still not known - enabled the [co-defendant] Jorge Martínez to flee the country and spend nearly four years living in Canada. Therefore, it is clear that, without trying to equate the rebellious conduct of Jorge Martínez to that of Marvin Martínez, the Court cannot ignore the fact that the money was diverted by the accused[546] to the accounts of companies that were shown to be related to the Martínez Meléndez family. This increases the possibility that, with the same money that Jorge Martínez spent four years living in Canada, Marvin Martínez could also do so, which is why the majority of the Court considers that there is a danger of flight […].

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distance from the decision. *Cf.* ECHR, *Case of Kyprianou v. Cyprus*, No. 73797/01, G.C., Judgment of December 15, 2005, paras. 130 - 133.

541 *Cf. Case of Case of Apitz Barbera et al, ("First Contentious Administrative Court")*, *supra, para.* 56, and *Case of Barreto Leiva v. Venezuela*, *supra,* para. 98.

542 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, *supra, para.* 77, and *Case of Zegarra Marín v. Peru, supra,* para. 121

543 *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra, para.* 184, and *Case of Zegarra Marín v. Peru, supra,* para. 123.

544 *Cf. Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs.* Judgment of November 25, 2004. Series C No. 119, para. 160, and *Case of Acosta et al. v. Nicaragua*, supra, para. 190.

545 *Cf.* Decision of the Criminal Court, of July 30, 2004 (evidence file, folio 26146).

546 On August 21, 1998, the Office of the Assistant Prosecutor for Economic, Corruption and Tax Crimes filed charges against Jorge Martínez Meléndez, [SMM], Marvin Martínez Meléndez and [HBH] for the crime of fraud to the detriment of the Social Compensation and Land Titling Program and the State. *Cf.* Decision of the Special Duty Criminal Court of San José, of August 22, 1998 (evidence file, folio 2017). On September 7, 2000, the Criminal Court of San José, considering the Indictment and Request for Opening of a Trial by the Public Prosecutor's Office against Jorge Martínez Meléndez, Marvin Martínez Meléndez, [SMM] and [HBH] for the crimes of embezzlement to the detriment of the Social Compensation and Land Titling Program, decided to order the complex processing of the case, as well as to maintain the 'contempt of court' ruling and the international warrant for the arrest of Jorge Martínez Meléndez, and to summon the rest of the parties to this proceeding to a preliminary hearing. *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of September 7, 2000 (evidence file, folio 2054).

390. Thus, in the decision on the pretrial detention of Marvin Martínez Meléndez, assertions were made about the conduct of Jorge Martínez Meléndez, since it was stated that he fled Costa Rica and remained in Canada with funds that a previous judgment had determined had been diverted to the accounts of the companies of the Martínez Meléndez brothers. However, in the opinion of this Court, such rulings do not constitute an assessment of the criminal liability of Jorge Martínez Meléndez.

391. Subsequently, Judge Marco Mairena was a member of the trial court and was part of the majority vote that on July 17, 2007 convicted Jorge Martínez Meléndez.[547] In this regard, the Court considers that this was a ruling of a collegiate body composed of three judges, and that the decision was adopted by the unanimous vote of all its members, which is why the participation of Judge Mairena does not violate Mr. Martínez Meléndez's right to an impartial judge.

A.2.1.2. Alleged violation of the right to an impartial and competent judge owing to the substitution of Judge Adela Sibaja by Judge Miriam Sandí Murcia

392. It is evident from the case file before this Court that Judge Sibaja was replaced by Judge Sandí Murcia on May 15, 2007 in case No. 03-82-016-TP against Jorge Martínez.[548] The representatives of Mr. Martínez alleged that this substitution violated his right to a qualified and competent judge and breached the rule of impartiality and objectivity of a judge, given that Judge Sandí did not have the necessary appointment to hear the criminal case nor territorial jurisdiction and, furthermore, she had no familiarity with the evidence during her appointment as fourth judge, owing to the lack of direct interaction with the matter. The Court will address these points below.

393. First, it is clear from official communication 708-APCC-2007 of the Judicial Branch Department of September 12, 2007,[549] that Judge Sandí Murcia was appointed as a criminal judge on the dates of the trial hearings; however, it is recorded that she was appointed to the Criminal Court of Desamparados-Hatillo, which is part of the Third Judicial Circuit of San José, with its seat in Desamparados, while the case in question corresponded to the Criminal Court of the First Judicial Circuit of San José.[550]

394. In this regard, Article 47 of the Costa Rican Code of Criminal Procedure in force at the time established the rules for determining the territorial jurisdiction of the courts. Specifically, paragraph a) stated:

> The court shall have jurisdiction over criminal offenses committed within the judicial district where it exercises its functions. If there are several judges in the same district, they shall divide their tasks in an equitable manner, in accordance with the distribution established for this purpose. In case of doubt, the judge who has ordered the proceedings shall hear the case. The judge who has issued the first order or resolution of the proceeding shall be deemed to have acted first.[551]

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547 *Cf.* Judgment No. 680-2007 of the Trial Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folios 34053 to 35363).

548 *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folios 33985 and 33986).

549 *Cf.* Official letter 078 APCC 2007 of the Personnel Department of the Judiciary, September 12, 2007 (evidence file, folio 27356).

550 The Criminal Court of Desamparados-Hatillo, forms part of the Third Judicial Circuit of San José, according to the document of the Planning Department of the Judicial Analysis Section "Territorial and Hierarchical Jurisdiction of the Courts and Offices of the Judicial Branch" 1005-PLA-2004 June 2004 (updated in January 2015), from the web page: https://www.poder-judicial.go.cr/planificacion/images/documentos/licoteje.pdf

551 *Cf.* Legislative Assembly of Costa Rica. Criminal Procedure Code [Law 7594] (April 10, 1996) Article 47.

395. In addition, Article 29(1) of the Organic Law of the Judiciary sets forth the procedure for the substitution of a judge, when necessary:

> 1.- Judges shall be substituted by other judges of the same area, in the manner established by the President of the Court. If they, in turn, are unable to hear the case, the respective substitutes shall be called and, if the case also includes the substitutes, the incumbent of the office where the case is located shall hear the matter, despite grounds for disqualification and without disciplinary liability for that reason.[552]

396. In a decision dated March 11, 2008, the Third Chamber ruled on this point, stating that the composition of the court by Judge Sandí Murcia, among others, was in keeping with the Costa Rican legal system:

> […] [Judge] Miriam Sandí Murcia, joined the court as fourth judge, pursuant to the provisions of Article 336 subparagraph d)[553] of the Code of Criminal Procedure, and had therefore been participating in all the trial hearings. Therefore, this is not a mere substitution. […] the certification provided shows that the said judge is assigned to the Criminal Court of San José, Desamparados Section, which is a section of the San José Criminal Court, in accordance with Articles 22 and 96 bis final paragraph[554] of the Organic Law of the Judiciary, and was sworn in from the moment she was appointed to the position, as notified to the undersigned judges by the Office of the Supreme Court of Justice, from March 5, 2005 to December 5, 2007. Therefore, it is not true that she was not qualified to hear this matter.[555]

397. In this regard, the representatives did not provide sufficient arguments or evidence to disprove the Third Chamber's comments on a matter that involves interpreting Costa Rican law in relation to the organization of the Judiciary. Therefore, this Court does not have the necessary elements to decide whether there was a violation of the principle of a competent judge with respect to the participation of Judge Sandí Murcia in judgment No. 680-2007, issued on July 17, 2007 against Mr. Martínez Meléndez.[556]

398. With respect to the alleged violation of the principle of immediacy of the evidence, according to Article 328 of the CCP in force at the time, "the trial shall be conducted with the uninterrupted presence of the judges and of the parties."[557] In this regard, this Court notes that Judge Sandí Murcia was appointed as the fourth judge[558] of the criminal case in session number 18-06 of March 14, 2006. In that session it was stated that, "the fourth judge will participate in the trial in a passive manner, not having the power to question witnesses, but

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[552] *Cf.* Legislative Assembly of Costa Rica. Organic Law of the Judiciary [Law 8] (November 29, 1937) Article 29.

[553] *Cf.* Legislative Assembly of Costa Rica. (November 29, 1937).Code of Criminal Procedure Law 7594 (10 April 1996): "Continuity and suspension: The hearing shall be held without interruption, for as many consecutive sessions as may be necessary until its completion; however, it may be suspended for a maximum period of ten days, in the following cases: [...] d) if any judge, prosecutor or defense counsel becomes ill to the point of being unable to continue to act in the trial, unless the latter two can be replaced immediately or the court has been constituted, from the start of the hearing, with a higher number of judges than that required for its constitution, so that the substitutes integrate the court and allow the continuation of the hearing […]."

[554] *Cf.* Legislative Assembly of Costa Rica. (November 29, 1937). Organic Law of the Judiciary [Law 8]: Article 96 bis.- "The criminal trial courts shall be constituted with only one of their members to hear the following cases: […]in places that are not the seat of a trial court, the court may provide for the operation of other offices attached to that court; these shall be heard by the number of judges necessary, based on the required efficiency of the service. […].judges of the main office and of the attached offices may substitute for each other reciprocally."

[555] *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folios 33985 and 33986)

[556] *Cf.* Judgment No. 680-2007 of the Criminal Court of the First Judicial Circuit of San José, of July 17, 2007 (evidence file, folio 35363).

[557] *Cf.* Legislative Assembly of Costa Rica. (April 10, 1996) Article 328. Code of Criminal Procedure [Law 7594].

[558] *Cf.* Organic Law of the Judiciary, Article 96.- "The criminal trial courts shall be composed of at least four judges and shall be constituted, in each case, with three of them, to hear the following matters: 1.- The trial phase, in proceedings against persons who at the date of the facts belonged to the Supreme Powers of the State, or for crimes punishable by more than five years of prison, unless the abbreviated procedure is applicable […]."

having the power to participate in all deliberations, and if necessary, she will replace one of the judges."[559] In addition, the record shows that the trial stage began[560] on April 3, 2006, the date on which the first hearing took place and at which Judge Sandí Murcia was present.[561] In addition, when deciding on the cassation appeal filed by Mr. Martínez in relation to this point, the Third Chamber indicated in its ruling of March 11, 2008, that Judge Sandí "ha[d] participated in all the trial hearings."[562]

399. On this matter, the representatives did not provide this Court with sufficient arguments or evidence to prove their assertion that the fact that Judge Sandí Murcia participated only passively in the trial until the moment she replaced Judge Sibaja implies her lack of immediacy with the evidence or a lack of impartiality or objectivity. Therefore, the Court does not find a violation of the American Convention in relation to this point.

400. The representatives further alleged that Mr. Martínez's right to an impartial and competent judge was violated with respect to the substitution of Judge Sibaja Rodríguez by Judge Sandí Murcia, because since this was a complex proceeding and the suspension of the hearings due to the judge's incapacity could last up to 20 working days; however, it was on the third day of Judge Sibaja Rodríguez's absence that she was replaced by Judge Sandí Murcia.

401. This Court notes that the representatives of Mr. Martínez had already made this claim in the cassation appeal decided by the Third Chamber on March 11, 2008, in the following terms:

> […] the Court proceeded with the substitution of Judge Adela Sibaja Rodríguez by Judge Miriam Sandí Murcia, […] considering that the former had been granted incapacity [leave] for more than ten days […]. That is to say, as the complainants indicate, it was overlooked that the suspension period allowed by Article 336 in relation to Article 378 paragraph c) was twenty days and not ten, as it is a matter of complex processing. However, this assessment is not important, since Article 336, in subparagraph d), specifically provides that such suspension will occur in the event that any of the judges becomes ill to the point of being unable to act in the trial, unless the Court has been constituted from the beginning of the hearing with a higher number of judges than required for its composition, so that the substitutes may join the Court and allow the continuation of the hearing. Thus, according to what has been established, the suspension will not be justified when the Court has been integrated in this way, which is the case we are dealing with here. Therefore, the sentencing body was right to proceed, given that, based on the notion of reasonableness, it involved the illness of a judge that covered a prolonged period and that two of the accused had been held in pretrial detention on an exceptional basis, solely to ensure their presence at the trial […].[563]

402. In this regard, this Court considers that the representatives of Mr. Martínez did not offer any arguments or evidence to demonstrate that the actions of the Costa Rican courts violated his right to a competent and impartial judge, and therefore it finds no violation in relation to the substitution of Judge Sibaja after 10 days.

A.*2.1.3. Alleged lack of impartiality of Judge Arias Céspedes*

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559 *Cf.* Record of Proceedings, Hearings number 1 and 2 of April 3, 2006 (evidence file, folio 24752).

560 The trial stage is fundamental, since it is the procedural moment in which the evidence is presented to resolve the dispute. Article 326 of the Code of Criminal Procedure in force at the time, stated: "The trial is the essential phase of the proceeding. It shall be conducted on the basis of the accusation, in an oral, public, adversarial and continuous manner."

561 *Cf.* Record of Proceedings, Hearings number 1 and 2 of April 3, 2006 (evidence file, folio 24751).

562 *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33986).

563 *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folios 33984 and 33985).

403. The Factum Consorcio representatives also alleged the violation of the right to an impartial judge because, allegedly, in the trial hearings on July 17[564] and 20,[565] 2006, in case No. 2003-000082-016-TP against Mr. Martínez, Judge Arias Céspedes expressed an interest in assisting the Public Prosecutor's Office in its prosecutorial role, to the detriment of the defense's position, by interrupting in the defense's cross-examination to guide and prompt the witness.

404. On this point, after an analysis of the minutes of the hearings of July 17 and 20, 2006, this Court considers that there is no evidence to support the allegations of the representatives that Judge Arias Céspedes acted under direct or indirect influence, encouragement, pressure, threats or interference, or that she expressed hostility against Mr. Martínez, but rather that she maintained her role of guiding the trial in an impartial manner. In this regard, the representatives of Mr. Martínez did not provide videos of the trial hearings of July 17 and 20, 2006 and there are no elements in the trial records to confirm their allegations. Consequently, this Court does not have the necessary elements to prove that there was a violation of the principle of an impartial judge with respect to the actions of Judge Arias Céspedes in the aforementioned criminal case. Therefore, the Court considers that no violation of the right to an impartial judge established in Article 8(1) of the Convention has been proven in relation to this point

A.2.2. Situation of Rafael Rojas Madrigal (Group 2)

File 99-000136-065-PE (Use of a false document)

405. The Inter-American Defenders alleged that in the instant case the State violated the right to be heard by an impartial judge or court to the detriment of Rafael Rojas Madrigal, given that some judges ruled several times on the appeals for cassation or review filed by him and his defense counsel in the same criminal case.

406. First, it is clear from the case file that in criminal case No. 99-000136-065-PE against Mr. Rojas, a total of four cassation appeals were filed, which were decided in two rulings. Initially, two cassation appeals filed by Mr. Rojas[566] and his defense counsel,[567] respectively, were analyzed jointly in the decision of the Third Chamber of February 2, 2001.[568] In said decision, the Third Chamber heard the appellants' allegations concerning the lack of intellectual and evidentiary grounds, the erroneous assessment of the evidence and the illegitimate grounds for setting the sentence.[569] It annulled the challenged decision due to lack of grounds regarding the setting of the sentence, and ordering a retrial.[570]

407. Subsequently, on March 28, 2001, the Court of the Second Judicial Circuit of Alajuela again issued judgment 172-2000.[571] Mr. Rojas and his defense counsel then filed two more

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564 *Cf.* Record of Proceedings, Hearings Nos. 98 and 99 of July 17, 2006 (evidence file, folio 25027).

565 *Cf.* Record of Proceedings, Hearings Nos. 103 and 104 of July 20, 2006 (evidence file, folio 25036).

566 *Cf.* Writ of cassation filed by Rafael Rojas Madrigal against Judgment No. 172-2000, on December 18, 2000 (evidence file, folio 966).

567 *Cf.* Writ of cassation filed by Luis Fernando Gonzáles against Judgment No. 172-2000, on December 21, 2000 (evidence file, folio 997).

568 *Cf.* Decision No. 2001-000122 of the Third Chamber of the Supreme Court of Justice, of February 2, 2001 (evidence file, folio 1010).

569 *Cf.* Writ of cassation filed by Luis Fernando Gonzáles against Judgment No. 172-2000, on December 21, 2000 (evidence file, folios 998 to 1007).

570 *Cf.* Decision 2001-000122 of the Third Chamber of the Supreme Court of Justice, of February 2, 2001 (evidence file, folio 1012 to 1013).

571 *Cf.* Judgment No. 172-2000 of the Court of the Second Judicial Circuit of Alajuela, of March 28, 2001 (evidence file, folio 33470 to 33482).

appeals against it on April 2[572] and 24,[573] 2001. In the latter, the defense counsel once again alleged "illegitimate grounds for the setting of the sentence."[574] In this regard, in a decision on June 8, 2001, the Third Chamber analyzed the sentence imposed and confirmed that, in effect, its *quantum* was based on facts on which the statute of limitations had expired. It also pointed out certain aspects that were not considered by the trial court, and therefore decided that the four-year sentence imposed was disproportionate, reduced it to three years, granted the defendant the benefit of a suspended sentence and ordered his immediate release.

408. In the rulings of February 2, 2001[575] and June 8, 2001,[576] the Third Chamber of the Supreme Court of Justice was constituted, *inter alia*, by Judges Daniel González, Mario A. Houed, Rodrigo Castro and Carlos Redondo, the latter as an alternate judge. On both occasions, these judges ruled on the alleged lack of grounds for the sentence in two different judgments, in which the sentence to be imposed on Mr. Rojas was determined (*supra* para. 177). Although in the case under study the aforementioned judges decided aspects of substance and not only of form,[577] and therefore should have abstained from participating in the second decision of February 8, 2001, this Court notes that in both decisions, the Third Chamber declared admissible the appeals filed in favor of Mr. Rojas. Therefore, there is no evidence of any prejudice caused by the fact that these judges were members of the Chamber on both occasions.

409. Secondly, in August 2001, Mr. Rojas filed a motion for review, which the Third Chamber declared inadmissible in a decision of September 14, 2001, finding that it did not meet the requirements stipulated in Article 410 of the Code of Criminal Procedure, which requires "specific reference to the grounds on which it is based."[578] On November 29, 2004, Mr. Rojas requested the withdrawal of "any motion for review filed against judgment No. 172-2000," stating that he had not received any technical legal support for its presentation. This withdrawal was accepted by the Third Chamber, including by Judges Rodrigo Castro, Jesús Ramírez and José Manuel Arroyo,[579] who were the same judges who declared inadmissible the motion of review filed in August 2001. [580] It should be noted that Judge Rodrigo Castro had already formed part of the composition of the Third Chamber that issued the two aforementioned cassation rulings (*supra* paras. 406 and 407).

410. It is evident from the rulings on the motion for review and its withdrawal, that in both decisions none of the judges examined substantive issues,[581] resolving only procedural matters. Therefore, the right to an impartial judge was not violated.

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572 *Cf.* Appeal for cassation filed by Rafael Rojas Madrigal against Judgment No. 172-2000, of April 2, 2001 (evidence file, folio 1016).

573 *Cf.* Appeal for cassation filed by Luis Fernando González against Judgment No. 172-2000, on April 24, 2001 (evidence file, folio 1021).

574 *Cf.* Appeal for cassation filed by Luis Fernando González against Judgment No. 172-2000, on April 24, 2001 (evidence file, folio 1022)

575 *Cf.* Decision No. 2001-000122 of the Third Chamber of the Supreme Court of Justice, of February 2, 2001 (evidence file, folio 1010).

576 *Cf.* Decision No. 00550-2001 of the Third Chamber of the Supreme Court of Justice, of June 8, 2001 (evidence file, folio 1033).

577 *Mutatis mutandis*, Case *Herrera Ulloa v. Costa Rica, supra, para.* 174.

578 *Cf.* Decision No. 2001-00882 of the Third Chamber of the Supreme Court of Justice, of September 14, 2001 (evidence file, folio 1040).

579 *Cf.* Notification from the Third Chamber of the Supreme Court of Justice, of February 23, 2005 (evidence file, folio 1042).

580 *Cf.* Decision No. 2001-00882 of the Third Chamber of the Supreme Court of Justice, of September 14, 2001 (evidence file, folio 1040).

581 Case *of Herrera Ulloa v. Costa Rica, supra, para.* 174.

411. Third, in 2005 Mr. Rojas filed two motions for review against the second judgment 172-2000, which were decided by a single ruling on October 19, 2007,[582] including by Judge Jesús Ramírez, who had been among the judges of the Third Chamber that declared inadmissible the motion for review filed in August 2001, and admitted the request for withdrawal of November 2004 (*supra* paras. 178, 179 and 409). Subsequently, between February and March 2007, Mr. Rojas filed a special motion for review against the second judgment 172-2000, based on Transitory Provision I of Law 8503.[583] This special review was decided by Judge María Elena Gómez C., among other judges. In addition, on August 12, 2008,[584] Mr. Rojas initiated another review procedure, which was heard, *inter alia*, by Judges José Manuel Arroyo and Jesús Ramírez, and decided on October 29, 2010.[585] Judges María Elena Gómez, José Manuel Arroyo and Jesús Ramírez formed part of the composition of the Third Chamber that accepted the withdrawal of the motion for review filed by Rafael Rojas in November 2004.[586] However, as already stated, since they did not rule on substantive issues on that occasion, the participation of these judges in hearing new motions for review did not imply a breach of their impartiality.

412. Fourth, this Court notes that the Judge Jesús Ramírez also heard the aforementioned motions for review filed in 2005 and 2008 by Mr. Rojas (*supra* paras. 180 and 185). In the motions filed in 2005, Mr. Rojas alleged that his right to due process was violated, due to the alleged failure to observe the principle of correlation between indictment and sentence. He alleged that the indictment did not describe the specific circumstances of the crimes of use of a false document and forgery, and that, in view of the statute of limitations of one of the crimes, the prosecutor decided to start the case for a new offense but without extending the indictment. In this regard, in decision No. 2007-01177 the Third Chamber declared the motion inadmissible, among other reasons, because:

> It was not necessary to extend any indictment, since if this part did not coincide with the facts considered proven, it was only to benefit the accused, in the sense that one of the facts in the accusation could not be taken as true. Likewise, [...] both the indictment and the list of proven facts contain an adequate and sufficient description of the act for which the defendant was charged and for which he was convicted [...].[587]

413. In the motion for review filed in 2008, the only reason stated was the alleged violation of due process, since "[he] was not notified of or charged with the acts [committed] to the detriment of the public interest […] during the investigation stage." This motion was declared inadmissible based on Article 411 of the Code of Criminal Procedure, which provides that in the review phase, claims that are manifestly unfounded shall be inadmissible. On October 29,

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582 *Cf.* Decision No. 2007-01177 of the Third Chamber of the Supreme Court of Justice, of October 19, 2007 (evidence file, folio 1045). The date on which the appeals were filed does not appear in the evidence. However, according to information provided by the State, the first appeal was filed on July 12, 2005. *Cf.* Brief of the State of September 13, 2017 (merits file, folio 3396). In turn, the representatives stated that the appeal was filed on August 1, 2005. *Cf.* Brief of the representatives of September 28, 2017, (merits file, folio 3502). Regarding the second appeal, the evidence shows that "[...] by resolution of 8:10 a.m. on October 28, 2005, this Chamber ordered the joinder of a second review proceeding filed by the convicted person […]"[582] *Cf.* Decision No. 2007-01177 of the Third Chamber of the Supreme Court of Justice, of October 19, 2007 (evidence file, folio 1046).

583 *Cf.* Decision No. 2010-00544 of the Third Chamber of the Supreme Court of Justice, of May 28, 2010 (evidence file, folios 33581 and 33588).

584 The date on which the appeal was filed is not recorded in the evidence. However, according to information provided by the State, it was filed on August 12, 2008. *Cf.* Brief of the State of September 13, 2017, Table 2 (merits file, folio 3396).

585 *Cf.* Decision No. 2010-01205 of the Third Chamber of the Supreme Court of Justice, of October 29, 2010 (evidence file, folio 33589).

586 *Cf.* Notification card of the Third Chamber of the Supreme Court of Justice, of February 23, 2005 (evidence file, folio 1042).

587 *Cf.* Decision No. 2007-01177 of the Third Chamber of the Supreme Court of Justice, of October 19, 2007 (evidence file, folios 1045-1050).

2010, the Third Chamber found Mr. Rojas' claims to be groundless, since they were based on "a factual assumption completely unrelated to the reality of the case file […]."[588]

414. The Court notes that in its decision of October 19, 2007, the Third Chamber addressed the claim filed by the appellant in a well-reasoned manner, while in the decision of October 29, 2010 it merely dismissed the appellant's insistence on the same matter precisely because it had already been addressed previously and because the motion was manifestly unfounded, that is to say, on the second occasion it did not examine the merits of the matter raised. Therefore, this Court does not consider that the fact that on both occasions the Third Chamber included Judge Jesús Ramírez constitutes a violation of the guarantee of an impartial judge.

A.2.3. Situation of Miguel Mora Calvo (Group 7)

415. In the instant case, the SIPDH representatives alleged the violation of the right to an impartial judge, established in Article 8(1) of the Convention, to the detriment of Mr. Mora Calvo. They noted that on September 22, 2000, Judge Llobet Rodríguez was a member of the court that issued decision No. 2000-731 on the extension of Mr. Mora Calvo's pretrial detention and, subsequently, on December 5, 2000, the Trial Court of Goicochea, also constituted by Judge Llobet, among others, issued a conviction in criminal case No. 99-003994-042 PE.[589] According to the representatives, because Judge Llobet had been involved in extending the pretrial detention, he would have formed a prior opinion and lost objectivity.

416. In this regard, the Court notes that the Court of Criminal Cassation composed, among others, by Judge Javier Llobet, which extended the pretrial detention, made the following analysis:

> […] An examination of the case file leads to the conclusion that the case was handled diligently by the prosecution, without wasting time and within the reasonable possibilities of investigation, [...], so that no irregularity or negligence was detected. Now, the possibility of the defendants' commission of the crime under investigation is proven by the status of the case file, which shows that the case was sent to trial; and the possibility of a severe penalty arises because of the legal classification established in the indictment of the Public Prosecutor's Office. Consequently, the requirements for the application of Articles 239 and 240 of the Code of Criminal Procedure are satisfied. This leads this Chamber to accept the prosecutor's request, but granting the measure for two months […].[590]

417. It is clear from the foregoing that the Court of Criminal Cassation and, in particular, Judge Llobet, at no time addressed the merits of the case, but rather studied the elements necessary to order pretrial detention, as set forth in the Code of Criminal Procedure. Therefore, this Court does not consider that the right to be tried by an impartial judge was violated in the case of Mr. Mora Calvo.

B. Right to be tried within a reasonable time

B.1. Arguments of the parties

418. Neither the ***Commission*** nor the ***State*** referred to this point. The ***Factum Consorcio*** representatives argued, with respect to Group 4, Jorge Martínez Meléndez, that the State "conducted the criminal proceedings very slowly, did not […] try [the alleged victim] within a

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588 *Cf.* Decision No. 2010-01205 of the Third Chamber of the Supreme Court of Justice, of October 29, 2010 (evidence file, folios 33589 and 33590).

589 *Cf.* Judgment No. 632-2000 of the Trial Court of Goicoechea, of December 5, 2000 (evidence file, folio 20456).

590 *Cf.* Decision No. 2000-731 of the Court of Criminal Cassation, Second Judicial Circuit of San José of September 22, 2000 (evidence file, folio 44980).

reasonable time, [and] did not release him; this was detrimental to his ability to defend himself and to his personal integrity, and violated his right to liberty, subjecting him to cruel and dehumanizing treatment. This situation is clearly reflected in the efforts made to keep him in pretrial detention, exceeding the legally permitted time limits, subjecting him for several years without a break to lengthy and continuous judicial proceedings. Likewise, the delay, for many years, of the judicial proceedings to which he was subjected not only affected his safety but also harmed his physical integrity, dignity, property, freedom and human rights. This was compounded by the fact that the State forcefully interpreted its regulations and exceeded its sovereign power over the alleged victim, in order to keep him in preventive detention during this exceedingly long and unreasonable judicial process.

B.2. Considerations of the Court

419. This Court notes that the Factum Consorcio representatives made two different arguments: the first regarding the reasonableness of the overall duration of the criminal proceedings, and the second, regarding the legality and reasonableness of the pretrial detention. This second aspect has already been addressed in Chapter VIII.II of this judgment, concerning personal liberty, for which reason the Court will not comment on it again.

420. This Court has pointed out that the "reasonable time" referred to in Article 8(1) of the Convention must be assessed in relation to the overall duration of the proceedings until the final judgment is issued.[591]

421. The Court recalls that the facts investigated in a criminal trial must be resolved within a reasonable period of time, since in certain cases a prolonged delay may, in itself, constitute a violation of judicial guarantees.[592]

422. In addition, this Court has considered four elements to determine the reasonableness of a period of time: a) the complexity of the matter; b) the procedural activity of the interested party; c) the conduct of the authorities, and d) the effects on the legal situation of the person involved in the process.[593] The Court recalls that it is for the State to justify, based on the above criteria, the reason why it has required the time elapsed to process the cases and, if it does not do so, the Court has broad powers to make its own assessment in this regard.[594]

423. Accordingly, the Court will determine whether the State respected Mr. Martínez's right to be judged within a reasonable time and will proceed to analyze each of these four elements.

424. Regarding the first element, this Court has taken into account several criteria to determine the complexity of the case, including: i) the complexity of the evidence;[595] ii) the

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591 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, *supra, para.* 71, and *Case of Gutiérrez Hernández et al. v. Guatemala*. *Preliminary objections, merits, reparations and costs.* Judgment of August 24, 2017. Series C No. 339, para. 183.

592 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Favela Nova Brasilia v. Brazil, supra,* para. 217.

593 *Cf. Case of Valle Jaramillo et al. v. Colombia*. *Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 5, 2018. Series C No. 346, para. 135.

594 *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, Para. 156, and *Case Pacheco León et al. v. Honduras. Merits, reparations and costs.* Judgment of November 15, 2017. Series C No. 342, para. 121.

595 *Cf. Case of Genie Lacayo v. Nicaragua*. *Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, Para. 78, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra, para.* 137.

number of procedural subjects[596] or the number of victims;[597] iii) the time elapsed since the violation;[598] iv) the characteristics of the remedies available under domestic law,[599] and v) the context in which the facts occurred.[600] With regard to the second element, namely the procedural activity of the interested party, the Court has considered whether the parties took the necessary steps in the proceedings that could reasonably be expected of them.[601] As for the third element, that is, the conduct of the judicial authorities, the Court has considered that the judges have the duty to direct and guide the process, so as not to sacrifice justice and due legal process in favor of formalism.[602] In relation to the fourth element, that is, the effects on the legal situation of the person involved in the proceedings, the Court has established that the authorities must act with greater diligence in cases where the protection of other rights of the parties involved depends on the duration of the process. [603]

425. With respect to the complexity of Mr. Martínez' case, the Court notes that on September 7, 2000, the Criminal Court of the First Judicial Circuit of San José ordered - in view of the number of documents that formed part of the indictment- the complex processing of the case file, considering that this would "facilitate the doubling of the deadlines established in favor of the parties to allow them to carry out the procedural actions." Moreover, the criminal indictment consisted 135 pages and included 276 facts. The complexity of this process also lay in the fact that it was a criminal case with a plurality of defendants, since there were four defendants and 19 civil defendants.[604] In addition, Mr. Martínez faced charges for 12 crimes of embezzlement. Therefore, this Court considers that there are sufficient elements to conclude that Mr. Martinez's case was a complex criminal case.

426. With regard to the procedural actions carried out by Mr. Martínez, the Special Duty Criminal Court, in its decision of August 22, 1998, found that he was apparently involved in pressuring a witness "so that he would not talk" and participated in the "theft of public documents [to] proceed with their destruction."[605] On the other hand, it is an undisputed fact that on November 28, 1999, Mr. Martínez Meléndez applied for refugee status in Canada. On December 13, 1999, he was declared in contempt of court, and on December 16, 1999, an

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596 *Cf. Case of Acosta Calderón v. Ecuador, supra, para.* 106, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 137.

597 *Cf. Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 156, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 137.

598 *Cf. Case of Heliodoro Portugal v. Panama*, *supra, para.* 150, and *Case Pacheco León and et al. v. Honduras*, *supra,* para. 122.

599 *Cf. Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, Para. 83, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 137.

600 *Cf. Case of Genie Lacayo v. Nicaragua, supra,* paras. 78 and 79, *and Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 137.

601 *Cf. Case of Fornerón and Daughter v. Argentina. Merits, reparations and costs*. Judgment of April 27, 2012. Series C No. 242, para. 69, and *Case Andrade Salmón v. Bolivia, supra,* para. 158.

602 *Cf. Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs*. Judgment of November 25, 2003. Series C No. 101, para. 211, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 144.

603 *Cf*. *Case of Valle Jaramillo et al. v. Colombia, supra,* para. 155, and *Case of Andrade Salmón v. Bolivia, supra,* para. 158.

604 *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of September 7, 2000 (evidence file, folio 2054). Article 376 of the Code of Criminal Procedure in force at that time established the procedure for processing complex matters: "Admissibility. When the processing is complex due to the multiplicity of facts, the large number of defendants or victims or when it involves cases related to the investigation of any form of organized crime, the court, *ex officio* or at the request of the Public Prosecutor's Office, may authorize, through a reasoned decision, the application of the special rules provided for in this Title […]."

605 *Cf.* Decision of the Special Duty Criminal Court of August 22, 1998, (evidence file, folio 26262).

international warrant was issued for his arrest.[606] Thus, Mr. Martínez remained abroad for 4 years and 7 days,[607] out of the more than nine years that the criminal trial lasted in total.[608]

427. As for the conduct of the authorities, the Court notes that, in their arguments, Mr. Martínez' representatives did not specify which aspects of the proceedings were conducted slowly. Nor did they present the complete criminal file of Mr. Martínez. Therefore, this Court considers that they did not provide sufficient arguments or evidence for it to rule on this point.

428. Finally, it has been established that, in order to determine the question of reasonable time, it is necessary to consider the impact generated by the duration of the proceedings on the legal situation of the person involved. In this case, Mr. Martínez faced the possibility of a long sentence, since he was accused of twelve crimes of embezzlement in the form of a continuing offense, which increased the possible prison sentence to up to 24 years.[609] In addition, during the criminal proceedings, the alleged victim was held in pretrial detention that lasted 4 years and 9 months. Therefore, the duration of these proceedings would have an impact on Mr. Martínez.

429. In view of the foregoing, this Court considers that, although there was a possibility of a significant impact on the defendant, the criminal case was highly complex. Moreover, Mr. Martínez was in Canada for 4 years and 7 days and this played an important role in the delay of his trial. Likewise, the representatives did not provide evidence to demonstrate undue slowness on the part of the State in processing the criminal case. Therefore, the Court concludes that in this case the violation of the right to a hearing within a reasonable time, established in Article 8(1) of the Convention, was not proven.

C. Alleged violation of the right to defense

C.1. Arguments of the Commission and the parties

430. The ***Commission*** indicated, with respect to Groups 2 (Rafael Rojas Madrigal) and 3 (Enrique and Luis Archbold Jay), that it did not have sufficient evidence to determine that the violation of their right to defense alleged by their representatives actually took place. The Commission did not mention this point with respect to Group 4 (Jorge Martínez Meléndez).

431. The ***SIPDH*** representatives alleged that their clients in Group *3* (Enrique and Luis Archbold Jay) were victims of a criminal proceeding that did not ensure, in terms of fairness and equal opportunity, the exercise of their right to defense. Both the courts of first instance, and the various rulings by the Third Chamber or the Courts of Cassation in the motions for cassation and review that they heard, violated the basic principles that govern the assessment

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606 *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of September 7, 2000 (evidence file, folio 2055).

607 *Cf.* Press report: "Canada hands over fugitive Martínez", published in La Nación newspaper, December 3, 2003, which refers to decision No. 2003-IMM-4206-01 of the Federal Court of Canada of March 26, 2003 (evidence file, folio 2042).

608 The criminal proceeding began on August 22, 1998 with the order for pretrial detention. *Cf.* Decision of the Special Duty Criminal Court of August 22, 1998, (evidence file, folio 26256). It concluded with a final decision on the petition for a writ of reversal on cassation, on March 11, 2008. *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33874).

609 *Cf.* Decision of the Criminal Court of the First Judicial Circuit of San José, of December 3, 2003 (evidence file, folio 2007).

and interpretation of evidence in the criminal matters, which is subject to the rules and guarantees of due process of law and Article 8(2) of the Convention.

432. The ***Factum Consorcio*** representatives presented the following arguments with respect to Group 4 (Jorge Martínez Meléndez): i) on April 3 and May 24, 2006, the Criminal Trial Court of San José prevented the alleged victim from being present and making direct statements regarding the evidence introduced at that time; ii) part of the documentary evidence was never analyzed, and the State refused to receive testimonial and documentary evidence proposed by Mr. Martínez' defense.[610] In addition, the State concealed documentary evidence for the defense,[611] lost other evidence, and gave legal weight to evidence from the Public Prosecutor's Office that was obtained "arbitrarily and illegally," all this, in violation of Article 8(2)(f) of the Convention; and iii) the principle of legality was violated because the alleged victim was only able to access the complete text of the judgment three years after his conviction, when, on December 3, 2010, in the Semi-Institutional Center of San Agustín in Heredia, he was allowed to use a computer in order to read said judgment, as well as the ruling of the Cassation Chamber of 2008. This is in violation of Article 364 of the CCP, which requires the court to read out the judgment and hand over a copy of it. Although his public defender had digital access to the judgment, Mr. Martínez did not receive a written copy nor was he given digital access to it, since the prison did not have the necessary digital system required to read it and properly exercise the material defense.

433. The ***Inter-American Defenders*** argued with respect to Group 2 (Rafael Rojas), that he was not given a printed copy of his conviction for the crime of embezzlement and that this violated his right to defense, due process and access to justice, established in Articles 8(1), 8(2) and 25(1) of the Convention. They further alleged that Mr. Rojas was given his judgment in audio and video format through a DVD, which he was unable to view because he was in prison. Despite having filed writs of *habeas corpus* and *amparo*, these were denied.

434. The ***State*** did not comment specifically on the arguments concerning the alleged violation of the right to defense of Group *3* (Enrique and Luis Archbold Jay). Regarding Group 4 (Jorge Martínez Meléndez), it argued that the representatives of the alleged victim made a series of allegations regarding the evidentiary activity that took place in the oral and public trial that led to the conviction, limiting themselves to reiterating arguments discussed internally in the cassation proceedings, seeking to have the Inter-American Court act as a fourth instance.

435. Regarding Group 2 (Rafael Rojas Madrigal), the State indicated that the judgment was handed down orally and that it was recorded in digital format. It pointed out that Rafael Rojas did not request the prison authorities to provide him with the equipment required to access the digital file of the judgment. Moreover, his technical defense had full access to the file in question, and could even have arranged to accompany him to the Criminal Court's offices to discuss, analyze and define the defense strategy in the appeal phase or, if appropriate, take the necessary steps to do so in the prison facility where he was being held at the time.

C.2. Considerations of the Court

[610] The representatives alleged that Mr. Martínez was "prevented from submitting […] essential evidence […] to prove that he did not embezzle the funds of the government programs, but that these were received by the beneficiaries." This evidence consisted of statements of the beneficiaries of the Social Compensation program.

[611] The evidence referred to consisted of a series of checks whose originals were allegedly not produced because the State "alleged that it had lost them, [and] that it could not produce or deliver them, and [later] provided a set of photocopies whose origin was also not determined, and which were used to convict."

436. This Court will now analyze the alleged violations of the right to defense of Jorge Martínez (Group 4), Luis and Enrique Archbold Jay (Group 3) and Rafael Rojas (Group 2). In this regard, the Court has pointed out that the right of defense is a central component of due process that requires the State to treat the individual, at all times, as a true subject of the proceedings, in the broadest sense of this concept and not simply as an object thereof.[612]

C.2.1. Situation of Jorge Martínez Meléndez (Group 4)

C.2.1.1. Alleged violation of the right to hear and present evidence

437. In the instant case, Mr. Martínez Meléndez's right to defense was allegedly violated because he was not allowed to have direct access to the evidence. According to his representatives, Mr. Martínez asked the trial court to be present and to be able to comment on the introduction of any documentary or testimonial evidence; however, he was prevented from doing so during the introduction of some evidence, which meant that he was unable to know its content or make direct comments on it.

438. In their arguments, the representatives did not specify on which occasions Mr. Martínez did not have the opportunity to hear and present evidence. They merely cited judgment No. 2008-232 issued by the Third Chamber of Criminal Cassation, which mentions the dates of hearings in which, allegedly, this situation would have arisen. Therefore, the Court will now analyze only the hearings mentioned in the excerpt of the cassation judgment cited by the representatives in their arguments. These trial records refer to the hearings of May 24 and 25, July 13, August 1, 3, 9, 16 and 23 and September 5, 8, 13 and 19, 2006.[613]

439. First, it appears from the records that during hearing No. 38 held on Wednesday, May 24, 2006, Mr. Martínez was present at all times.[614] During this hearing, his representative informed the trial court that he always wished to have direct access to the evidence.[615] Subsequently, due to a medical appointment, Mr. Martínez indicated that he would be unable to attend the hearing programed for the following Friday, so "the president of the court indicate[d] that […] neither of the two hearings would be held on Friday."[616]

440. On Thursday, May 25, 2006, the trial court announced that "the first hearing today cannot be held, since the defendant Jorge Martínez has stated on several occasions that he wishes to be present both in the incorporation of the documentary evidence and in the presentation of the testimonial evidence. Therefore, there will be no hearing in the morning, given his absence."[617] That same day, in the afternoon, the trial hearing took place, but unlike other court records, this one does not show that Mr. Martínez was absent; nor does it show that his defense counsel expressed his disagreement with the holding of the hearing, in the event that his client was not present. Therefore, this Court does not have elements to rule on the hearing of May 25, 2006. It should be noted that before this hearing concluded, it was announced that "the parties are summoned for the continuation of the trial tomorrow, Friday, May 26, at 8.30 am."[618]

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612 *Cf. Case of Barreto Leiva v. Venezuela, supra, para.* 29, and *Case of Pollo Rivera et al. v. Peru. Merits, reparations and costs.* Judgment of October 21, 2016. Series C No. 319, para. 189.

613 *Cf.* Decision No. 2008-00232 of the Third Chamber of the Supreme Court of Justice, of March 11, 2008 (evidence file, folio 33970).

614 *Cf.* Record of Hearing No. 38 of May 24, 2006 (evidence file, folio 24887).

615 *Cf.* Record of Hearing No. 38 of May 24, 2006 (evidence file, folio 24889).

616 *Cf.* Record of Hearing No. 38 of May 24, 2006 (evidence file, folios 24887 and 24889).

617 *Cf.* Record of Hearing No. 39 of May 25, 2006 (evidence file, folios 24891 to 24892).

618 *Cf.* Record of Hearing No. 39 of May 25, 2006 (evidence file, folio 24894).

441. Now, despite the fact that on Wednesday, May 24, 2006, it had been announced that Mr. Martínez would not be present at the hearing on Friday, May 26, the record of this last session does not state that Mr. Martínez was not present, something that does occur in other records of the trial hearings. There is also no record that his defense attorney objected to holding the hearing in the event that Mr. Martínez was not present.[619] Therefore, the Court does not have elements to rule in respect of the hearing of Friday, May 26, 2006.

442. Second, Mr. Martínez was present at all times during the hearing of September 13, 2006.[620]

443. Third, it appears that during the hearings of July 13,[621] August 1,[622] 9[623] and 16,[624] and September 5[625], 8[626] and 19[627] 2006, Mr. Martínez was present during most of the time, being absent for only a few minutes due to different situations; however, whenever he was absent, his lawyer remained at the hearing as his representative. At the time of his absence, Mr. Martínez gave his express or tacit authorization to his attorney, by not opposing the taking of evidence.

444. However, during the hearing of August 3, 2006, Mr. Martínez had to leave the hearing for five minutes due to a medical problem. On this occasion, the defense counsel told the trial court that he did not agree to continue with the admission of documentary evidence until Mr. Martínez returned, since he "did not have express authorization to represent his client." Although it is true that on that occasion the Court ordered that "the respective defense counsel be authorized from this moment on, so that when any of the co-defendants deprived of liberty suffer health problems, they may be represented in the admission of documentary evidence." The trial record shows that, in fact, the admission of the evidence did not take place until Mr. Martínez returned to the courtroom.[628]

445. Fourth, the trial record shows that on August 23, 2006, two hearings took place and that Mr. Martínez was not present at the first hearing, or during the first 30 minutes of the second.[629] The also record shows that evidence was taken during said hearings because Mr. Martínez's absence that day was unjustified:

> "[…] Today, evidence will be admitted during the first hearing, and then the judge notes that the defendants did not come, that they are not authorized to be absent and are required to attend, […] and as the Court had already stipulated, it is not necessary for the accused to be present to take evidence. The defense attorneys of the defendants are told that they must talk to them since they do what they want, the defendants Jorge and [S] Martínez did not want to come this morning when the guards went for them saying that they had a medical appointment at nine in the morning. The lawyer Laura Sánchez called the prison doctor who reported that the defendants did not have a medical appointment today, […] so the defense attorneys are asked to speak to their clients because they are not allowed to be absent during the trial without permission […]."[630]

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619 *Cf.* Record of Hearing No. 40 of May 26, 2006 (evidence file, folio 24895).

620 *Cf.* Record of Hearings No. 169 and 170 of September 13, 2006 (evidence file, folio 25167).

621 *Cf.* Record of Hearings No. 94 and 95 of July 13, 2006 (evidence file, folio 25020).

622 *Cf.* Record of Hearings No. 115 and 116 of August 1, 2006 (evidence file, folio 25066).

623 *Cf.* Record of Hearings No. 125 and 126 of August 9, 2006 (evidence file, folio 25083).

624 Record of Hearings No. 134 and 135 of August 16, 2006 (evidence file, folio 25096).

625 *Cf.* Record of Hearings No. 158 and 159 of September 5, 2006 (evidence file, folios 25151 to 25152).

626 *Cf.* Record of Hearing No. 164 of September 8, 2006 (evidence file, folio 25161).

627 *Cf.* Record of Hearings No. 174 and 175 of September 19, 2006 (evidence file, folios 25178 to 25179).

628 […] when the defendant Jorge Martínez enters at 14:15 hours, he is informed of the court's provisions. Next, the session continues with the prosecutor's cross-examination of the witness […]. *Cf.* Record of Hearings No. 117 and 118 of August 3, 2006 (evidence file, folios 25068 to 25070).

629 *Cf.* Record of Hearings No. 141 and 142 of August 23, 2006 (evidence file, folios 25112 to 25115).

630 *Cf.* Record of Hearings No. 141 and 142 of August 23, 2006 (evidence file, folio 25113).

446. In view of the foregoing, this Court cannot prove that any of Mr. Martínez's rights was violated.

447. Fifth, it was also alleged before this Court that Mr. Martínez was prevented from commenting on the introduction of evidence, in breach of his right to participate in the first and second hearings of April 3, 2006, when the trial court stated that "the intervention of the accused will be limited to his statements, since his petitions should be handled by his technical defense in accordance with Article 345 […]."[631] In this regard, the representatives did not provide this Court with sufficient arguments or evidence to determine why the requirement to file petitions through the technical defense represented a violation of his right to defense, and therefore it does not find any violation in relation to this point.

C.2.1.2. Alleged denial of the right to introduce evidence

448. Mr. Martínez's representatives alleged that part of the documentary evidence was never analyzed, and that the State refused to receive testimonial and documentary evidence proposed by Mr. Martínez' defense. They also alleged that the State had concealed or lost documentary evidence for the defense, all this, in violation of Article 8(2)(f) of the Convention.

449. Article 8(2)(f) of the Convention establishes the "minimum guarantee" of "the right of the defense to examine the witnesses present in court and to obtain the attendance, as witnesses or experts, of other persons who can shed light on the facts," which embodies the principles of adversarial proceedings and procedural equality. The Court has pointed out that, among the guarantees recognized to those who have been accused of an offense is the right to examine the witnesses against them and in their favor, under the same conditions, in order to exercise their defense.[632]

450. This Court recalls that the arguments presented by the representatives of Mr. Martínez were also included in the cassation appeal decided by the Third Chamber on March 11, 2008 (*supra* paras. 321 to 324). With respect to the alleged violations of Article 8(2)(h) of the Convention, in Chapter VIII.I of this judgment this Court considered that the Third Chamber carried out a comprehensive review of the judgment (*supra* paras. 328 and 329). In this regard, this Court has established that "[i]t is up to the State's courts to examine the facts and the evidence presented in the individual cases" and that, in principle, it is not up to this Court to determine whether the domestic courts made a correct evaluation of their domestic law.[633] In this sense, the representatives did not provide arguments or evidence that would allow this Court to determine whether the actions of the Third Chamber are contrary to the provisions established in Article 8(2)(f) of the Convention. Therefore, the alleged violation is not proven.

C.2.1.3. Alleged violation of the right to read the judgment

451. The representatives of Mr. Martínez also alleged that the Criminal Court of the First Judicial Circuit of San José did not read out the entire conviction judgment and that they were

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631 *Cf.* Record of Hearings No. 1 and 2 of April 3, 2006 (evidence file, folio 24757).

632 *Cf. Case of Castillo Petruzzi et al. v. Peru, supra,* para. 154, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche indigenous people) v. Chile*, *supra,* para. 242. See also, *ECHR, Case of Barberà, Messegué and Jabardo,* Judgment of December 6, 1998, Series A no. *146*, para. 78 and *ECHR, Case of Bönishc.* Judgment of May 6, 1985, Series A No. 92, para. 32.

633 *Cf. Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and Merits*. Judgment of November 28, 2006. Series C No. 161, para. 80, and *Case of Pollo Rivera et al. v. Peru, supra,* para. 192.

not provided with a printed copy, in violation of his right of defense, since he was incarcerated in a prison facility and did not have the means to read the digital version.

452. In is an undisputed fact that the aforementioned court provided a digital copy of the conviction, which consisted of more than one thousand pages, to Mr. Martínez and his representative.[634] In this regard, this Court considers that the representatives did not offer sufficient arguments or evidence to demonstrate why a complete reading of the judgment would be necessary to ensure the alleged victim's right of defense. Furthermore, there is no record in the case file - nor was it alleged - that Mr. Martínez had requested the technological means necessary to read the judgment while he was in prison and, therefore, this Court does not have the necessary elements to prove a violation of the right of defense recognized in Article 8(2) of the Convention.

C.2.2. Situation of Luis Archbold Jay and Enrique Archbold Jay (Group 3)

453. In the instant case, the representatives of Luis and Enrique Archbold Jay alleged that their clients were unable to exercise their right to a full defense in the criminal proceedings. They also mentioned that in the proceedings before the courts of first instance and in the appeals for review and cassation, some basic principles of due process established in Article 8(2) of the Convention were violated.

454. The representatives of Luis and Enrique Archbold did not indicate in their arguments regarding the right of defense, which specific aspects and in what circumstances their rights were violated. Therefore, this Court does not have sufficient elements to rule on the alleged violation of Article 8(2) of the Convention.

C.2.3. Situation of Rafael Rojas Madrigal (Group 2)

455. In the instant case, the representatives of Mr. Rojas alleged violations of Articles 8(1), 8(2) and 25 of the Convention because the defendant was not provided with a printed copy of his conviction for the crimes of embezzlement and use of a false document, but was only provided with the judgment in audio and video format on a DVD, which he was unable to view because he was in prison and, despite having filed writs of *habeas corpus* and *amparo*, these were denied. As already noted, on July 17, 2009, Mr. Rojas presented a writ of *habeas corpus* that was declared inadmissible by the Constitutional Chamber because no evidence was provided to show that he had asked the prison authorities to provide the necessary technological tools to access the judgment and that this request had been denied (*supra* para. 294). Consequently, the Court considers that Mr. Rojas' representatives did not provide any evidence or arguments to reach a different conclusion, and therefore, in application of the principle of complementarity, it will not make additional considerations in this regard.

D. Conclusion

456. In view of the foregoing, the Court concludes that the State is not internationally responsible for: (i) the violation of the right to an impartial judge established in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Jorge Martínez Meléndez and Rafael Rojas Madrigal; (ii) the violation of the right to a hearing within a reasonable time established in Article 8(1) of the Convention to the detriment of Jorge

[634] *Cf.* Decision No. 2008-00232 of the Third Chamber of March 11, 2008 (evidence file, folio 33959) and *Cf.* Judgment No. 680-2007 of the Trial Court of the First Judicial Circuit of San José of July 17, 2007 (evidence file, folios 340053 to 35363).

Martínez Meléndez; (iii) the violation of the right to presumption of innocence established in Article 8(2) of the Convention, in relation to Article 1(1) thereof, to the detriment of Jorge Martínez Meléndez; and (iv) the violation of the right of defense established in Article 8(2)(f) of the Convention to the detriment of Jorge Martínez Meléndez, Luis Archbold Jay and Enrique Archbold Jay.

VIII.IV
RIGHT TO PERSONAL INTEGRITY
(ARTICLE 5 OF THE CONVENTION)

A. Arguments of the Commission and the parties

457. The ***Commission*** noted that Mr. Damas Vega Atencio alleged that he was subjected to acts of torture or cruel, inhuman and degrading treatment; however, it pointed out that it did not have the basic elements of proof required to make a factual determination on these circumstances.

458. The ***SIPDH representatives*** alleged that on July 24, 2006, Damas Vega and other detainees filed a complaint with the Ministry of Justice and the Office of the Comptroller of Services alleging that on July 20, 2006, a search was conducted during which they were subjected to cruel, inhuman and degrading treatment, as well as to acts of sexual violence. According to this complaint, 21 inmates housed in Cellblock D2, Dormitory No. 3, were subjected to abuse by officers of the Security Area, especially by Officer Reyes, who, with his fingers, touched the private parts of the inmates who were being searched. In addition to a body search of the anus, testicles and penis, they alleged that the modus operandi of the search also represented a risk for the inmates, since they were taken out of their dormitory, which could result in the "planting" of illicit objects inside the dormitory by the security guards.

B. Considerations of the Court

459. In the instant case, Mr. Damas Vega filed a complaint with the Ministry of Justice and the Office of the Comptroller of Services alleging that on July 20, 2006, a search was conducted at the CAI La Reforma during which he was subjected to cruel, inhuman and degrading treatment, as well as acts of sexual violence by prison guards. On September 24, 2006, he filed a criminal complaint with the Prosecutor's Office of Alajuela alleging sexual abuse and abuse of authority by a prison officer during the events denounced on July 20, 2006. In addition, on October 2, 2006, Mr. Vega requested that the Court of Alajuela extend the criminal case to a supervisor and an inspector, superiors of the officer, considering them as the intellectual authors of the crime. On November 25, 2006, Mr. Vega filed a complaint with the Sentence Execution Court of Alajuela, against the Security Area B of the CAI La Reforma. He alleged that the practices of the prison officers during searches were abusive, and included sexual touching (*supra* paras. 233 to 237).

460. With regard to the manner in which searches should be conducted within a prison, the Mandela Rules 50, 51 and 52 ensure that searches of inmates shall be conducted in a manner that respects the inherent dignity of the human being and the privacy of the individual. In addition, the prison administration shall keep records of any searches that are carried out, in particular strip searches, body cavity searches and cell searches, as well as the reasons for such searches. Furthermore, invasive searches shall only be carried out when absolutely necessary, by qualified physicians or staff members who have been adequately trained. In addition, Principle XXI of the Principles and Best Practices on the Protection of Persons

Deprived of Liberty in the Americas, which states that intrusive vaginal and anal searches shall be prohibited by law, establishes standards very similar to those of the Mandela Rules.[635]

461. This Court has established in its constant case law that the duty to investigate is an obligation of means and not of result, which must be assumed by the State as its own legal duty, not as a mere formality preordained to be ineffective, or as a step taken by private interests[636] that depends upon the initiative of the victim or his family or upon their offer of proof.[637] The investigation must be serious, impartial and effective, and be aimed at determining the truth and ensuring the pursuit, capture, prosecution and eventual punishment of the perpetrators of the acts.[638] Likewise, due diligence requires that the investigating body carry out all the actions and inquiries necessary to achieve the desired result. Otherwise, the investigation is not effective under the terms of the Convention.[639]

462. In particular, in accordance with Article 1(1) of the American Convention, the obligation to guarantee the rights recognized in Article 5(1) and 5(2) of the American Convention entails the duty of the State to investigate possible acts of torture or other cruel, inhuman or degrading treatment.[640] The obligation to investigate is reinforced by the provisions of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, which require the States Parties "to take effective measures to prevent and punish torture within their jurisdictions," as well as "to prevent and punish […] other cruel, inhuman or degrading treatment or punishment." Furthermore, under Article 8 of said Convention, "States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case. Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process."

463. In this specific case, the Court does not have sufficient evidence to prove that the mistreatment denounced actually occurred. The Court also notes that in final decision No. 010-223-2006 of the Department of Administrative Procedures of the Ministry of Justice, issued on May 7, 2009, it was determined that the responsibility of the alleged offender could not be proven and therefore it was not appropriate to apply any sanction for the alleged acts committed against the inmates. This decision states that, "according to witnesses brought to the proceeding and based on evidence gathered in the administrative file, it does not appear that the person involved here had engaged in degrading, discriminatory and unequal treatment when searching the inmates of Area B, Cellblock D2, Dormitory 3 of [CAI] La Reforma."[641] In this regard, this Court does not find arguments or evidence that demonstrate

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635 *Cf.* Matter of the Penitentiary Complex of Curado regarding Brazil. Provisional Measures. Order of the Inter-American Court of Human Rights of November 23, 2016, paras. 44 and 45, and United Nations Standard Minimum Rules for the Treatment of Prisoners, Rules 51 and 52; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXI.

636 *Cf. Case of Velásquez Rodríguez v. Honduras, Merits, supra,* para. 177, and *Case of Espinoza Gonzáles v. Peru*, *supra,* para. 238.

637 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra,* para. 177, and *Case of Espinoza Gonzáles v. Peru*, supra, para. 238.

638 *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of June 7, 2003. Series C No. 99, Para. 127, and *Case Espinoza Gonzáles v. Peru*, supra, para. 238.

639 *Cf. Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs.* Judgment of March 1, 2005. Series C No. 120, Para. 83, and *Case of Espinoza Gonzáles v. Peru*, *supra, para.* 238.

640 *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 147, and *Case of Espinoza Gonzáles v. Peru, supra,* para. 239.

641 Final Decision No. 010-223-2006 of the Department of Administrative Procedures of the Ministry of Justice, of May 7, 2009, page 17.

that the investigation conducted by the Ministry of Justice was ineffective or negligent. Therefore, it is not possible to declare a violation of the Convention in relation to this point.

464. On the other hand, this Court notes that Damas Vega filed a complaint with the Sentence Execution Court for having been locked up in a maximum security cell for 72 hours, on September 28, 2008, without receiving an explanation of the reasons for his transfer and being held incommunicado for more than 20 hours (*supra* paras. 60 and 239). On November 21, 2008, the Sentence Execution Court declared this motion admissible and ordered "the immediate restitution of his rights" (*supra* para. 239). Consequently, this Court considers that the State has already remedied this matter and, in application of the principle of complementarity (*supra* para. 281), will not make additional considerations in this regard.

C. Conclusion

465. In view of the foregoing, the Court concludes that the State did not violate Articles 5(1) and 5(2) of the Convention, in relation to Article 1(1) thereof, to the detriment of Damas Vega.

IX
REPARATIONS

466. Based on the provisions of Article 63(1) of the American Convention,[642] the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation,[643] and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[644]

467. Reparation for the harm caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation prior to the violation. If this is not feasible, as occurs in the majority of cases of human rights violations, the Court may order measures to protect the rights that have been violated and to repair the harm caused.[645]

468. This Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven, as well as the measures requested to repair the respective harm. Therefore, the Court must analyze such concurrence to rule appropriately and according to the law.[646]

469. In consideration of the violations of the Convention declared in the previous chapter, the Court will analyze the claims presented by the representatives of the victims, as well as

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642 Article 63(1) of the American Convention establishes that: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

643 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of the Xucuru Indigenous People and its members v. Brazil*, *supra,* para. 182.

644 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra,* para. 25, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 182.

645 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra,* para. 26, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 183.

646 *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 the Xucuru Indigenous People and its members v. Brazil, supra,* para. 184.

the arguments of the State, in light of the criteria established in its case law regarding the nature and scope of the obligation to make reparation.[647]

A. Injured party

470. The Court reiterates that under Article 63(1) of the Convention, it considers as injured party anyone who has been declared a victim of the violation of any right recognized therein.[648] Therefore, this Court considers Jorge Martínez Meléndez as injured party. Consequently, the Court will only refer to the arguments made on his behalf.

B. Comprehensive measures of reparation

B.1. Satisfaction

B.1.1 Publication of the judgment

B.1.1.1 Arguments of the Commission and the parties

471. The ***Commission*** did not request measures of satisfaction.

472. The common interveners ***Factum Consorcio*** asked the Court to order the State to issue a statement in which it accepts and declares its responsibility for the violations of human rights and judicial guarantees in relation to the victim Jorge Alberto Martínez Meléndez.[649]

473. In general terms, the ***State*** asked the Court to reject all claims for reparation made by the alleged victim.

B.1.1.2. Considerations of the Court

474. With respect to the request made by the common interveners Factum Consorcio, the Court does not consider it necessary to order a "declaration" of responsibility on the part of the State. In this regard, international jurisprudence has established that the judgment constitutes *per se a* form of reparation.[650] Nevertheless, as it has done in other cases,[651] the Court finds it pertinent to order the State to make the following publications within six months of notification of this judgment: a) the official summary of this judgment prepared by the Court, to be published in the Official Gazette, in a legible and adequate font size, and b) this judgment in its entirety, to be made available for at least one year on an official web site of the State.

475. The State shall immediately inform this Court once it has made each of the publications ordered, regardless of the one-year term to submit its first report provided for in twenty-fourth operative paragraph of this judgment.

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647 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 to 27, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 185.

648 *Cf. Case of the La Rochela Massacre v. Colombia*. *Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 187.

649 In their final written arguments they requested, extemporaneously, the publication of the official summary of the judgment in the Official Gazette and in a daily newspaper and the publication of the judgment for one year on the web site of the Costa Rican Legal Information System (SINALEVI).

650 *Cf. Case of El Amparo v. Venezuela. Reparations and costs.* Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 197.

651 *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 199.

C. Other measures requested

C.1.1 Arguments of the parties

476. The common interveners ***Factum Consorcio*** asked the Court to order the State: i) to restore Jorge Martínez Meléndez's status as a citizen prior to the alleged violations of his human rights; ii) to issue an express prohibition to the State to prevent it from committing similar violations of human rights and judicial guarantees in the future; iii) to establish the obligation of the State to legally provide for sanctions applicable to State officials when they commit breaches or violations, so as to prevent other persons from being victims in the future of similar actions, violations, and interpretations by State officials, which entail the suppression of the right to liberty, the violation of human rights, and the breach of judicial guarantees; iv) to cover the cost of psychological treatment for the victim and his family; v) to cover the cost of medical treatment for the victim; vi) to rescind and render null and void all judicial and police records, and registry entries under the name of Jorge Martínez Meléndez; vii) to ensure the immediate cessation of all legal effects related to or arising from the unified prison sentences and the disqualification from holding public office, and viii) to annul and lift all restrictions and conditions on the free exercise of Jorge Martínez Meléndez's right to personal liberty and his right to travel within and outside the country.

477. In general, the ***State*** objected to the reparations requested by the representatives, considering that there is no causal relationship, since the plaintiff was at fault.

C.1.2. Considerations of the Court

478. The Court considers that there is no causal link between the violations declared in this judgment and the reparations requested by Factum Consorcio. Furthermore, the Court considers that the issuance of this judgment and the reparations ordered in this chapter are sufficient and adequate to remedy the violations suffered by the victim and does not deem it appropriate to order additional measures. [652]

D. Compensation

D.1. Non-pecuniary damage

479. The ***Commission*** asked the Court to order full reparation for the violations declared in the Merits Report, including adequate compensation.

480. The common interveners ***Factum Consorcio*** requested compensation of 50,000,000 Costa Rican colones (hereinafter CRC) for moral damage in favor of Jorge Martínez Meléndez. They also requested compensation of 50,000,000 CRC for bodily injury caused to the victim's health; according to the representatives, these ailments are described in his respective medical records. They also requested 50.000.000 CRC for damage to the life project of Mr. Jorge Martínez Meléndez, since this was disrupted by the alleged illegitimate and unlawful actions of the Costa Rican State.

481. The ***State*** argued that it has not engaged in unlawful conduct, and therefore no compensation is due.

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[652] *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 359, and *Case of Lagos del Campo v. Peru, supra,* para. 290.

D.1.2. Considerations of the Court

482. The Court has developed in its case law the concept of non-pecuniary damage, and has established that this "may include both the suffering and afflictions caused to the direct victim and his family, the impairment of values of great significance for the individual, as well as changes of a non-pecuniary nature in the living conditions of the victim or his family.[653]

483. In consideration of the human rights violations established in this judgment, the Court considers that the State must pay Jorge Martínez Meléndez, as non-pecuniary damage, the sum of USD $2,000.00 for the violation of his right to personal liberty.

D.2. Pecuniary damage

D.2.1. Arguments of the Commission and the parties

484. The ***Commission*** asked the Court to order full reparation for the violations declared in the Merits Report, including adequate compensation.

485. The common interveners ***Factum Consorcio*** requested payment of 1,315,777,076.83 CRC in favor of Jorge Martínez Meléndez, for pecuniary damage and costs incurred in the proceedings before this Court, the Commission and the Costa Rican judicial proceedings, including interest and "due indexation," for income lost as a result his unlawful deprivation of liberty and the actions that violated his human rights. They also requested the sum of 369,921,000 CRC in his favor for consequential damages.[654]

486. The ***State*** argued that it has not engaged in unlawful conduct, and therefore the claims of the representatives should be rejected.

D.2.2. Considerations of the Court

487. The Court has developed in its case law the concept of pecuniary damage and the circumstances in which it must be compensated. The Court has established that pecuniary damage supposes "the loss of or detriment to the victims' income, the expenses incurred as a result of the facts and the pecuniary consequences that have a causal nexus with the facts of the case.[655]

488. The Court observes that the common intervenor Factum Consorcio, based on the opinion of the Public Accountant Guiselle Chacón Araya, requested payment of 1,315,777,076.83 CRC in favor of Mr. Martínez Meléndez, for pecuniary damage, taking into account his lost income plus interest, in view of his unlawful deprivation of liberty. Ms. Chacón "certified the variables to be considered and determined the amount lost for damages, lost profits, financial losses, business losses, and damages for being unable to exercise his professions as an attorney and notary public for a period of time." In this regard, the expert stated that she made a calculation in accordance with the Decrees of the Executive Branch of Costa Rica during the period under study, which established the minimum salaries for the professions of attorney and notary public. According to the accountant, she calculated the

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653 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 341, para. 306**.**

654 For a farm given in guarantee that was supposedly appropriated by the State with a value of 211,001,000 Costa Rican colones (CRC) and another farm handed over to the State with a value of 40,560,000 Costa Rican colones, as well as costs of political asylum, housing and living expenses, totaling USD $220.000.

655 *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 208.

indemnity for the periods from August 22, 1998 to February 1999 and December 2003 to May 29, 2015. She also stated that she reviewed public legal documents and all the documentation related to the corresponding claim, in order to substantiate the aforementioned amount.[656]

489. The Court recalls that the expert opinions aimed at quantifying the scope of the damage caused by the violation of human rights must contain logical arguments that allow this Court to understand and assess them with the rest of the evidence, in accordance with the rules of sound judgment. This is particularly necessary with regard to expert appraisals based on technical expertise unrelated to that of the Court,[657] as in the present case.

490. The Court previously declared the violation (*supra* para. 369) of Articles 7(1), 7(3) and 7(5) of the Convention to the detriment of Jorge Martínez Meléndez, considering that the extension of his pretrial detention from June 3, 2006 until July 17, 2007- the date on which he was convicted of 12 crimes of embezzlement – was arbitrary and unlawful. In this regard, the Court considers it pertinent to award an amount for the financial losses suffered by Mr. Martínez during the 13 months and 14 days of his pretrial detention. However, the Court observes that the aforementioned expert did not attach to her opinion the accounting records or supporting evidence necessary to justify the amounts of income that she calculated. Thus, in the absence of sufficient evidence to calculate the victim's monthly income, the Court, given the particularities of the case, decides to set a reasonable amount of USD $5,000.00 for the pecuniary damage caused between June 3, 2006, and July 17, 2007.

E. Costs and Expenses

E.1.1. Arguments of the Commission and the parties

491. The common interveners ***Factum Consorcio*** requested payment for costs and expenses generated in the domestic judicial proceedings and in the proceedings before the inter-American system. In their final written arguments, the representatives stated that: the fees for professional representation of Mr. Adrián Martínez Blanco amounted to USD $12,000.00; the travel expenses of Martínez Blanco from Buenos Aires, Argentina to San José on August 12, 2017, totaled USD $2,161.40, and the fees for legal representation of Néstor Morera Víquez, totaled USD $8,000.00.

492. For their part, the common interveners ***SIPHD***, in their pleadings and motions brief related to Groups 3, 7 and 8, requested the payment of legal fees and reimbursement of costs incurred in processing the case both in the domestic courts and in the international jurisdiction. However, they did not indicate a specific amount for costs and expenses.

493. The ***State*** requested that the Court reject all claims for reparation made by the alleged victims, including the payment of costs and of expenses.

E.1.2. Considerations of the Court

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656 Affidavit of Guiselle Chacón Araya (evidence file, folios 44464 and 44465). In his statement before a notary public Mr. Martínez Meléndez stated that "[d]uring all this time I suffered financial losses, I lost my office, my professional practice company which I had opened in the early 1980s, it simply collapsed and was closed, and my clientele dispersed so I could not generate income, and all my savings were spent." *Cf.* Affidavit of Jorge Martínez Meléndez (evidence file, folio 44450).

657 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra,* para. 230, and *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs*. Judgment of March 4, 2011 Series C No. 223, para. 100.

494. The Court reiterates that, in accordance with its case law,[658] costs and expenses form part of the concept of reparation, because the efforts made by the victims to obtain justice both at the national and international level involve disbursements that must be compensated when the international responsibility of the State is declared in a judgment. Likewise, the Court reiterates that is not sufficient merely to forward probative documents; rather, the parties are required to include arguments that relate the evidence to the facts that they represent and, in the case of alleged financial disbursements, clearly specify the items and their justification.[659] Therefore, the mere forwarding of receipts is not sufficient and the expense vouchers issued by the representative organizations themselves are not sufficient proof of the expenses incurred.[660]

495. In the instant case, the Court considers that the costs and expenses arising from the domestic and international proceedings should be proportional to the number of persons represented and declared as victims in this judgment.

496. First, the Court notes that since the international responsibility of the State has not been established to the detriment of the petitioners represented by the common interveners SIPDH, it is not appropriate for this Court to rule on costs and expenses.[661]

497. As for the common interveners Factum Consorcio, the Court notes that they proved costs and expenses for: an airline ticket for travel from Argentina to Costa Rica, on August 12, 2017, at a cost of USD $1,044.43,[662] and professional services during the hearing on merits and closing arguments of the lawyer Néstor Morera Víquez, for the sum of USD $5,000.00.[663] They also submitted an invoice for "professional services in the Case of Manfred Amrhein et al." from the attorney Adrián Alberto Martínez Blanco, for the sum of USD $12,000.00.[664] However, this invoice does not indicate the amount would correspond to professional services provided after the submission of the pleadings and motions brief. Consequently, the Court considers that the State should pay the sum of USD $ 18,044.43 (eighteen thousand and forty-four United States dollars and forty-three cents) in favor of the firm Factum Consorcio for costs and expenses incurred in the domestic proceedings and in the international proceedings before the Inter-American Human Rights System.

F. Reimbursement of expenses to the Victims' Legal Assistance Fund

498. The ***Inter-American Defenders*** requested the support of the Victims' Legal Assistance Fund of the Court to cover their participation in the proceedings, both in the hearing on preliminary objections and in the hearing on the merits. In their pleadings and motions brief, they requested access to the Legal Assistance Fund "both for the exercise of the defense in the inter-American proceedings and in relation to all the expenses required for any activity related thereto. These expenses include the attendance at the hearing before the

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658 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra,* para. 42, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 214.

659 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra,* para. 277, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra,* para. 215.

660 *Cf. Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 14, 2014. Series C No. 287, para. 607, and *Case of Vereda La Esperanza v. Colombia, supra,* para. 314.

661 *Cf. Case of Castillo González et al. v. Venezuela. Merits*. Judgment of November 27, 2012. Series C No. 256, fourth operative paragraph.

662 *Cf.* Reservation of airline tickets Argentina-Costa Rica and Costa Rica-Argentina of Adrián Alberto Martínez Blanco (evidence file, folio 44972).

663 *Cf.* Invoice for professional services of Néstor Morera Víquez of September 28, 2017 (evidence file, folio 44886).

664 *Cf.* Invoice for professional services of Adrián Alberto Martínez Blanco, of September 28, 2017 (evidence file, folio 44975).

Court of the victim, the expert witness offered and both Inter-American Defenders (including travel, transfers, lodging and per diem expenses for the days necessary to attend the hearings to be arranged), as well as the cost of the fees of the expert witness offered." In the Order of November 17, 2016, the President of the Court approved the request filed by the victims through their representatives to have access to the Court's Legal Assistance Fund and granted the necessary financial assistance to cover the travel, accommodation and living expenses necessary for the Inter-American Defender Belinda Guevara Casaya to attend the public hearing, as well as any necessary expenses incurred – or that they may be incurred – by the three Inter-American Defenders.

499. On December 5, 2017, a report on expenses was sent to the State, pursuant to Article 5 of the Rules for the Operation of the Fund. The State had an opportunity to present its observations on the disbursements made, which amounted to USD $5,789.30 for expenses incurred. Costa Rica did not submit observations.

500. In view of the violations declared in this judgment and in compliance with the requirements to have access to the Legal Assistance Fund, the Court orders the State to reimburse said Fund in the amount of US$ 5,789.30 (five thousand seven hundred and eighty-nine United States dollars and thirty cents) for the expenses incurred. This amount shall be reimbursed to the Inter-American Court within six months of notification of this judgment.

G. Method of compliance with the payments ordered

501. The State shall pay compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, as established in this judgment, directly to the persons and organizations indicated therein, within one year of notification of this judgment, without prejudice to the possibility of making full payment within a shorter period of time. In the event that the beneficiaries have died or die before they receive the respective compensation, this shall be delivered directly to their heirs, in accordance with the applicable domestic law.

502. The State shall comply with its monetary obligations through payment in United States dollars, or the equivalent in national currency, using for the respective calculation the exchange rate in force on the New York Stock Exchange (United States of America), on the day prior to payment.

503. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the period indicated, the State shall deposit said amounts in favor of the beneficiaries, in an account or certificate of deposit in a solvent Costa Rican financial institution, in United States dollars, and on the most favorable financial terms permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the accrued interest.

504. The amounts awarded in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be paid in full directly to the persons and organizations indicated, without any deductions arising from possible taxes or charges.

505. If the State should fall into 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 Costa Rica.

X
OPERATIVE PARAGRAPHS

506. Therefore,

THE COURT

DECIDES,

By five votes in favor and one against,

1. To declare admissible the preliminary objection of failure to exhaust domestic remedies with respect to Groups 1 (Manfred Amrhein Pinto et al.) and 5 (Guillermo Rodríguez Silva and Martín Rojas Hernández); as well as with respect to Groups 2 (Rafael Rojas), file No. 099-0029291-042-PE; 7 (Miguel Mora Calvo), file No. 99-003994-0042-PE, and 8 (Damas Vega Atencio), files No. 99-000506-062-PE and No. 01-002231-0063-PE. It also declares admissible the objection with respect to the following persons of Group 3: Carlos Eduardo Yepes Cruz, Miguel Antonio Valverde Montoya, and Fernando Saldarriaga Saldarriaga. All of the above, in the terms of paragraphs 39 to 56 of this judgment.

Unanimously,

2. To declare partially admissible the preliminary objection of the alleged "use of the Inter-American system as a fourth instance" with respect to the allegations of Group 4 (Jorge Martínez Meléndez), pursuant to paragraphs 84 to 90 of this judgment.

Unanimously,

3. To declare admissible the preliminary objection of violation of the principle of complementarity in relation to the prison conditions with respect to Groups 2 (Rafael Rojas Madrigal) and 8 (Damas Vega Atencio), pursuant to paragraphs 97 to 115 of this judgment.

Unanimously,

4. To declare admissible the preliminary objection of extemporaneous submission of the petition with respect to Group 6 (Manuel Adilio Hernández Quesada), pursuant to paragraphs 122 to 128 of this judgment.

Unanimously,

5. To dismiss the preliminary objection of "Monitoring compliance with the Judgment in the case of *Herrera Ulloa v. Costa Rica,* as *res judicata* under international law" filed by the State, pursuant to paragraphs 26 to 30 of this judgment.

By five votes in favor and one against,

6. To dismiss the objection of failure to exhaust domestic remedies with respect to Groups 2 (Rafael Rojas Madrigal), case files No. 99-000136-065-PE and 02-004656-0647-TP; 4 (Jorge Alberto Martínez Meléndez), case files No. 03-000082-016-TP and No. 05-007495-0647-TP; 6 (Manuel Hernández Quesada), case file No. 01-203116-0305-PE; and 7 (Miguel Mora Calvo), case file No. 97-000061-301-PE, and in relation to the following persons of Group 3 (Enrique Archbold Jay and Luis Archbold Jay), case file No. 02-000759-455-PE-2; all this in the terms of paragraphs 39 to 57 of this judgment.

Unanimously,

7. To dismiss the preliminary objection of alleged lack of due process on the part of the Inter-American Commission, alleged lack of procedural balance and alleged violation of the State's right of defense, pursuant to paragraphs 68 to 78 of this judgment.

Unanimously,

8. To dismiss the preliminary objection of alleged "use of the Inter-American system as a fourth instance" in relation to the allegations of Groups 3 (Luis Archbold Jay, Enrique Floyd Archbold Jay, Carlos Eduardo Yepes Cruz, Fernando Saldarriaga Saldarriaga, and Miguel Antonio Valverde Montoya) and 6 (Manuel Adilio Hernández Quesada), pursuant to paragraphs 84 to 90 of this judgment.

Unanimously,

9. To dismiss the preliminary objection of the extemporaneous submission of the petition of Group 7 (Miguel Mora Calvo), in the terms of paragraphs 122 to 124 of this judgment.

Unanimously,

10. To dismiss the preliminary objection of the State regarding the error in the Merits Report with respect to Group 7 (Miguel Mora Calvo), pursuant to paragraphs 132 to 135 of this judgment.

DECLARES:

By five votes in favor and one against, that:

11. The State is responsible for the violation of the right to personal liberty contained in Articles 7(1), 7(3) and 7(5) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 4 (Jorge Martínez Meléndez), pursuant to paragraphs 350 to 369 of this judgment.

Unanimously, that:

12. The State is not responsible for the violation of the right to appeal the judgment contained in Article 8(2)(h) of the American Convention, in relation to Article 8(1) thereof, to the detriment of Group 2 (Rafael Rojas Madrigal), Group 3 (Luis Archbold Jay and Enrique Archbold Jay), Group 4 (Jorge Martínez Meléndez) and Group 7 (Miguel Mora Calvo) in the terms of paragraphs 255 to 345 of this judgment.

Unanimously, that:

13. The State is not responsible for the violation of the right to an impartial judge established in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 4 (Jorge Martínez Meléndez), Group 2 (Rafael Rojas Madrigal) and Group 7 (Miguel Mora Calvo), pursuant to paragraphs 383 to 417 and 456 of this judgment.

Unanimously, that:

14. The State is not responsible for the violation of the presumption of innocence established in Article 8(2) of the American Convention to the detriment of Group 4 (Jorge Martínez Meléndez), pursuant to paragraph 390 of this judgment.

Unanimously, that:

15. The State is not responsible for the violation of the right to a trial within a reasonable time as established in Article 8(1) of the American Convention to the detriment of Group 4 (Jorge Martínez Meléndez), pursuant to paragraphs 419 to 429 and 456 of this judgment.

Unanimously, that:

16. The State is not responsible for the violation of the right to defense established in Article 8(2) of the American Convention to the detriment of the members of Group 3 (Luis Archbold Jay and Enrique Archbold Jay); of Group 4 (Jorge Martínez Meléndez) and of Group 2 (Rafael Rojas Madrigal), pursuant to paragraphs 436 to 456 of this judgment.

Unanimously, that:

17. The State is not responsible for the violation of the right to defense contained in Article 8(2)(f) of the American Convention to the detriment of Group 4 (Jorge Martínez Meléndez), in the terms of paragraphs 450 to 452 and 458 of this judgment.

Unanimously, that:

18. The State is not responsible for the violation of the right to appeal the legality of a detention contained in Articles Article 7(6) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 4 (Jorge Martínez Meléndez), pursuant to paragraphs 370 to 372 of this judgment.

Unanimously, that:

19. The State is not responsible for the violation of the right to personal integrity contained in Articles 5(1) and 5(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 8 (Damas Vega Atencio), pursuant to paragraphs 459 to 465 of this judgment.

AND ESTABLISHES:

By five votes in favor and one against, that:

20. This judgment constitutes, *per se*, a form of reparation.

Unanimously, that:

21. The State shall make the publications indicated in paragraph 474 of this judgment, in the terms set forth in paragraphs 474 to 475 thereof.

By five votes in favor and one against, that:

22. The State shall pay the amounts established in paragraphs 483, 490 and 497 of this judgment, as compensation for non-pecuniary and pecuniary damage, and to reimburse costs and expenses, pursuant to the aforementioned paragraphs and the provisions of paragraphs 479 to 497 of this judgment.

Unanimously, that:

23. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, pursuant to paragraph 500 of this judgment.

Unanimously, that:

24. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures adopted to comply with its provisions.

Unanimously, that:

25. The Court will monitor full compliance with this judgment, in exercise of its powers and in compliance with its obligations under the American Convention on Human Rights, and will close this case once the State has complied fully with its provisions.

Judge Eduardo Vio Grossi advised the Court of his partially dissenting opinion, which is attached to this judgment.

DONE, at San José, Costa Rica, on April 25, 2018, in the Spanish language.

Eduardo Ferrer Mac-Gregor Poisot

President

Eduardo Vio Grossi

Roberto F. Caldas

Humberto Antonio Sierra Porto

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri

Registrar

So ordered,

Eduardo Ferrer Mac-Gregor Poisot

President

Pablo Saavedra Alessandri

Registrar

PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI, INTERAMERICAN COURT OF HUMAN RIGHTS, CASE OF AMRHEIN ET AL. V. COSTA RICA, JUDGMENT OF APRIL 25, 2018 (Preliminary objections, Merits Reparations and Costs)

Introduction

In accordance with the provisions of the corresponding applicable norm,[1] in this separate opinion on the judgment in the epigraph,[2] which consists of 25 operative paragraphs, I will comment only on the five paragraphs on which I do not agree with the decision reached in the present case.

Obviously, before addressing these disagreements, it is necessary to reiterate, as a preliminary matter, that I issue this opinion in the understanding that it cannot affect, in any way, the full and absolute compliance with the decision of the Inter-American Court of Human Rights[3] nor the due consideration that, in all fairness, its members deserve. Therefore, this opinion should be seen as a contribution to the understanding of the judgment and as an expression of the pluralism that prevails in the Court.

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[1] Art. 65(2) of the American Convention on Human Rights: "*If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.*"
Art. 24. Statute of the Inter-American Court of Human Rights: "*The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate*."
Art. 32(1)(a) of the Rules of Procedure of the Inter-American Court of Human Rights: "*The Court shall make public: its judgments, orders, opinions, and other decisions, including separate opinions, dissenting or concurring, whenever they fulfill the requirements set forth in Article 65(2) of these Rules.*"

[2] Hereinafter, the Judgment.

[3] Hereinafter, the Court.

This opinion is also based on the conviction that respect for the inter-American legal system in the area of human rights, both substantive and procedural, entails the corresponding principle of legal certainty. In this sense, the Court's actions in its search for justice through the law[4] must be as efficient and effective as possible in order to guarantee the enforcement of human rights or, as the case may be, their prompt reestablishment.

Finally, I wish to reiterate that this document is offered in the hope that the Court will, in the future, modify its jurisprudence on the matter in accordance with its intrinsic nature, that is, as an auxiliary source of international law or as a means for determining the rules of law[5] and, consequently, not immutable, except in the case in which the respective judgment has been rendered.[6]

It is worth noting that two of the operative paragraphs with which I disagree are related to the objection of prior exhaustion of domestic remedies[7] and three others are related to pretrial detention.[8]

I. Prior exhaustion of domestic remedies

[4] Art. 2 of the Ibero-American Code of Judicial Ethics, XIII Ibero-American Judicial Summit, Santo Domingo, Dominican Republic, June 2006: "- *The independent judge is one who, based on the Law in force, determines a fair decision, without any influence, either real or apparent, outside the Law."*

[5] Art.38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

[6] Art. 68: "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State."
Art. 59 of the Statute of the International Court of Justice: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[7] "1. To declare admissible the objection of failure to exhaust domestic remedies with respect to Groups 1 (Manfred Amrhein Pinto et al.) and 5 (Guillermo Rodríguez Silva and Martín Rojas Hernández); as well as with respect to Groups 2 (Rafael Rojas), file No. No. 099-0029291-042-PE; 7 (Miguel Mora Calvo), file No. 99-003994-0042-PE, and 8 (Damas Vega Atencio), files No. 99-000506-062-PE and No. 01-002231-0063-PE. It also declares admissible the objection with respect to the following persons of Group 3: Carlos Eduardo Yepes Cruz, Miguel Antonio Valverde Montoya, and Fernando Saldarriaga Saldarriaga. All of the above, in the terms of paragraphs 39 to 56 of this judgment." and "6. To dismiss the objection of failure to exhaust domestic remedies with respect to Groups 2 (Rafael Rojas Madrigal), files No. 99-000136-065-PE and 02-004656-0647-TP; 4 (Jorge Alberto Martínez Meléndez) files No. 03-000082-016-TP and No. 05-007495-0647-TP; 6 (Manuel Hernández Quesada), File No. 01-203116-0305-PE and 7 (Miguel Mora Calvo), File No. 97-000061-301-PE, as well as in relation to the following persons of Group 3: (Enrique Archbold Jay and Luis Archbold Jay), file No. 02-000759-455-PE-2; all this in the terms of paragraphs 39 to 57 of this judgment."

[8] "*11. The State is responsible for the violation of the right to personal liberty contained in Articles 7(1), 7(3) and 7(5) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 4 (Jorge Martínez Meléndez), pursuant to paragraphs* 350 to 369 *of this judgment";* "*20. This judgment constitutes, per se, a form of reparation*" and *"22. The State shall pay the amounts established in paragraphs 483, 490 and 497 of this judgment, as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, pursuant to the aforementioned paragraphs and the provisions of paragraphs* 479 to 497 of *this judgment".*

With regard to the operative paragraphs of the judgment that accept the objection of prior exhaustion of domestic remedies filed by Costa Rica,[9] it should be noted that the judgment follows the criterion that compliance with the requirement of prior exhaustion of domestic remedies is enforceable at the time the Inter-American Commission on Human Rights[10] decides on the admissibility of the petition that has been submitted to it, and not at the time of its presentation.[11]

This opinion, on the contrary, holds that the aforementioned requirement must be complied with at the time when the respective petition is *lodged* before the Commission; consequently, its admissibility will depend on whether said requirement was met at that time.

It is for this reason that this document does not argue that the preliminary objection filed by the State should have been rejected or that the reasons given by the representatives of the alleged victims in this regard should have been accepted. It merely argues that, by proceeding as it did, it prevented the trial from discussing whether or not said requirement had been met at the time the corresponding petitions were filed.

For a better understanding of the arguments put forward in this document, it is appropriate to reiterate what has been stated on other occasions,[12] and to refer, first of all, to the provisions of the corresponding rules of the American Convention[13] on the requirement of prior exhaustion of domestic remedies; then to the provisions of the Commission's Rules of Procedure on the same issue;[14] and thirdly, to the consequences - particularly in the present case - of accepting the approach followed hitherto by the Court.

A. Conventional norms

[9] Hereinafter, the State.

[10] Hereinafter, the Commission.

[11] Paragraph 41 of the judgment. Hereinafter, "para." or "paras." shall be understood to mean "*paragraph" or "paragraphs", respectively, of the judgment.*

[12] *Separate Concurring Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Yarce et al. v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2016. Series C No. 325*; Concurring Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Herrera Espinoza et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2016. Series C No. 316*; Concurring Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of November 19, 2015. Series C No. 307*; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of the Peasant Community of Santa Bárbara v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 299*; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2015. Series C No. 297*; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292*; Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014. Series C No. 276*, and Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 244.

[13] Hereinafter, the Convention.

[14] Hereinafter, the Rules of Procedure.

The rule of prior exhaustion of domestic remedies is provided for in Article 46 of the Convention in the following terms:

> *"1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:*
> *a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;*
> *b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;*
> *c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and*
> *d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.*
> *2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:*
> *a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;*
> *b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or*
> *c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."*

Article 47(a) and (b) add that:

> *"The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:*
> *a) any of the requirements indicated in Article 46 has not been met;*
> *b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;*

1. Ancillary or complementary nature of the rule

As a first observation, it should be noted that the aforementioned rule corresponds to the third paragraph of the Preamble of the Convention, which refers to *"international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."*

This means that the inter-American jurisdiction does not substitute or replace the domestic jurisdiction, but merely supports or complements it. In other words, it contributes or helps the latter to reestablish, as soon as possible, the effectiveness of the human rights that are alleged to have been violated. In this regard, it should not be forgotten that the State is bound by the Convention[15] and, therefore, not only has the international obligation to

[15] Arts. of the Convention: 1(1) "*The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*"

respect and enforce the rights enshrined therein but, in addition, on many occasions, it can do so only through its courts of justice.

For this reason, as the Court has pointed out, "*the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the opportunity to remedy them by its own means.*" Therefore, this rule is also a mechanism to encourage the State to comply with its human rights obligations without waiting for the inter-American system to order it to do so as a result of litigation. It also enables the State to re-establish, as soon as possible, the effective exercise of and respect for the human rights that have been violated, which is the object and purpose of the Convention and, consequently, should happen as soon as is practicable, making the intervention of the inter-American jurisdiction unnecessary.

The rule of prior exhaustion of domestic remedies means that in situations in which it has been alleged in the domestic jurisdiction that the State has not complied with its commitments to respect and ensure the free and full exercise of human rights, it is possible to seek the intervention of the international jurisdictional body so that, if appropriate, it may order the State to comply with the international obligations it has violated, guarantee that it will not violate them again, and make reparation for all the consequences of such violations.

2. Holder of the obligation.

The *effet utile* or practical effect of this rule is that the State re-establishes, as soon as possible, respect for the human rights that have been violated, which is the object and purpose of the Convention. For this reason, said rule is not only established primarily for the benefit of the victim of a human rights violation, but, in addition, it is he/she or the petitioner who must comply with it.

The aforementioned Article 46 is categorical in this regard. For the pertinent petition or communication to be admitted, the remedies under domestic law must have been exhausted and, evidently, it is up to the alleged victim, his or her representative or the petitioner to do so. Clearly, it would not be logical or reasonable to make the admissibility of a petition or communication for a violation of human rights dependent on whether the State against which it is directed has exhausted domestic remedies against its own consistent action, precisely for having violated human rights. In such an absurd hypothesis, it would never be possible to resort to the international body.

The above seems evident and if it is mentioned, it is merely to emphasize that, without a shadow of a doubt, the reference that the Court's jurisprudence has made to the fact that the rule in question "*was conceived in the interests of the State*" does not mean that it

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Art. 33 *"The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:*
a) the Inter-American Commission on Human Rights, referred to as "The Commission"; and
b) the Inter-American Court of Human Rights, referred to as "The Court."

bears the obligation to comply with it. The party obliged to do so, then, can only be the alleged victim, his representative or the petitioner, but not the State.

3. Timeliness of the petition

As a second comment, it is appropriate to point out that the rule of prior exhaustion of domestic remedies logically constitutes a requirement that must be complied with prior to submitting the petition to the Commission and that the latter must be informed of such compliance or of the impossibility of doing so.

Indeed, it should be borne in mind that Articles 46 and 47 refer to the *"petition or communication lodged,"* i.e., to an instantaneous act, which occurs at a given moment and is not prolonged over time. The same can be said with respect to Article 48(1)(a) of the Convention, which establishes that:

> *"When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:*
>
> *a) If it considers the petition or communication admissible, it shall request information from the government of the State indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case. [...]."*

In other words, what the Convention states is that the *"petition or communication lodged,"* whose *"pertinent portions*" are transmitted to the State concerned, must indicate compliance with the requirement of prior exhaustion of domestic remedies - or the impossibility of doing so due to any of the circumstances set forth in Article 46(2) - which means that at the time of lodging said petition, this must have already taken place.

This interpretation is reinforced by the provisions of Articles 46(1)(b) and 47(b), which state that the petition must have been:

> "*lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.*"

Certainly, the final judgment is understood to mean the one handed down after the last appeal has been filed, without there being any other appeals pending. That is to say, the time limit for filing the application is counted from the moment of notification of the final decision issued by the national authorities or courts on the remedies that have been filed before them and which are, therefore, those that may have generated the international responsibility of the State, which obviously implies that these must have been exhausted at the time the petition was *"lodged.*"

This idea is further reinforced by the wording of Article 46(1)(a) of the Convention insofar as it refers to the fact that "*the remedies under domestic law have been pursued and exhausted*, i.e., it alludes to something that has already occurred prior to presentation of the corresponding petition.

4. Mandatory rule

In accordance with the foregoing, we may also recall article 47(a), which states that:

> *"(T)he Commission shall declare inadmissible any petition or communication lodged in accordance with Articles 44 or 45 when: any of the requirements indicated in Article 46 has not been met."*

In other words, this provision is imperative. The Commission must declare inadmissible "*any petition or communication lodged*" that has not exhausted the domestic remedies or that does not reflect one of the situations contemplated in Article 46(2).

Evidently, the Commission cannot do otherwise than what has been indicated - such as, for example - declaring a petition or communication admissible even though, at the time it is "*lodged*" the requirement of prior exhaustion of domestic remedies has not been met, but *has* been met at the time it is "*admitted"*, since if it does so, as it has effectively and repeatedly done, it renders the aforementioned Article 46(1) meaningless and even the petition itself.

Indeed, if it does not require the exhaustion of domestic remedies prior to the *filing* of the petition or that the petition be filed within six months after final notification, it could not require that "*the subject of the petition or communication is not pending in another international proceeding for settlement*" or that it *"contains the name, nationality, profession, domicile and signature of the person or persons or of the legal representative of the entity lodging the petition,"* requirements that are also stipulated in Article 46 of the Convention, since all of this could be remedied later and, in any case, before the declaration of admissibility, which is clearly not in accordance with the provisions of this rule.

5. Presentation and admissibility of the petition

Finally, it should be noted that the aforementioned articles of the Convention do not indicate that the requirements must be met at the time the Commission rules on the admissibility of the petition or communication. Rather, it can be argued that the aforementioned articles of the Convention distinguish between two moments, namely, one in which the petition or communication is "*lodged*" or filed, and the other in which it is "*admitted*." This would also be supported by the provisions of Article 48(1)(a) and, likewise, by the provisions of subparagraphs b) and c) of the same article, which establish that:

> *"When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: [...]*
>
> *b) After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed;*
>
> *c) The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received."*

Thus, these rules establish that once the petition or communication has been "*lodged*" before the Commission, the admissibility procedure begins, in which the "dispute" arises as to whether the petition or communication should be declared "*admissible*" or "*inadmissible,*" that is, whether or not, at the time it was "*lodged*" it met the requirements set forth in Article 46. On the other hand, it does not stipulate that at the time the Commission rules on the admissibility of the petition, the latter must meet these requirements. In this regard, it should be noted that once again, the rule indicates that the Commission must rule on the admissibility of the petition or communication "*lodged*" and obviously considers that this filing gave rise to the corresponding case and that, consequently, at that moment it complied with the requirement of prior exhaustion of domestic remedies or that it was alleged that this was not applicable, and not afterwards.

B. Rules of Procedure of the Commission

The Commission's own Rules of Procedure in force at the time when the petitions in question were submitted to the Commission also regulate the admissibility procedure and, in doing so, reflect its interpretation of Article 46 of the Convention.[16] This procedure distinguishes between the lodging of the petition and its initial review, the forwarding of the petition to the State, the State's response and the observations of the parties and, finally, the decision on admissibility.

a. Initial review by the Commission

First, it is appropriate to consider the provisions of Article 26 of the Rules of Procedure, entitled *"Initial Review:*

> *1. The Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure.*
>
> *2. If a petition or communication does not meet the requirements set forth in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them.*
>
> *3. If the Executive Secretariat has any doubt as to whether the requirements referred to have been met, it shall consult the Commission."*[17]

In turn, Article 27 of said regulatory text, entitled *"Condition for Considering the Petition"*, establishes that:

> *"The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member States of the OAS, only when the petitions*

[16] Adopted by the Commission at its 109th special session held on December 4 to 8, 2000, and amended during its 116th regular session, held on October 7 to 25, 2002, and at its 118th regular session, held on October 6 to 24, 2003. The footnotes indicate the rule that is currently in force, equivalent to that in force between 2004 and 2006, the period during which the petitions of the instant case were lodged before the Commission.

[17] Article 26 of the current Rules of Procedure.

fulfill the requirements set forth in those instruments, in the Statute, and in these Rules of Procedure."[18]

For its part, Article 28, entitled "*Requirements for the Consideration of Petitions,"* establishes in paragraph (h), that:

"*Petitions addressed to the Commission shall contain the following information: [...] any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided for in Article 31 of these Rules of Procedure*."[19]

It should be noted that Article 29(1) and (3) of the same regulatory text, entitled "*Initial Processing,"* reiterates the provisions of Article 26(2):

"1. The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented. Each petition shall be registered, the date of receipt shall be recorded on the petition itself and an acknowledgement of receipt shall be sent to the petitioner.

3. If the petition does not meet the requirements of these Rules of Procedure, the Commission may request that the petitioner or his or her representative complete them in accordance with Article 26(2) of these Rules."[20]

It follows, then, that the information required for the petition to be "processed" or "considered" must refer either to the steps taken to exhaust the remedies under domestic law or to the impossibility of exhausting them. In other words, the petition must give an account of what was done to exhaust the remedies in question or state that it was impossible to exhaust them and, if nothing is expressed in that regard, the Commission must require the petitioner to do so under the statutory warning of not considering it.

In this sense, the Commission, acting through its Executive Secretariat, must carry out an initial control of conventionality of the petition, comparing it with the provisions of the Convention and with its Rules of Procedure; in other words, it must determine whether it meets the corresponding requirements at the time it was *"lodged"* and if it finds that it does not, it must demand that this be done. Otherwise, the logic and necessity of the "*study and initial processing*" of the petition by the Commission's Executive Secretariat could not be understood, nor the reason why the petitioner should be required to complete the petition by indicating the steps taken to exhaust domestic remedies or the impossibility of doing so.

b. Forwarding the petition to the State concerned

With respect to the forwarding of the petition to the State concerned, the Commission's Rules of Procedure also confirm the above interpretation, i.e., that the exhaustion of

[18] *Idem* in relation to Article 27 of the current Rules of Procedure.

[19] *Idem* in relation to Article 28(8) of the current Rules of Procedure.

[20] The provisions of Article 29(1) and (3) correspond to those included in Article 29(1), (a) and (b) of the current Rules of Procedure.

domestic remedies is a requirement that must be fulfilled prior to submitting the petition before the Commission.

Indeed, Article 30(1) and (2), of the Rules of Procedure, entitled *"Admissibility Procedure,"* establish:

> *"1. The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure.*
>
> *2. For this purpose, it shall forward the relevant parts of the petition to the State in question. The request for information made to the State shall not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition."*[21]

In this regard, it should be borne in mind that the forwarding to the State concerned ordered by the Commission can only be of the petition itself, as long as it complies with the requirement to provide information on the steps taken to exhaust domestic remedies or indicates the impossibility of doing so. That is to say, the forwarding of the petition must proceed on the assumption that it complies with the aforementioned requirement. The above rule does not establish, therefore, that said requirement must or may be fulfilled at a time subsequent to the filing of the petition. Likewise, attention must be paid to the fact that the petition must be transferred in the form in which it was filed and, therefore, must include the reference to the aforementioned requirement.

c. Response of the State and observations of the parties

According to Article 30(3), first phrase, and 5 of the Rules of Procedure,

> *"3. The State shall submit its response within three months from the date the request is transmitted.*
>
> *[...]*
>
> *5. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of these Rules of Procedure."*[22]

Thus, it is in this context that we should understand the Court's assertion that *"an objection to the jurisdiction of the Court based on the supposed failure to exhaust domestic remedies must be filed at the appropriate procedural opportunity, that is, during the admissibility stage of the proceedings before the Commission."*[23]

Obviously, the State's response to the petition forwarded to it and the additional observations of the parties in response to the invitation extended to them, must refer to

[21] Has the same wording as Article 30(1) and (2) of the current Rules of Procedure.

[22] In the same terms as Article 30(3), first phrase, and 5 of the current Rules of Procedure.

[23] Para. 39.

said petition, which – I repeat- must meet all the requirements stipulated, including information on any steps taken to exhaust domestic remedies prior to its presentation.

For this reason, Article 31(3) of the Commission's Rules of Procedure states that:

> "*When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the information contained in the petition."*[24]

However, it is only logical that in the event - not expressly contemplated in the Commission's Rules of Procedure - that the petitioner indicates in his petition that he has previously exhausted domestic remedies, i.e. that he has complied with the provisions of Article 46(1)(a) of the Convention, the State may raise the argument or objection that this has not occurred.

Consequently, it is undeniable that this response by the State must necessarily relate to the petition that was "*lodged*" before the Commission, and that it is at that moment, and not later, that the litigation or the adversarial proceedings are instituted with respect to the prior exhaustion of domestic remedies.

It is evident, then, that compliance with the rule of prior exhaustion of domestic remedies or the impossibility of such compliance, must be indicated in the petition; otherwise, the State would not be able to provide a response on the matter. In other words, only if the petition indicates that this rule has been complied with, or that it is impossible to do so, may the State contest this claim and, as established by the Court, *"specify which domestic remedies have not yet been exhausted, and prove that these remedies were available, adequate, suitable and effective."*[25] All the foregoing shows, once again, that this requirement must be met previously, i.e. before drawing up the petition, the pertinent portions of which are forwarded to the State precisely so that it may respond to them.

On the other hand, if the petition makes no reference whatsoever to the requirement in question, it is only incumbent upon the State to point out that the petition does not comply with it. In such a situation, imposing on the State the obligation to demonstrate the existence of adequate, suitable and effective remedies that have not been exhausted, would mean substituting the petitioner for the State as the holder of the obligation to previously exhaust the domestic remedies as provided for in the Convention and in the Commission's Rules of Procedure, and requiring the State to assume the burden of someone else's obligation.

And, for the same reason, it is at that moment that the domestic remedies must have been exhausted or that the petitioner should have indicated the impossibility of doing so. To affirm that those remedies could be exhausted after the petition has been "*lodged*" and, consequently, notified to the State, would affect the essential procedural balance and would

[24] *Idem* in relation to Article 31(3) of the current Rules of Procedure.

[25] Para. 39.

leave the State defenseless, because it could not file the pertinent preliminary objection in time and in due form.

d. Decision on Admissibility.

Article 31(1) of the Rules of Procedure, entitled *"Exhaustion of domestic remedies,"* establishes that:

> *"In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."*[26]

It is worth noting that this provision states that in order to decide on the admissibility of a matter, the Commission must *"verify"* - that is, confirm or ascertain - whether the remedies under domestic law have been pursued and exhausted previously. However, it does not stipulate that such verification must be carried out with respect to remedies exhausted and filed prior to this, but only after the filing of the petition. Nor does it establish that these may be pursued and exhausted after the petition has been lodged.

Moreover, Article 32(1) of said Rules, entitled *"Statute of Limitation for Petitions"* coincides with the above interpretation, indicating that:

> *"The Commission shall consider those petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies."*[27]

In other words, this rule indicates the petitions that will be considered by the Commission with respect to their admissibility and reiterates the provisions of Article 46(1)(b) of the Convention, i.e., that the time period indicated for presenting them must be counted from the moment of notification of the final decision of the domestic authorities or courts on the remedies that have been filed with them which are, therefore, those that could have generated the international responsibility of the State. This obviously implies that they must have been exhausted at the time the petition was *"lodged."*

According to Article 36 of the Rules of Procedure, entitled *"Decision on Admissibility"*

> *"1. Once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter. The reports on admissibility and inadmissibility shall be public and the Commission shall include them in its Annual Report to the General Assembly of the OAS.*
>
> *2. When an admissibility report is adopted, the petition shall be registered as a case and the proceedings on the merits shall be initiated. The adoption of an admissibility report does not constitute a prejudgment as to the merits of the matter.*

[26] The same wording as Article 31(1) and (3) of the current Rules of Procedure.

[27] *Idem* in relation to Article 32(1) of the current Rules of Procedure.

3. In exceptional circumstances, and after having requested information from the parties in accordance with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of admissibility until the debate and decision on the merits. The case will be opened by means of a written communication to both parties."[28]

On this point, it is appropriate to note that the rule alluded to does not stipulate that the remedies of the domestic jurisdiction should necessarily have been exhausted to be able to adopt a decision on admissibility, since such decision may be to not admit the petition precisely because those remedies have not been exhausted.

It should also be noted that this rule does not establish that domestic remedies must be exhausted at the time the decision on admissibility is adopted, even if they had not been exhausted prior to the decision, but simply states that, *"once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter,"* nothing more. Thus, this rule does not refer specifically to the time at which the requirement of prior exhaustion of domestic remedies must have been complied with, but rather to the time at which the decision on the admissibility of the petition "lodged" must be adopted.

In conclusion, in order to decide whether or not to admit the petition, the Commission carries out a second control of conventionality of the petition, comparing it with the provisions of the Convention as regards the requirements that logically could and should have been met only when this occurred, that is, when it was "*lodged.*"

C. Consequences in general

In support of the argument that the rule of prior exhaustion of domestic remedies must be complied with *before* the petition is "lodged" with the Commission, it is worth reiterating that, in the opposite case, that is, if the rule were to allow it to be done later, it is possible that, in the event that one of the exceptions to this rule has not been invoked or has not been decided upon and at least for a period of time (for example, between the time when the petition is lodged and the time when the decision on its admissibility is adopted, which in many situations could be considered extremely long) the same case could be dealt with simultaneously by both the domestic jurisdiction and the international jurisdiction. This would obviously make the statement in the second paragraph of the Preamble meaningless, and even the rule of prior exhaustion of domestic remedies as a whole. Indeed, in this situation, the inter-American jurisdiction would not reinforce or be complementary to the domestic jurisdiction, but rather would substitute it or, at least, it could be used to bring pressure to bear on the latter and, clearly, this is not what the Convention seeks.

Moreover, under this hypothesis, it might constitute an incentive, which could be considered perverse, to lodge petitions before the Commission when said requirement has not been met in the hope that it can be complied with before the Commission decides on their admissibility. Evidently, this situation was not anticipated or sought by the Convention.

[28] As contemplated in Article 36 of the current Rules of Procedure.

This also begs the question of whether the "*study and initial processing*" of the petition is required, if it could be lodged without having previously exhausted the domestic remedies. Certainly, if this step were only demanded at the time of deciding on the admissibility of the petition, one might wonder what would be the point of initially studying the petition. And, furthermore, what would be the reason and the practical effect of the Convention's distinction between the time of submission of the petition and the time of its admissibility. Indeed, if it were considered that the above requirement or rule should be fulfilled at the time the decision on the admissibility of the petition is adopted and not at the moment it is lodged, it is logical to ask what would be the point of the petition itself.

It should also be noted that, if the criterion that the above requirement must be fulfilled at the time the petition is presented or supplemented is not followed and that, to the contrary, the argument is adopted that this requirement is determined by the moment in which the Commission rules on the admissibility of the petition, situations of open injustice or arbitrariness would arise. This is because the opportunity to comply with the requirement in question would ultimately depend not on the victim or the petitioner, nor on a rule valid for all, but on the Commission's decision to rule on the admissibility or inadmissibility of the petition, which on many occasions takes years to be adopted and could sometimes be classified as arbitrary.

Finally, it is reasonable to presume that, with a more streamlined processing and, therefore, more expeditious rulings by the Commission with respect to the admissibility of the petitions "*lodged,*" which would most likely require more resources and adequate regulations for that purpose, delays or setbacks in the processing of a considerable number of cases would surely be avoided.

D. Consequences in the present case

The first consequence of considering - as the Judgment does - the rule of prior exhaustion of domestic remedies as a requirement for the admissibility of the petition, is that it ultimately makes it possible that the issue raised in the case with the filing of the petition could vary considerably, transforming its object and seriously affecting the rights of one or both parties to such an extent that the Court ends up ruling on an objection different from the one raised, even changing the case.

In fact, what was alleged in this case was, logically, that the international wrong had already been committed on the date of the pertinent petitions[29] and the State duly responded to it,[30] obviously prior to the enactment of Law 8503, "Law on the Opening of Criminal Cassation" and its transitory provision I, of 2006,[31] and also of Law No. 8837 "Creation of an appeals procedure, other reforms to the appeals system and implementation of new rules on oral proceedings in criminal cases," of 2011.[32] However, the judgment analyzes the objection related to the requirement of prior exhaustion of domestic remedies in order

[29] Paras. 3 and 41.

[30] Para. 40.

[31] Para. 46.

[32] Para. 55.

to accept or reject it, not with reference to the legislation in force at the time the petitions were filed, but with respect to the aforementioned laws which, I repeat, were *not* in force at that time.

Thus, what the judgment ultimately did was to control the conventionality of the provisions of Laws N°. 8503, of 2006, and 8837, of 2011, distinguishing between the petitions that complied with the provisions of the former and those that did not,[33] forgetting that said law does not establish the obligation to file the appeals that it contemplates.[34]

In short, the judgment did not consider the possibility that the petitioners could raise - if they so wished, and at the appropriate time - the potential non-compliance with the provisions of said laws as a matter totally different from the one resolved in the case before this Court.

Likewise, this case was dealt with simultaneously by the domestic jurisdiction and the international jurisdiction, as shown by all the appeals filed in the cases ultimately considered by the judgment,[35] between the time when the petitions were filed, that is, between March 2004 and November 2006, and when their admissibility was decided, on July 22, 2011, which is clearly not in accordance with the provisions of the Convention.

It should also be noted that there is no record of the "*initial study and processing*" of the petition provided for in the applicable regulations or, indeed, of the 4 to 6 years that the Commission took to rule on admissibility, thus allowing the above situation to occur.

In synthesis, the instant case is a clear demonstration of how inappropriate it is to have demanded proof of compliance with the requirement of prior exhaustion of domestic remedies, or that such requirement was not applicable, at the time the Commission ruled on the admissibility of these petitions and not when they were lodged, as provided for in the Convention.

Therefore, in light of the above considerations, I disagree with the provisions of the first and sixth operative paragraphs[36] of the judgment and, for these same reasons, I agree with the provisions of the twelfth and nineteenth operative paragraphs of the judgment.[37].

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[33] Paras. 48 to 57.

[34] *"Persons convicted of a criminal act prior to the date of this Law, who have been prevented from petitioning for a writ of reversal on cassation against the judgment, due to the rules that regulated its admissibility at that time, may seek a review of the conviction before the competent court, invoking, in each case, the grievance and the factual and legal aspects that could not be heard in cassation*." Para. 46.

[35] Para. 172 and ff.

[36] *Supra*, Note N° 7.

[37] "*12.The State is not responsible for the violation of the right to appeal the judgment contained in Article 8(2)(h) of the American Convention, in relation to Article 8(1) thereof, to the detriment of Group 2 (Rafael Rojas Madrigal), Group 3 (Luis Archbold Jay and Enrique Archbold Jay), Group 4 (Jorge Martínez Meléndez) and Group 7 (Miguel Mora Calvo) in the terms of paragraphs 255 to 345 of this judgment.*
13. The State is not responsible for the violation of the right to an impartial judge established in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 4 (Jorge Martínez Meléndez) and the Group 2 (Rafael Rojas Madrigal) and the Group 7 (Miguel Mora Calvo), pursuant to paragraphs 383 to 417 and 456 of this judgment.

II. Pretrial detention

In this opinion I also wish to express my disagreement with the eleventh, twentieth and twenty-second operative paragraphs[38] of the judgment.

First, it should be noted that the judgment states that "*the extension of Mr. Martínez's pretrial detention by the trial court may have been legal, since apparently, the case law of the Constitutional Chamber allowed the extension of pretrial detention based on Article 329 of the CPP"*[39] and that "*in the conviction, Mr. Martínez's pretrial detention was extended for another six months and that, in a ruling of February 29, 2008, it was extended for a further two months, which was permitted by Article 378 of the CPP."*[40]

Secondly, I also draw attention to the fact that, according to the judgment, the State has an "*obligation to not restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he does not interfere with the proceedings or evade the action of justice.*"[41]

Third, it is important to bear in mind that the judgment criticizes the fact that the victim's pretrial detention was made subject to "*the duration of the proceedings."*[42]

Moreover, it is by virtue of the foregoing, and invoking the *pro homine* principle, that the judgment declares that *"pretrial detention became the rule for Mr. Martínez*"[43] and that this "*exceeded the limits of reasonableness.*"[44]

Thus, by proceeding in this manner, the judgment does not adequately consider that the detention ordered in this case was carried out, as it indicates, in accordance with the law

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14. The State is not responsible for the violation of the presumption of innocence established in Article 8(2) of the American Convention to the detriment of Group 4 (Jorge Martínez Meléndez), pursuant to paragraph 390 *of this judgment.*
15. The State is not responsible for the violation of the right to a trial within a reasonable time established in Article 8(1) of the American Convention to the detriment of Group 4 (Jorge Martínez Meléndez), in the terms of paragraphs 419 to 429 and 456 of this judgment.
16. The State is not responsible for the violation of the right to defense established in Article 8(2) of the American Convention to the detriment of the members of Group 3 (Luis Archbold Jay and Enrique Archbold Jay); of Group 4 (Jorge Martínez Meléndez), in the terms of paragraphs 436 a 456 of this judgment.
17. The State is not responsible for the violation of the right to defense contained in Article 8.2.f of the American Convention to the detriment of Group 4 (Jorge Martínez Meléndez), in the terms of paragraphs 450 to 452 and 458 of this *judgment.*
18. The State is not responsible for the violation of the right to appeal the legality of a detention contained in Articles 7(6) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 4 (Jorge Martínez Meléndez), in the terms of paragraphs 370 to 372 of this judgment.
19. The State is not responsible for the violation of the right to personal integrity contained in Articles 5(1) and 5(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Group 8 (Damas Vega Atencio), in the terms of paragraphs 459 to 465 of this judgment.

[38] *Supra* Footnote N°8.

[39] Para. 367.

[40] Para. 368.

[41] Para. 367.

[42] *Idem*.

[43] Para. 367.

[44] Para. 368.

of the State, and therefore it is in conformity with the express provisions of Article 7(2) of the Convention, which precisely refers to the provisions of the "laws" of the State.

Nor does the judgment appear to consider that the reasonableness referred to in Article 7(5) of the Convention must be determined first by the competent national judge and subsequently, if applicable, as in the present case, by the Court. In both instances, this must be done in accordance with the provisions of the Convention and not only or principally as prescribed in the aforementioned domestic laws. Thus, the Convention allows this Court a certain margin of appreciation according to the circumstances of each case before it, without demanding its strict adherence to the provisions of domestic law. It should not be forgotten that the Court is responsible for applying and interpreting the Convention in the cases submitted to it,[45] that is, it must rule in accordance with it and not in accordance with the national laws of the State concerned, unless it refers to the latter, which is not the case here. Indeed, the reasonableness of the time period mentioned in Article 7(5) is subject to *"the guarantees that assure his (the defendant's) appearance at trial",* which was the situation in the instant case.

Finally, it is essential to recall that, as stated in the judgment itself,[46] the appearance of the detainee in this case occurred due to the extradition procedure carried out to secure his return from Canada, since he tried to evade justice by remaining in that foreign country. It is evident that his detention was the way to ensure his presence at trial, given the well-founded fear that he would again attempt to evade the action of justice.

Consequently, it is for the abovementioned reasons that I cannot agree with the decision reached in the judgment on this point. And it also explains why I do not consider it necessary to declare, as it does, that the judgment constitutes "*per se*, a form of reparation.

[45] Art. 62(3): "*The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.*"

[46] Para. 364.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Registrar