ORGANIZATION OF AMERICAN STATES
Inter-American Commission on Human Rights

Application to the Inter-American Court of Human Rights
in the case of Eduardo Kimel
(Case 12.450)
against the Republic of Argentina

DELEGATES:

Florentín Meléndez, Commissioner
Santiago A. Canton, Executive Secretary
Ignacio J. Álvarez, Special Rapporteur for Freedom of Expression

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April 10, 2007
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APPLICATION SUBMITTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS AGAINST THE REPUBLIC OF ARGENTINA

CASE 12.450
EDUARDO KIMEL

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or "the Commission") hereby submits to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," or "the Court") this application in Case 12.450, *Eduardo Kimel,* against the Republic of Argentina (hereinafter "the State," "the Argentine State" or "Argentina"). The application is in connection with the conviction of a one-year suspended prison sentence and a payment of twenty thousand pesos in damages imposed on the journalist and writer Eduardo Kimel (hereinafter "the victim"), the author of the book *La Masacre de San Patricio* ("The San Patricio Massacre"). The conviction was handed down during criminal proceedings for slander brought by a former judge who was criticized in the book for his actions during an investigation into a massacre committed while the country was ruled by a military dictatorship.

2. The Commission requests that the Court rule that the Argentine State failed to abide by its international obligations by violating Articles 8 (right to a fair trial) and 13 (freedom of thought and expression) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), in conjunction with the general obligation of respecting and ensuring human rights and of adopting domestic legal provisions set out in Articles 1(1) and 2 thereof.

3. This case has been processed in accordance with the terms of the American Convention and is submitted to the Court in compliance with Article 33 of its Rules of Procedure. Attached hereto, in the appendixes, is a copy of report No. 111/06, drawn up according to Article 50 of the Convention.[1]

4. The Commission believes it is justified in referring this case to the Court because of the need to ensure justice and to secure redress for the victim. Additionally, the Commission believes that this case offers an opportunity for developing inter-American jurisprudence regarding the inadmissibility of laws that criminalize, in a fashion similar to *desacato* contempt legislation, statements or opinions that criticize the way in which State agents perform their duties.

II. PURPOSE OF THE APPLICATION

5. The purpose of this application is to respectfully request that the Court conclude and declare that:

a) The Argentine Republic is responsible for violating, with respect to Eduardo Kimel, the right to freedom of thought and expression enshrined in Article 13 of the American Convention on Human Rights, in conjunction with the general obligations of respecting and ensuring human rights and of adopting such legislative or other measures necessary to give effect to those

[1] IACHR, Report No. 111/06 (merits), Case 12.450, *Eduardo Kimel*, Argentina, October 26, 2006; Appendix 1.

protected rights, in accordance with Articles 1(1) and 2 of the Convention; and

b) The Argentine Republic is responsible for violating, with respect to Eduardo Kimel, the right to a fair trial enshrined in Article 8 of the American Convention on Human Rights, in conjunction with the general obligation of respecting and ensuring human rights under Article 1(1) thereof.

6. In consideration of the above, the Inter-American Commission asks the Court to order that the State:

a) compensate Mr. Eduardo Kimel for the harm caused by the violation of his rights;
b) adopt the judicial, administrative, and other measures necessary to render void of effect the criminal proceedings initiated against Mr. Eduardo Kimel and the judgments handed down therein, including the order that he pay compensation for moral damages;
c) adopt the judicial, administrative, and other measures necessary to expunge Mr. Eduardo Kimel's criminal record arising from this case;
d) amend its criminal legislation to bring it into line with Article 13 of the American Convention; and
e) pay the legal costs and expenses incurred in pursuing this case at the national level, as well as those arising from its processing before the inter-American system.

III. REPRESENTATION

7. Pursuant to the provisions of Articles 22 and 33 of the Rules of Procedure of the Court, the Commission has appointed Commissioner Florentín Meléndez, Executive Secretary Santiago A. Canton, and Special Rapporteur for Freedom of Expression Ignacio J. Álvarez as its delegates in this case. The attorneys Ariel E. Dulitzky, Elizabeth Abi-Mershed, Juan Pablo Albán Alencastro, and Alejandra Gonza, specialists with the Executive Secretariat of the Commission, have been appointed to serve as legal advisors.

IV. JURISDICTION OF THE COURT

8. Under Article 62(3) of the American Convention, the Inter-American Court is competent to hear 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 its jurisdiction.

9. The Court has jurisdiction to hear this case. The Argentine Republic ratified the American Convention on September 5, 1984, and it accepted the contentious jurisdiction of the Court on the same date.

V. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION[2]

10. On December 6, 2000, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") received a petition lodged by

[2] The formalities referred to in this section can be found in the case file of proceedings before the Commission; Appendix 3.

the Center for Legal and Social Studies (CELS) and the Center for Justice and International Law (CEJIL)

11. Following the corresponding review, the complaint was initially joined to the file on another petition, under case 12,128, which at that time the Commission was already processing, owing to the similarity of the alleged facts in both cases.

12. In a communication of February 2, 2001, the Commission informed the petitioners that processing had begun and it sent the pertinent portions of the petition to the State as additional information related to petition 12.128, which was the subject of a friendly settlement procedure. In that communication, the State was given 30 days to submit such observations as it deemed appropriate regarding the new information relating to the petition on behalf of Mr. Kimel, and to provide an account of progress in the friendly settlement procedure under way in connection with petition 12.128.

13. On April 17, 2001, the petitioners communicated to the Commission their acceptance of the inclusion of this case in the already ongoing friendly settlement proceedings; irrespective of that, however, they requested that those proceedings analyze the elements of the petition as regards both the criminal and civil aspects of Eduardo Kimel's situation.

14. On July 30, 2001, the State communicated with the IACHR as a part of the friendly settlement proceedings in petition No. 12.128, submitting a copy of a legislative bill submitted to the Congress of the Nation by the federal executive with the purpose of amending the provisions of the Civil and Criminal Codes dealing with the crimes of libel *(calumnias)* and slander *(injurias)* in order to bring them into line with the purpose and goals of the American Convention. This communication was relayed to the petitioners on August 16, 2001, along with a deadline of one month in which to submit comments.

15. On September 27, 2001, the petitioners sent a note to the Executive Secretariat with reference to the bill submitted to Congress by the executive in order to amend the provisions of the Civil and Criminal Codes as regards the crimes of libel and slander. The relevant parts of that communication were conveyed to the State on October 12, 2001, along with a period of one month in which to submit any information deemed relevant in connection therewith.

16. At the petitioners' request, the Commission convened a working meeting of the parties, which took place on November 15, 2001, during the IACHR's 113th period of sessions. At the meeting the parties discussed the need for the State to define its position regarding the possibility of dealing with Mr. Kimel's case through friendly settlement proceedings. In addition, the topic of the proposed legislation was also dealt with at a meeting held during the working visit conducted by the rapporteur for Argentina in July 2002.

17. In a communication dated August 15, 2002, the petitioners asked the Commission to request that the State submit up-to-date information on progress with the proposed amendments to the Civil and Criminal Codes.

18. The Commission invited the parties to a new working meeting, held on October 18, 2002, during the IACHR's 116th session. On that occasion the State reported on its progress with the bill and said that, given the nature of Mr. Kimel's petition, it would not be feasible to resolve it in full by means of the friendly settlement proceedings initiated in the *Verbitsky* case (No. 12.128).

19. On November 27, 2002, the Commission received a communication from the petitioners requesting that the complaint lodged on Mr. Kimel's behalf be ruled admissible, on account of the expiration of the deadline set by Article 30 of the Commission's Rules of Procedure

for the State to submit its comments or objections regarding a petition's admissibility. The IACHR forwarded the relevant parts of that submission to the State by means of a note dated February 5, 2003.

20. The Commission convened another working meeting with the parties, which took place during its 117th session on February 28, 2003. The aim of the meeting was to update the state of the negotiations in the friendly settlement proceedings of No. 12.128 and to define how the processing of that case and of the complaint dealing with Mr. Kimel's situation was to proceed.

21. On March 17, 2003, the State requested a 30-day extension for submitting its reply to the petitioners' last submission; that reply was finally sent on April 16, 2003, as a part of the processing of petition No. 12.128.

22. On May 27, 2003, the petitioners told the Commission that given the lack of progress with the amendments bill, the talks toward reaching a friendly settlement agreement in connection with petition No. 12.128 had come to a conclusion.

23. On November 26, 2003, the Commission formally separated Mr. Eduardo Kimel's petition from its ongoing processing of complaint No. 12.128 *(Verbitsky et al.)*, and it informed the parties that its processing would continue as No. P720/00. In that same communication, the Commission informed the parties that it was concluding the friendly settlement proceedings on account of their failure to yield results, and that it was giving them a period of one month in which to submit any further comments on the admissibility of both petition 720/00 and petition 12.128. The petitioners replied by reiterating their request that the case be ruled admissible. The Government, in contrast, did not reply.

24. On February 24, 2004, at its 119th regular session, the Commission issued Admissibility Report 5/04,[3] in which it concluded that it was competent to examine the petition submitted with respect to the alleged violation of Articles 8 and 13 of the Convention, in conjunction with Articles 1.1 and 2 of that instrument, to the detriment of Mr. Kimel. As well, in observance of the principal of *iura novit curia,*[4] the Commission reserved the right to evaluate the alleged facts in light of Article 25 of the Convention on judicial protection.

25. On March 12, 2004 the Commission transmitted the admissibility report to the parties, giving the petitioners two months to present their observations on the merits, and it made itself available for reaching a friendly settlement of the matter, in accordance with Article 24(1)(f) of the American Convention.

26. On January 4, 2005 the petitioners, after an extension, presented their additional observations on the merits of the case, which were transmitted to the State on January 27, 2005, giving it two months to present its observations.

27. On January 31, 2005, at the petitioners' request and in compliance with Articles 60 and 62 of its Rules of Procedure, the Commission called the parties to a public hearing, which was held on March 4, 2005, during its 122nd regular session.

28. On May 31, 2005 the State submitted its observations on the merits of the case, in which it reiterated its willingness to "reopen the friendly settlement procedure abandoned by the

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[3] IACHR, Report 5/04, Petition 720/00, Admissibility, Eduardo Kimel, Argentina, February 24, 2004, Appendix 2.

[4] PCIJ, *Lotus Case*, Judgment of September 7, 1927, Series A No. 10, p. 31.

petitioners," and it indicated the importance of giving "the Argentine State a reasonable period of time before pronouncing itself on the merits of the case."

29. On July 7, 2005, Mr. Victor Abramovich formally resigned as legal counsel and representative of the Center for Legal and Social Studies (CELS) in the Kimel case, as a result of his election as a member of the IACHR.

30. On March 3, 2006 the Commission transmitted to the petitioners the pertinent portions of the observations submitted by the State, and gave them one month to present their observations on that information. On April 7, 2006, the petitioners submitted their comments, which were forwarded to the State.

31. On September 12, 2006, the Human Rights Clinic of the Universidad de Palermo presented an *amicus curiae* brief, which was transmitted to the parties for their information.

32. On October 26, 2006, during its 126th session, the Commission adopted Report on Merits 111/06, drawn up in compliance with Article 50 of the Convention. In that report, it concluded that:

> [...] the Argentine State violated the rights of Eduardo Kimel to freedom of thought and expression, protected by Article 13 of the American Convention, in connection with Articles 1.1 and 2 thereof, as well as his right to due process pursuant to Article 8 of the treaty, in connection with Article 1.1 thereof.

33. In the Report on the Merits, the Commission served the following recommendations on the Argentine State:

> 1. That the Argentine State recognize its international responsibility for the facts of the present case.
>
> 2. That the State grant adequate reparations to Eduardo Kimel for the violation of his rights.
>
> 3. That the State, to fully repair Eduardo Kimel's rights, must adopt all the necessary judicial, administrative and other measures necessary to nullify completely the criminal proceedings against Mr. Eduardo Kimel and their sentences, expunging the resulting criminal record and economic implications.
>
> 4. That the State adjust its criminal legislation in accordance with Article 13 of the American Convention.

34. Notification that a report on the merits had been adopted was sent to the State on November 10, 2006, together with a period of two months in which to report back on the steps taken in pursuit of its recommendations, as provided for in Article 43(2) of the Commission's Rules of Procedure.

35. Also on November 10, 2006, in compliance with Article 43(3) of its Rules of Procedure, the Commission informed the petitioners that a report on the merits had been adopted and had been conveyed to the State; it also asked them to state their position, within the following month, regarding the possible referral of the case to the Inter-American Court.

36. In a communication of December 12, 2006, the petitioners informed the Commission of their desire for the case to be submitted to the Court in light of the "failure of the negotiation

channels explored and promoted by the petitioners, and on account of the absence of legal reforms respecting the right of free expression and information."

37. On January 22, 2007, the Argentine State sent the Commission a proposal for the establishment of a dialogue panel between the parties in an attempt to seek out the best way to comply with the Commission's recommendations in this case. In that same communication, the State requested an extension of the deadline set by Article 51(1) of the American Convention on Human Rights, in order to fully comply with the recommendations. On that occasion the State said that it recognized that if the requested extension were granted, the deadline set by Article 51(1) of the American Convention would be suspended. Consequently, if the matter were referred to the Inter-American Court of Human Rights, the Argentine State would expressly waive the right to file preliminary objections regarding observance of the deadline described in the aforesaid article.

38. In a communication of February 6, 2007, the Commission informed the State of its decision to grant it a two-month extension for it to report back on its implementation of the recommendations contained in the Report on the Merits. In the same communication, the Commission told that State that in light of the extension, the new deadline for the referral of the matter to the Inter-American Court would be April 10, 2007.

39. After analyzing the available information on the implementation of the recommendations set out in the Report on the Merits, and seeing a lack of substantive progress with their effective compliance, the Commission resolved to refer the case to the Inter-American Court.

VI. CONSIDERATIONS OF FACT

A. Background

1. The murder of five Pallottine clerics and the judicial investigation

40. On July 4, 1976, some three months after the assumption of power by the military dictatorship that overthrew Argentina's constitutional government, the priests Alfredo Kelly, Alfredo Leaden, and Pedro Duffau, and the seminary students Salvador Barbeito and Emilio Barletti, all of whom belonged to the Pallottine order, were murdered.

41. The killings took place at the parish church of San Patricio, located in the Belgrano district of the city of Buenos Aires. The bodies were found by Rolando Savino, the church organist.

42. The investigation of the incident was carried out by National First-Instance Court for Federal Criminal and Correctional Matters No. 1, under judge Guillermo Rivarola. The legal proceedings concluded on October 7, 1977, with a ruling provisionally dismissing the alleged perpetrators of the crimes. The proceedings were reopened in 1984, but a declaration in June 1987 ruled that statutory limitations applied and ordered the case closed again.

2. The victim

43. Eduardo Kimel is a historian who graduated from the University of Buenos Aires, Argentina. He has also worked as a journalist, writer, and historical researcher. As a result of his research, he published a series of books dealing with Argentine political history, including *20 años*

de historia política argentina (1945-1965), 30 años de historia política argentina (1965-1995), and *La Masacre de San Patricio*.[5]

3. The book *La Masacre de San Patricio*

44. In 1989 Mr. Kimel published his book *La Masacre de San Patricio* ("The San Patricio Massacre"), setting out the results of his investigation into the murder of the five members of the Pallottine order.

45. The book criticizes the actions of the authorities responsible for investigating the killings, including judge Guillermo Federico Rivarola, in the following terms:

> Judge Rivarola discharged all the applicable procedures: he collected the police reports containing the preliminary information; he requested and was provided with the reports of the coroner and the ballistics expert. He summoned a sizeable number of people who were able to provide information to further the enquiry. However, an examination of the judicial records poses an initial question: Was there any real intention to turn up clues that might lead to the murderers? Under the dictatorship, judges were normally acquiescent to, when not complicit in, the repression of the dictatorial regime. In the Pallottines' case, Judge Rivarola complied with most of the formal requirements of the investigation. It is clear, however, that a series of decisive elements that could have shed light on the killings were not taken into account. Evidence that the order to carry out the crime had come from within the military power structure paralyzed the enquiry, bringing it to a standstill.[6]

46. The book has won several prizes and has been reprinted several times since 1995.

B. The legal proceedings against the victim

47. On October 28, 1991, Mr. Guillermo Federico Rivarola filed a criminal suit against Mr. Eduardo Kimel for the crime of libel as defined in Article 109 of the Argentine Criminal Code,[7] deeming the fragment of the book transcribed *supra* (paragraph 45) to be injurious to him.

48. In the complaint Mr. Rivarola said that "although a dishonorable accusation leveled at a magistrate by reason of or in connection with his functions would constitute *desacato* under the repealed Art. 244 of the relevant Code, the specific accusation of a publicly actionable offense necessarily constitutes libel."[8] He also said that Mr. Kimel's claims "clearly assume the commission of the offenses of dereliction of duty by a public official (Art. 248 of the Criminal Code) and of cover-up (*ibid,* Art. 277)."[9]

49. The case was heard by the 8th National First-Instance Court for Criminal and Correctional Matters of the city of Buenos Aires, which recorded it as No. 2.564.

50. On September 25, 1995, the court issued its judgment, stating, *inter alia*, that:

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[5] See: Eduardo Kimel, *La Masacre de San Patricio*, Ediciones LOHLÉ-LUMEN, Second Edition, 1995, Annex 8.

[6] See: Eduardo Kimel*, La Masacre de San Patricio,* Ediciones LOHLÉ-LUMEN, Second Edition, 1995, Annex 8.

[7] This provision reads: Libel or false accusation of a publicly actionable crime shall be punished by imprisonment of between one and three years.

[8] Judgment of September 25, 1995, issued by the 8th National First-Instance Court for Criminal and Correctional Matters of Buenos Aires, result II; Annex 1.

[9] Judgment of September 25, 1995, issued by the 8th National First-Instance Court for Criminal and Correctional Matters of Buenos Aires; Annex 1.

a) In no way, under the prevailing doctrine and jurisprudence, can it be validly held that such epithets constitute an accusation of criminal behavior as required by the typical and antijuridical definition of libel. The question as such cannot imply a concrete accusation, but rather the author's mere and perfectly subjective appraisal – and subject to the subjectivity of the reader also – of a no less subjective appraisal of the evidentiary value of evidence presented at trial by Dr. Rivarola. It is, therefore, an opinion-based criticism of the actions of a magistrate in a given trial. But different interpretations of the facts and circumstances can in no way imply the clear and unequivocal accusation of a publicly actionable offense.
b) Claiming that Kimel's intent was to accuse Mr. Rivarola with the commission of publicly actionable offenses is in line with neither the spirit of the text or the malice required for the offense of libel. That is because the objective falsehood of the accusation requires that the active subject be aware and apprised of the falsehood of the claimed facts. Since Kimel uses the interrogative form, he claims nothing with certainly, merely making, at most, value judgments that are unfavorable to Mr. Rivarola but that in no way constitute the offense of libel. Although there are suggestions of irregularities during the investigation – justified on account of the military involvement – it cannot for that reason be claimed that it was Kimel's intention to accuse the plaintiff of committing the crimes to which he refers.
c) The global intent that emerges from Chapter V of the document containing the alleged libel, which the defense describes as being that of "investigation, information, and opinion," has gone beyond the sphere that is perfectly protected by constitutional guarantees – which the defense also invokes – to enter the realm of unnecessary and excessive criticism and dismissive and pejorative opinion regarding the work of a magistrate that in no way contributes to the functions of information, social instruction, cultural dissemination, much less the clarification of the incident or of social awareness.
d) The undersigned has no doubts that, as the defendant maintains, his intention was to offer a criticism of the judiciary at a specific time and in a given situation and to reveal one of the many abuses committed by the military authorities under the dictatorship. However, neither can the defendant ignore the fact that the claims, suggestions, and doubts he presents, with specific reference to Dr. Rivarola, could harm the dignity of the magistrate and of the common man behind that position. Clearly, Kimel has committed an unjustified, arbitrary, and unnecessary excess regarding certain specific historical events on the pretext of informing the general public. The reader could be given the same information without offering speculation or interpretations regarding the work of the offended magistrate or, were they offered, they could be given in terms that were not harmful or mistaken to the extent that his prestige as a magistrate was undermined. As the defense admits, Kimel did not merely inform; in addition, he gave his opinion regarding the facts in general and regarding Dr. Rivarola's actions in particular. And in that harmful excess lies the offense of slander.
e) The offense of slander was not included in the law suit and was instead added later by the plaintiff. In this regard, the court accepted the possibility of a conviction for slander, considering that the defendant Kimel's lawyers "have drawn up their defense in an all-embracing fashion, covering all crimes against honor and claiming that at no time did their client intend to perpetrate any offense against the plaintiff's honor." The framework and development of the defense also covers slander [...].[10]

51. It consequently decided to:

a) Convict Mr. Eduardo Kimel of the crime of slander, described in and punishable under Article 110 of the Criminal Code, sentencing him to one year in prison, suspended, with costs.

[10] Judgment of September 25, 1995, issued by the 8th National First-Instance Court for Criminal and Correctional Matters of Buenos Aires; Annex 1.

b) Order Mr. Eduardo Kimel to pay the plaintiff, Guillermo Federico Rivarola, the sum of twenty thousand pesos ($20,000), as compensation to make redress for the harm caused.
c) Set the fees of the attorney in the suit at the amount of three thousand pesos ($3,000).[11]

52. Mr. Kimel's defense challenged the first-instance ruling by lodging an appeal "requesting the revocation of resolutions I and II of the judgment in question and the consequent acquittal of the defendant in the crime of which he was convicted" and seeking the imposition on "the plaintiff of the costs for both instances." In turn, the plaintiff filed remedies to appeal against and seek the annulment of the judgment, requesting, *inter alia,* that "item I of the judgment be upheld, with second-instance costs [...] and the defendant be ruled guilty of the crime of libel," and that "item II be upheld in part, with second-instance costs, requesting that it be amended to include the relevant compensatory interest."[12]

53. On November 19, 1996, the 6th Chamber of the National Criminal and Correctional Appeals Court ruled on the appeal and on the annulment remedies lodged against the first-instance judgment.

54. In its judgment, the 6th Chamber of the National Appeals Court spoke about freedom of thought and expression in the press and said that "holder[s] of public office [are] exposed to criticisms in the press of [judges'] performance."[13]

55. It consequently decided to:

a) dismiss the annulment of the suit sought;
b) annul item I of the judgment of September 25, 1995, and acquit Eduardo Gabriel Kimel of the crime of slander for which he was convicted;
c) annul item II of the judgment of September 1995 as regards sentencing Eduardo Kimel to pay the amount of twenty thousand pesos as compensation to redress the moral damages inflicted on Mr. Guillermo Federico Rivarola.

56. On December 22, 1998, the Supreme Court of Justice of the Nation admitted an extraordinary appeal[14] filed by the plaintiff against the acquittal ordered by the Appeals Court, and ordered that the proceedings be returned to the original venue for a new judgment to be given in consideration of the terms of its ruling, stating that:

a) The offenses alleged by Mr. Rivarola invoke sufficient federal matter to be examined by the extraordinary appeal, since the judgment against which the appeal is brought had as its basis innocuous arguments, based on a partial examination of the text regarding which suit was filed and on an arbitrary understanding of the crimes of slander and libel that left them unprotected.
b) [...] the arguments offered by the judges who signed the acquittal on the grounds that the crime of libel was not committed are groundless. That is particular the case since from a

[11] Judgment of September 25, 1995, issued by the 8th National First-Instance Court for Criminal and Correctional Matters of Buenos Aires; Annex 1.

[12] Judgment of November 19, 1996, handed down by the 6th Chamber of the National Criminal and Correctional Appeals Court; Annex 2.

[13] Judgment of November 19, 1996, handed down by the 6th Chamber of the National Criminal and Correctional Appeals Court; Annex 2.

[14] Under Article 14 of Law 48, an extraordinary federal appeal is an appeal lodged with the Supreme Court of Justice once the proceedings in question have expired under provincial jurisdiction.

> fragmented and isolated reading of the text in question it can be said – as the lower court does – that the accusation of crime is not leveled at the plaintiff.
>
> c) Kimel neglected to state in his publication that Dr. Rivarola ignored the repeated requests for provisional dismissal of the proceedings lodged by the prosecutor Julio César Strassera."[15]

57. On March 17, 1999, in compliance with the orders of the Supreme Court of Justice of the Nation, the 4th Chamber of the National Criminal and Correctional Appeals Court handed down a new judgment whereby it resolved:

> to uphold in part item I [*supra* paragraph 51] of the judgment [...] sentencing Eduardo Gabriel Kimel to a one-year suspended prison sentence, with costs for both instances, modifying the conviction to the crime of libel defined in and punishable under Article 109 of the Criminal Code.[16]
>
> [...]
>
> to uphold item II of the judgment whereby Eduardo Kimel was ordered to pay the plaintiff, Dr. Guillermo Federico Rivarola, the amount of twenty thousand pesos ($20.000) as compensation to redress the moral damages inflicted.[17]

58. The change of the conviction offense in this new ruling was based on the argument that:

> the documents contain a false accusation of a publicly prosecutable offense, in the sense that Kimel made that accusation knowing that it was false (cf. "whereas" clauses 7, 8, and 10, Supreme Court).[18]

59. In this new judgment, the Appeals Court, following "the line of argument of the [Supreme] Court, from which it may not distance itself," said that:

> the statements made by the journalist against the plaintiff are libelous in nature and, consequently, the arguments used by the 6th Chamber in ordering an acquittal on the grounds that libel was not committed are groundless (cf. "whereas" clauses 7, 8, and 10, Supreme Court).

In reaching that decision the Appeals Court gave consideration to "the grounds of the suit as regards the records of the proceedings" dealing with the death of the Pallottines, "which indicates the falsehood of the criminal accusations."[19]

60. The alleged victim filed an extraordinary appeal against the judgment handed down by the Appeals Court,[20] which was declared inadmissible. He later filed a complaint remedy that

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[15] Judgment of December 22, 1998, handed down by the Supreme Court of Justice of the Argentine Nation; Annex 3.

[16] This provision reads: Libel or false accusation of a publicly actionable crime shall be punished by imprisonment of between one and three years.

[17] Judgment of March 17, 1999, handed down by the 4th Chamber of the National Criminal and Correctional Appeals Court; Annex 4.

[18] Judgment of March 17, 1999, handed down by the 4th Chamber of the National Criminal and Correctional Appeals Court; Annex 4.

[19] Judgment of March 17, 1999, handed down by the 4th Chamber of the National Criminal and Correctional Appeals Court; Annex 4.

[20] Deed filing for an extraordinary appeal with the Supreme Court of Justice of the Argentine Nation; Annex 5.

was ruled *in limine* by the Supreme Court of Justice on September 14, 2000, with which the conviction was made firm.[21]

C. The proposed amendments of the Criminal and Civil Codes

61. During the proceedings before the IACHR, the State reported that on July 6, 2001, "the bill was lodged with the office of the President of the Nation, with the support of the Minister of Foreign Affairs, International Trade, and Worship and the Minister of Justice and Human Rights [...] containing proposed amendments to bring the provisions of the national Civil and Criminal Codes into line with principles of the Constitution and those of international human rights treaties." The bill in question, submitted to the legislature on December 27, 2001,[22] is based on the premise that the honor of public officials and public personalities warrants different protection; consequently, only cases of false information produced with actual malice are liable for civil sanctions. The proposal excludes civil liability for value judgments of all kinds and imposes no civil liability for the faithful reproduction of information. As regards criminal matters, the bill eliminates the possibility of imposing criminal sanctions on the freedom of criticism and expressly forbids the punishment of value judgments in humorous information and statements.[23]

62. Another bill containing amendments had previously been submitted (file No. 119-D-2001, parliamentary proceedings No. 17) by Deputy Graciela Caamaño, published on March 22, 2001,[24] but had produced no results.

63. Subsequently the Argentine legislature received several amendment proposals, including file No. 1251/04, submitted by Senators Jenefes, Pichetto, and Latorre on May 5, 2004, and sent to the archive on September 13, 2006;[25] file No. 3234/05, submitted by Senator Negre de Alonso on September 29, 2005,[26] without results; file No. 42/06, submitted by Senator Jenefes on March 1, 2006,[27] without results; file No. 4345-D-2004, parliamentary proceedings No. 93, submitted by Deputy Jorge Vanossi, published on July 15, 2004,[28] without results.

64. However, as of the date of this case's referral to the Court, those bills have not been discussed by the Argentine legislature and there are no expectations of their being so in the near future.

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[21] Resolution of September 14, 2000, handed down by the Supreme Court of Justice of the Argentine Nation; Annex 6.

[22] Bill contained in file 0073-PE-01, published on December 27, 2001; Annex 7(a).

[23] Bill contained in file 0073-PE-01, published on December 27, 2001; Annex 7(a).

[24] Bill contained in file 1119-D-2001, published on March 22, 2001; Annex 7(b).

[25] Information available as of April 10, 2007, at http://www.senado.gov.ar/web/comisiones/verExpeComi.php?origen=S&tipo=PL&numexp=1251/04&nro_comision=&tConsulta=2, bill of May 5, 2004, contained in file No. 1251/04; Annex 7(d).

[26] Information available as of April 10, 2007, at http://www.senado.gov.ar/web/comisiones/verExpeComi.php?origen=S&tipo=PL&numexp=3234/05&nro_comision=&tConsulta=2, bill of September 29, 2005, contained in file No. 3234/05; Annex 7(e).

[27] Information available as of April 10, 2007, at http://www.senado.gov.ar/web/comisiones/verExpeComi.php?origen=S&tipo=PL&numexp=42/06&nro_comision=&tConsulta=2, bill of March 1, 2006, contained in file No. 42/06; Annex 7(f).

[28] Bill contained in file No. 4345-D-2004, published on July 15, 2004; Annex 7(c).

VII. CONSIDERATIONS OF LAW

A. Violation of the right of free expression (Article 13 of the Convention)

1. Content of the right to freedom of thought and expression

65. Article 13 of the American Convention provides that:

> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputations of others; or
>
> b. the protection of national security, public order, or public health or morals.
>
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

66. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have stressed the broad meaning of the right to freedom of thought and expression, and have developed from that Article various perspectives whereby human beings relate to information. Those bodies have produced this broad interpretation of the right to freedom of thought and expression through an analysis of its two dimensions, individual and social.

67. The Court has held that the right to freedom of thought and expression grants to all those protected by the Convention "not only the right and the freedom to express their own thoughts but also the right and the freedom to seek, receive and impart information and ideas of all kinds."[29] Both the American Convention and other international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights establish a general right to seek and receive information

68. In describing the social dimension of this right, the Court has indicated that, in addition to being a right of each individual, it also implies "a collective right to receive any information whatsoever and to have access to the thoughts expressed by others."[30]

69. The right to seek, receive and impart information contains the two dimensions, individual and social, developed by the Court and the Commission, and implies, in the present case, the right of those who engage in investigative journalism to seek information, to investigate issues

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[29] I/A Court H. R., *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, para. 163; I/A Court H. R., *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 77; I/A Court H. R., *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, para. 108.

[30] I/A Court H. R., *Case of López Álvarez*, footnote 26, *supra*, para. 163; I/A Court H. R., *Case of Palamara Iribarne*. Judgment of November 22, 2005. Series C No. 135, para. 68; I/A Court H. R., *Case of Ricardo Canese,* footnote 26, *supra*, para. 77; I/A Court H. R., *Case of Herrera Ulloa,* footnote 26, *supra*, para. 108; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30.

of interest, to publicize information through their reports, to write about that information, to analyze and publish the results of their work, to disseminate information deriving from their investigation, to transmit their conclusions and opinions, and at the same time it implies the right of society to be informed, to have a variety of information sources, with different versions of the same event, and to decide which of those information sources it will read, listen to, or observe.

70. It is obvious that investigative journalists do not have to confine themselves to a factual recounting of the matter being investigated, but are also free to issue an opinion on the results of their work. In this sense, Principle 6 of the IACHR Declaration of Principles on Freedom of Expression holds that "any person has the right to communicate his/her views by any means and in any form."

2. The right to freedom of expression: the importance of criticism of public officials in a democratic society

71. There is a convergence among the different regional systems for protecting human rights and the universal system, with respect to the essential role that this right plays in the exercise of democracy.[31] Without the effective freedom of expression, protected in all its forms, democracy withers, pluralism and tolerance begin to break down, mechanisms of citizen control and oversight become inoperable, and the way is opened for authoritarian systems to take root in society.[32]

72. Consequently, in a democratic society it is essential that those who are subject to the jurisdiction of the State should be free to criticize the State itself and its public officials in the performance of their duties, without fear of civil or criminal liability. If a citizen can be punished with a fine or imprisonment for issuing his opinions on the way public affairs are being conducted, then democracy will be weakened and opinions will be silenced.

73. The Commission has held that the right to freedom of expression and information is one of the main mechanisms that society has for exercising democratic control over the persons responsible for matters of public interest.[33]

74. Thus, in weighing the importance of freedom of thought and expression against the reputation of public officials, that weighting must not place too much implicit value on institutional

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[31] Inter-American Democratic Charter, approved at the first plenary session of the OAS General assembly on September 11, 2001, Article 4; *Case Ricardo Canese*, *supra* note 26, para. 86; *Case of Herrera Ulloa, supra* not 26, para. 113; *Case of Ivcher Bronstein.* Judgment of February 6, 2001. Series C No. 74, para. 152; *"The Last Temptation of Christ" Case (Olmedo Bustos et al.).* Judgment of February 5, 2001. Series C No. 73, para. 69; *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 29, ECHR 2003-XI; *Perna v. Italy [GC]*, no.48898/98, § 39, ECHR 2003-V; *Dichand and others v. Austria*, no. 29271/95, § 37, ECHR 26 February 2002; *Eur. Court H.R., Case of Lehideux and Isorni v. France*, Judgment of 23 September, 1998, para. 55; *Eur. Court H.R., Case of Otto-Preminger-Institut v. Austria*, Judgment of 20 September, 1994, Series A no. 295-A, para. 49; *Eur. Court H.R. Case of Castells v. Spain*, Judgment of 23 April, 1992, Series A. No. 236, para. 42; *Eur. Court H.R. Case of Oberschlick v. Austria,* Judgment of 25 April, 1991, para. 57; *Eur. Court H.R., Case of Müller and Others v. Switzerland*, Judgment of 24 May, 1988, Series A no. 133, para. 33; *Eur. Court H.R., Case of Lingens v. Austria*, Judgment of 8 July, 1986, Series A no. 103, para. 41; *Eur. Court H.R., Case of Barthold v. Germany*, Judgment of 25 March, 1985, Series A no. 90, para. 58; *Eur. Court H.R., Case of The Sunday Times v. United Kingdom*, Judgment of 29 March, 1979, Series A no. 30, para. 65; y *Eur. Court H.R., Case of Handyside v. United Kingdom*, Judgment of 7 December, 1976, Series A No. 24, para. 49. UN., Human Rights Committee, *Aduayom et al. v. Togo* (422/1990, 423/1990 y 424/1990), opinion of 12 July 1996, para. 7.4; *African Commission on Human and Peoples' Rights*, Media Rights Agenda and Constitutional Rights Project v. Nigeria, Communication Nos 105/93, 128/94, 130/94 and 152/96, Decision of 31 October, 1998, para 54.

[32] *Cf. Case of Herrera Ulloa, supra* note 26, para. 116

[33] IACHR, Third Report on the Human Rights Situation in Paraguay, paragraph 35.

juridical goods, which would leave ample ground for authoritarianism to flourish, particularly in a matter where one of the essential elements for the functioning of democracy is at stake, i.e. the freedom of persons to express themselves, and the right to criticize.

3. Restrictions on the right to freedom of thought and expression: subsequent criminal and civil liability and protection of the right to reputation

75. The importance given to the freedom of expression does not, however, make it an absolute right. Article 13 of the Convention prohibits censorship, but goes on, in paragraphs 4 and 5, to list a series of possible limitations on that right. Paragraph 3 prohibits restricting this right through indirect methods or means, and provides a merely illustrative list of such restrictions, making clear the exceptional nature of legitimate restrictions on this fundamental right. The Commission notes that the State's duty to respect the freedom of thought and expression, and in this particular case the right to impart information and opinions, presupposes the obligation not to impose restrictions beyond those allowed in Article 13(2) of the Convention.

76. That rule prohibits censorship, but it allows for subsequent liability under certain assumptions. According to Article 13(2), a restriction is legitimate when it does not involve prior censorship; when it flows from subsequent imposition of liability for the abusive exercise of this right, where the grounds for such liability are expressly established by law;[34] when it is necessary to ensure "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals"; and where it does not place limits beyond those strictly necessary on the full scope of freedom of expression, so as to become a direct or indirect mechanism of prior censorship.[35]

77. In other words, for the State to fulfill its duty to respect this right, the restriction must be proportionate to the interest that justifies it and must be designed strictly to achieve that legitimate objective, interfering as little as possible in the effective exercise of the freedom of expression.[36]

78. The State must therefore reduce to the minimum the restrictions of places on the free circulation of ideas, and must choose the alternative that does the least damage to rights. To be compatible with the Convention, restrictions must be justified by social objectives that, by their importance, clearly outweigh the social need for full enjoyment of the right guaranteed by Article 13 and they must not place limits beyond those strictly necessary on the right enshrined in that Article.[37]

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[34] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 *supra* note 27, para. 35.

[35] *Cf.* I/A Court H. R., *Case of Ricardo Canese, supra* note 26, para. 95; I/A Court H. R., *Case of Herrera Ulloa, supra* note 26, para. 120; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 *supra* note 27, para. 39

[36] *Cf.* I/A Court H. R., *Palamara Iribarne, supra* note 27, para. 85; I/A Court H. R., *Ricardo Canese*, *supra* note 26, para. 96; I/A Court H. R., *Herrera Ulloa, supra* note 26, paras. 121 & 123; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 *supra* note 27, para. 46

[37] *Cf.* I/A Court H. R., *Ricardo Canese, supra* note 26, para. 96; I/A Court H. R., *Herrera Ulloa, supra* note 26, paras. 121 & 123; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 *supra* note 27, para. 46; see also *Eur. Court H. R.*, *Case of The Sunday Times v. United Kingdom*, para. 59; and *Eur. Court H. R., Case of Barthold v. Germany*, para. 59.

79. Article 11 of the American Convention declares that everyone has the right to have his honor respected and his dignity recognized, and consequently this right implies a limitation on expression, attacks or interference by individuals or the State.

80. With specific reference to Article 13(2) of the American Convention, the Commission maintains that not every subsequent liability is legitimate, even when invoked to protect honor or reputation, for in certain circumstances punishment may be disproportionate and unnecessary in a democratic society. This is particularly true when punishment is applied to criticism of public officials' actions.

81. In addition, particular consideration must be given to other means of establishing subsequent liability that can defend the reputation of others in a manner less restrictive and stigmatizing than criminal action.

82. The Inter-American Court has previously held that criminal law is the most severe and restrictive means for establishing liabilities with respect to illicit conduct,[38] and it has ruled unnecessary in a democratic society the restrictions on the freedom of thought and expression inherent in criminal proceedings and the sentencing of persons who have issued statements on matters of public interest, for the crimes of libel, slander, publication of insults and the like (*Canese* and *Herrera Ulloa* cases), as it did with respect to *desacato* (contempt) laws (*Palarma Iribarne* case).[39]

83. With respect to publicity and the degree of corroboration that the press must exercise in reporting on matters of public interest involving public personalities, the European Court has ruled that a democratic society does not need to require journalists to prove that their opinions or value judgments concerning public figures are true.[40]

84. This is because free discussion and political debate are an essential part of democratic life and they are of imperative social interest, which leaves the State much less scope for justifying a limitation on the freedom of expression.[41]

85. These considerations in no way imply that the reputation of public officials or of public figures should not be legally protected, but rather that this must be done in a manner consistent with the principles of democratic pluralism,[42] which demand that such persons must tolerate criticism and value judgments about the way they perform their duties, even if those opinions or judgments are painful.

86. The with respect to restrictions on the freedom of expression, the Commission and the Court have granted broad protection to the expression of opinions concerning public officials and other persons who exercise public functions, on the grounds that "it is logical and appropriate" that, pursuant to Article 13(2) of the Convention, such statements should enjoy greater protection, leaving room for the broad debate that is essential for the functioning of a truly democratic

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[38] *Cf.* I/A Court H. R., *Case of Ricardo Canese, supra* note 26, para. 104.

[39] *Cf. Case of Palamara Iribarne*, *supra* note 27, para. 88.

[40] ECHR, "Oberschlick v. Austria," Judgment of 23 May 1991, Series A., No. 204. paras: 57, 58, 61, 62, 63 and 64.

[41] Feldek v. Slovakia, European Court of Human Rights, Judgment of 12 July 2001, para. 59.

[42] *Cf.* I/A Court H. R., *Case of Ricardo Canese, supra* note 26.

system.[43] This greater protection for statements relating to issues of public interest requires that the State, its officials, and persons who exercise public activities must be more tolerant and open to criticism in the form of statements and assessments offered by individuals in the exercise of democratic oversight.[44]

87. This different threshold of protection is appropriate because such persons have voluntarily exposed themselves to more demanding public scrutiny, and consequently they must accept a greater risk of criticism, for their activities go beyond the private domain and become part of the sphere of public debate.[45]

88. In addition, the Court has held that in the arena of public debate or in issues of great public interest, the inter-American system protects not only statements or expressions that are inoffensive or well received by public opinion, but also those that shock or offend the State or a segment of the population.[46]

89. Consequently, the Commission maintains that, in regulating protection of the honor and dignity of persons in accordance with Article 13.2 and 11 of the American Convention, States have the obligation to protect the right to honor and privacy of persons, but without unduly limiting the freedom of expression.

90. Bearing in mind the protection of the reputation of public officials or personalities, Principle 10 of the IACHR Declaration of Principles on Freedom of Expression provides that:

> [p]rivacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person, or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

91. The Commission considers that the State has other alternatives for protecting privacy or reputation that are less restrictive than the application of criminal punishment, and that it can serve the objective of protecting the rights of others by establishing statutory protection against intentional attacks on honor and reputation through civil action that respects international standards, and by adopting laws that guarantee the right of correction or response. In this way, the State can guarantee the protection of private life for all individuals without abusing its coercive powers to repress the individual freedom to form and express opinions.[47]

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[43] *Cf. Palamara Iribarne, supra* note 27, para. 82; *Ricardo Canese*, *supra* note 26, para. 98; *Herrera Ulloa, supra* note 26, para. 128; and *Ivcher Bronstein, supra* note 28, para. 155

[44] *Cf.* I/A Court H. R., *Palamara Iribarne, supra* note 27, para. 83; I/A Court H. R., *Ricardo Canese*, *supra* note 26, para. 97; I/A Court H. R., *Herrera Ulloa, supra* note 26, para. 127; and I/A Court H. R., *Ivcher Bronstein, supra* note 26, para. 155. Similarly see *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII; and *Sürek and Özdemir v. Turkey,* nos. 23927/94 and 24277/94, § 60*,* ECHR Judgment of 8 July, 1999.

[45] *Cf.* I/A Court H. R., *Herrera Ulloa*, *supra* note 26, para. 129.

[46] *Cf.* I/A Court H. R., *"The Last Temptation of Christ" Case (Olmedo Bustos et al.), supra* note 28, para. 69.

[47] Ibid. See also Principle 10 of the IACHR Declaration of Principles on Freedom of Expression, which refers to crimes against reputation and honor.

92. It is clear from the jurisprudence of the Commission and of the Court that value judgments, opinions and criticisms leveled against public officials in a democratic society are beyond the power of the State to punish.

4. Application of the above standards in the present case

93. In the present case, the Commission must analyze the facts in light of the right to freedom of thought and expression protected by Article 13 of the Convention, from the specific perspective of seeking, receiving and imparting information that that right implies, recognizing that Mr. Eduardo Kimel, a historian, journalist and writer, after offering a factual account of the judicial investigation, issued a value judgment critical of the performance of the judiciary during the last military dictatorship in Argentina, in his book, *La Masacre de San Patricio*.

94. The Commission will therefore examine compatibility with Article 13(2) of the Convention with respect to the subsequent liabilities to which Mr. Kimel was subjected for the crimes of libel and slander, using as a framework for interpretation the criteria issued by the Inter-American Court with respect to "pressing social need," proportionality with the interest protected, and the concept of "legitimate objective."[48]

95. The crimes of libel and slander for which Mr. Kimel was charged are covered by title II of the Criminal Code, which deals with crimes against reputation, the protection of which is a legitimate goal. Those rules were valid at the time of the events, and are stated as follows:

> **Article 109**. Libel or false accusation of a publicly actionable crime shall be punished by imprisonment of one to three years.
>
> **Article 110**. Any person who injures another person's honor or reputation shall be punished with a fine of 1500 pesos to 90,000 pesos, or imprisonment of one month to one year.
>
> **Article 111**. A person accused of slander may only prove the truthfulness of his accusation in the following cases:
>
> 1. If the accusation was made for the purpose of defending or securing an actual public interest
>
> 2. If the deed attributed would give rise to criminal proceedings.
>
> 3. If the plaintiff seeks proof of the charge made against him. In these cases, if the accusations are proven to be true, the defendant is exempt from penalty.

96. In a society that has lived through a military dictatorship, as did Argentina from 1976 to 1983, the freedom of thought and expression takes on special importance for the historic reconstruction of the past and the formation of public opinion. Concretely, this means that any person must be able to express opinions according to his own thoughts, to form a judgment on the actions of the de facto authorities and on measures taken by the government during the transition to democracy, to analyze, in-depth or otherwise, the actions of those holding public office during that time, including those in the judiciary, and to issue criticisms of their performance, even if strongly worded and offensive.

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[48] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 *supra* note 27, para. 46

97. As has been demonstrated, Mr. Kimel, as a professional journalist, conducted an investigation and published the results of his findings in a book that first appeared in November 1989, entitled *La Masacre de San Patricio*. In that book, he examined the ruling issued by Judge Rivarola and criticized the general approach taken by the judges during the military dictatorship, indicating that they "were normally acquiescent, when not complicit, in the repression of the dictatorial regime."

98. In his efforts to investigate the murder of the Pallottine priests, events stemming from the dictatorial past in Argentina, Mr. Kimel was exercising his right to seek information in order to transmit it, and to fulfill the social function that journalists have to impart the information they obtain. An informed society is a prerequisite for the full enjoyment of freedom and for strengthening public debate.[49]

99. Moreover, democratic oversight fosters transparency in government activities and encourages officials to be accountable for their public management,[50] and in a State governed by the rule of law there is no valid excuse for waiving this consideration for those involved in the administration of justice.

100. The book makes specific mention of Mr. Rivarola and the following terms:

> Judge Rivarola carried out all the applicable procedures: he collected the police reports containing the preliminary information; he requested and was provided with reports of the coroner and the ballistics expert. He summoned a sizable number of people who were able to provide information to further the inquiry. However, an examination of the judicial records poses an initial question: was there any real intention to turn up clues that might lead to the murderers? Under the dictatorship, judges were normally acquiescent, when not complicit, in the repression of the dictatorial regime. In the Pallottines' case, Judge Rivarola complied with most of the formal requirements of the investigation. However, it is evident that a series of decisive elements that could have shed light on the assassination were not taken into account. Evidence that the order to carry out the crime had come from within the military power structure paralyzed the inquiry, bringing it to a standstill.[51]

101. According to the standards previously developed, broad protection must also be accorded to critical opinions of the performance of judges and the decisions they take, offered by a journalist in the course of investigating a matter that is of broad public interest and the subject of much public debate. This is particularly true because he was criticizing the work of the judiciary during a military dictatorship, and that criticism was based on conclusions from his examination of evidence to which Mr. Kimel had access relating to the investigation of the Pallottine priests' murder. The controversy unleashed in Argentine society over the massive violations of human rights to which thousands of persons were subjected during the military dictatorship is obvious and inevitably and necessarily attracts the attention of public opinion. The opinions expressed by Mr. Kimel referred to the manner in which Mr. Rivarola carried out his jurisdictional duties.

102. Nevertheless, on October 28, 1991, almost two years after publication of the book, the former judge in that case, Guillermo Rivarola, filed criminal charges for libel against Mr. Kimel,

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[49] *Cf.* I/A Court H. R., *Herrera Ulloa*, *supra* note 26, para. 119; *Ivcher Bronstein, supra* note 28, para. 150

[50] *Cf.* I/A Court H. R., *Palamara Iribarne, supra* note 27, para. 83; I/A Court H. R., *Ricardo Canese*, *supra* note 26, para. 97; I/A Court H. R., *Herrera Ulloa, supra* note 26, para. 127; and I/A Court H. R., *Ivcher Bronstein, supra* note 28, para. 155. Similarly, see *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII; and *Sürek and Özdemir v. Turkey,* nos. 23927/94 and 24277/94, § 60*,* ECHR Judgment of 8 July, 1999.

[51] Kimel, Eduardo. *La Masacre de San Patricio*. Reseña. Ediciones Lohlé-Lumen. Buenos Aires, Argentina. Primera Edición. November 1989.

arguing that his statements in the book clearly accused him of "the crimes of dereliction of duty by a public official (...) and of cover-up" established, respectively, in Articles 248 and 277 of the Criminal Code.

103. Nearly four years after the complaint was filed, on September 25, 1995, the Eighth Federal Court of First Instance of Buenos Aires issued a ruling in which it held that "it is not possible to state that Kimel thereby had the intention to reproach the plaintiff for the crimes of dereliction of duty by a public official and of cover-up established, respectively, in Articles 248 and 277 of the Criminal Code." On this point, the court observed:

> [I]n no way, according to doctrine and jurisprudence in this matter, could it validly be argued that such epithets constitute an accusation of criminal conduct in the terms required by the definition (of libel). The question mark does not in itself imply a concrete accusation, but rather a purely subjective assessment, left to the subjectivism of the reader, on the part of the author, drawn from a no less subjective appreciation of the value of the evidence, incorporated in the process, by Dr. Rivarola. In the end, this is an opinionated critique of the actions of a magistrate in a specific proceeding. But a differing appreciation of the facts and circumstances in no way implies a clear and outright accusation of a publicly actionable crime.

104. Nevertheless, despite recognizing that Kimel's statements constituted an opinionated critique of an official, and that the charge against him made no mention of the crime of slander, the Federal Court of First Instance found Eduardo Kimel guilty of that crime, as defined in Article 110 of the Argentine Criminal Code. The conviction sentenced Mr. Kimel to a suspended prison term of one year, with costs, and payment of 20,000 pesos in damages.

105. Mr. Kimel appealed that decision, and it was overturned by the Sixth Court of the Federal Chamber of Appeals in Criminal in Correctional Matters on November 19, 1996. That ruling noted as follows:

> "Those of us who exercise public functions are exposed to criticism in the press about our performance. In recent times this activity has intensified and unfortunately the judiciary has been questioned in published opinions, which shape public opinion."

106. The plaintiff filed an extraordinary appeal against this decision before the Supreme Court of Justice, which revoked the acquittal issued by the court of second instance and returned the case to the Chamber of Criminal Appeals to issue a new ruling, on the grounds that its decision to acquit was arbitrary. On March 17, 1999, the Fourth Court of that Chamber, following the guidelines set by the Supreme Court, upheld in part the conviction of first instance with respect to the penalties, but instead of convicting Mr. Kimel for slander it ruled him guilty of the crime of libel, defined in Article 109 of the Criminal Code.

107. In the present case, Mr. Kimel was subjected to subsequent liability that is established in the Criminal Code with the legitimate purpose of protecting the reputation of a public official, i.e. that restriction is established in law and has a legitimate objective, consistent with Article 13.2.a.

108. Nevertheless, in convicting Mr. Kimel, the court failed to take account of the criteria summarized above as to the different threshold of protection for statements relating to matters of public interest, the requirement for greater tolerance of criticism, and the application of less restrictive means that both the Commission and the Court have sustained and that are clearly applicable in the present case.

109. On one hand, the criterion of greater protection applies to information on criminal proceedings involved in investigating the murder of the Pallottine priests, which Mr. Kimel sought,

received and transmitted with publication of his book, *La Masacre de San Patricio*. On the other hand, Mr. Rivarola, as the judge, is required to tolerate critical opinions as to the exercise of his jurisdictional function.

110. Of significance in this case is the Inter-American Court's ruling in the Palamara Iribarne case, where it held that the contempt law had been applied to a person for issuing opinions critical of, among other things, the manner in which the military justice authorities fulfilled their public duties. On this point, the Court found that the law established disproportionate penalties for criticizing the functioning of State institutions, thereby suppressing the debate that is essential to the functioning of a truly democratic system and unnecessarily restricting the freedom of thought and expression.[52]

111. Mr. Rivarola is a federal judge, and as such he exercises a jurisdictional function that is essential for the development of a representative and republican democracy, and he is subject to criticism by persons under his jurisdiction. His tolerance of criticism should be all the greater, considering that the opinions in question related to a time when State institutions did not operate under the rule of law, and as he stated in his complaint, "in 1976 I was appoint Federal Judge in Criminal and Correctional Matters, in charge of Court No. 3, by the military government."

112. Moreover, there is nothing in the statements made in Mr. Kimel's book to suggest that the journalist accused Mr. Rivarola of any specific crime. The criticism of the ruling issued by Mr. Rivarola was of great public interest both in Argentina and in the international community, given the interest in bringing to light and promoting public debate about the true history of the previous dictatorship.

113. The Commission stresses the point made earlier, in the sense that "considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence."[53]

114. On this point, the United Nations Special Rapporteur on Promotion and Protection of the Right to Freedom of Expression reaffirms the same principle, indicating that:

> "The threat of criminal sanctions, in particular imprisonment, exerts a chilling effect on freedom of expression. Prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media or to practice journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of libel laws.
> (...)
>
> In many countries, libel laws are frequently used to stifle public debate about matters of general concern, and to limit criticism of officials. Public officials and authorities should not take part in the initiation or prosecution of criminal libel cases and should not be granted greater protection than the ordinary citizen: they should instead tolerate more criticism because of the nature of their mandate."[54]

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[52] *Palamara Iribarne*, *supra* note 27, para. 88

[53] IACHR, Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights, paragraph 38.

[54] Commission on Human Rights, Civil and Political Rights, Including the Question of Freedom of Expression. The Right to Freedom of Opinion at Expression, Report of the Special Rapporteur, Ambeyi Ligabo. E/CN.4/2006/55, December 30, 2005, paras 52 and 55.

115. In this connection, the Commission considers that when criminal laws on slander and libel are used by public officials in a State party to inhibit criticism directed at them or to punish opinions as to the manner in which they perform and exercise their activities, this tends to attack and silence critical debate in the same way as do contempt laws.[55]

116. There is no doubt in the present case that crimes against reputation were used for the clear purpose of limiting the criticism of a public official. This is clear from the wording of Mr. Rivarola's complaint: "while a dishonorable accusation made against a judge by reason of or on the occasion of the exercise of his functions would constitute contempt under the terms of Article 244 of the code, which today has been repealed, the specific accusation of a publicly actionable crime is still libelous."

117. It is important here to note what the Inter-American Court said in the matter of reparations in the Palamar Iribarne case, in ordering the State of Chile to adapt its contempt laws to international standards. The Court welcomed the reform of the Criminal Code, whereby certain rules referring to the crime of contempt were repealed and amended. Nevertheless, finding that existing legislation held open the possibility of prosecuting conduct formerly treated as contempt under the still-valid crime of "threat," the Court ordered the modification of any domestic rules that were incompatible with international standards on the freedom of thought and expression, so that people would be able to exercise democratic control over all State institutions and the actions of their officials, by freely expressing their ideas and opinions thereon, without fear of subsequent repression.[56]

118. As to the effects of applying these laws in the present case, it must be noted that, as a result of the charge laid on October 28, 1991 by Mr. Rivarola, Mr. Kimel was subjected to a trial that ended in a conviction which was confirmed, as the petitioners indicate, on September 14, 2000 when the Supreme Court rejected an appeal (*recurso de queja*). In other words, for the expression of an opinion the State applied the most restrictive and severe means to establish liability and subjected Mr. Kimel to criminal proceedings that lasted nearly nine years, and it imposed on him a suspended prison sentence, among other penalties.

119. The consequences of the mere initiation of criminal proceedings, the imposition of such a penalty, the subsequent criminal record, the potential limitation of the right to personal freedom, the stigma that a criminal sentence carries in itself and the characterization of a person as a criminal are equally disproportionate, bearing in mind that all these consequences were suffered for imparting information of public interest relating to the activity of a State official.

120. The Commission concludes that the initiation of criminal proceedings, as well as the sentence imposed on Mr. Eduardo Kimel for the crime of libel, in order to protect the reputation of a public official, are restrictions disproportionate to the "justifying interest," and are incompatible with Article 13(2) of the Convention.

121. Furthermore, on the basis of the conviction for the crime of libel under Article 109 of the Criminal Code, the Eighth Federal Court, and subsequently the Chamber of Appeals, imposed a civil penalty on Mr. Kimel in the amount of 20,000 pesos for damages, and awarded the plaintiff court costs and lawyer fees.

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[55] See Annual Report of the Special Rapporteur for Freedom of Expression, Chapter II; IACHR Annual Report 1999; and IACHR Annual Report 1994, Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights.

[56] *Palamara Iribarne*, *supra* note 27, paras. 254 and 94.

122. As noted earlier, the publication of information on the activities of a public official dealing with matters of public interest could only entail civil liability if done with the intention of inflicting firm, or in full knowledge that the information was false, or if there were gross negligence in attempting to determine whether it was true.

123. Mr. Kimel's conduct was reasonable in the context of his work as an investigative journalist, for he was dealing with information of obvious public interest, based on a prior investigation intended to contribute to the debate and to serve as a means of calling a public official to account.

124. Consistent with the foregoing, the State having presented no arguments to show that there was any deliberate intention to impart false news or information in publishing the book *La Masacre de San Patricio*, the Commission concludes that no civil or criminal penalties can be imposed on Mr. Kimel as the author of an allegedly injurious book, written in the exercise of his freedom of expression.

125. Consequently, the civil damages awarded in this case as the result of the criminal trial, as well as all the consequences of Mr. Kimel's conviction, also stand in violation of Article 13 of the American Convention.

126. Based on all the above considerations, the Commission asks the Court to declare that the criminal trial, the criminal conviction, and the consequences thereof – including the accessory civil punishment – imposed on Mr. Eduardo Kimel for conducting an investigation, writing a book, and publishing information necessarily hampers the dissemination and reproduction of information on topics of public interest and also discourages public debate on matters that affect Argentine society; and that consequently, the State of Argentina violated the right of free expression enshrined in Article 13 of the American Convention with respect to Mr. Eduardo Kimel by initiating his criminal prosecution and imposing a sanction that was disproportionate to the interest that it sought to protect;[57] and that, in so doing, Argentina did also fail to meet the general obligation of respecting and ensuring human rights and freedoms set out in Article 1(1) thereof.

B. Violation of the right to a fair trial (Article 8 of the Convention)

127. Article 8(1) of the Convention provides as follows:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

128. The "reasonable time" referred to in this article must be seen in relation to the total duration of the proceedings, from the first procedural step until the issuing of the final judgment. In criminal matters, the time begins on the date the individual is arrested. When that is not applicable, as in the case at hand, but criminal proceedings are ongoing, the time must be taken as starting on the date that the judicial authority is informed of the case.[58]

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[57] The Inter-American Court has ruled that before a restriction is placed on freedom of expression, the least restrictive way of accomplishing that goal must be identified. The Court requires that the interpretation of that relationship be guided by the need to uphold democratic institutions. I/A Court H. R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29, American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Series A No. 5, paragraphs 41 and 42.

[58] I/A Court H. R., *Case of Tibi,* Judgment of September 7, 2004, Series C No. 114, paragraph 168.

129. In consideration of the above, in this case the period is to include not only the regular proceedings before the National First-Instance Court and before the National Appeals Court, but also the time during which the judicial authorities dealt with the extraordinary appeal filed by Mr. Rivarola against Mr. Kimel's acquittal and all the formalities and procedures pursued subsequently.

130. Mr. Kimel's criminal trial began on October 28, 1991, the date on which the judicial authority was made aware of the suit filed by Mr. Rivarola. Those proceedings lasted for almost nine years, until September 14, 2000, when the conviction was ruled final.

131. To examine whether a judicial proceeding was exhausted within a reasonable time, three elements must be taken into consideration: (a) the complexity of the matter, (b) the procedural activity of the parties involved, and (c) the actions of the judicial authorities.[59]

132. The case was not complex; Mr. Eduardo Kimel was tried for the privately prosecutable offenses of slander and libel; he was one person, as was the plaintiff; and the evidence was essentially the book that the accused had written about the massacre of the members of the Pallottine community.

133. As regards the procedural activity, the trial documents do not indicate that Mr. acted in any way that was incompatible with his status as the accused or did in any hamper the proceedings by pursuing formalities to delay the trial.[60]

134. In Mr. Kimel's criminal trial, the judicial authorities failed to act with due diligence and speed; this can be seen, for instance, in the fact that even though the matter was simple:

(a) the trial lasted a total of almost nine years until a final judgment was handed down and confirmed;

(b) between the filing of the suit on October 28, 1991, and the handing down of the first-instance conviction on September 25, 1995, almost four years went by;

(c) from the adoption of the second-instance acquittal on November 19, 1996, until the Supreme Court of Justice's admitted the extraordinary appeal filed by the plaintiff and overturned the acquittal on December 22, 1998, more than two years went by;

(d) almost four years passed from the adoption of the second-instance acquittal on November 19, 1996, until the conviction handed down by the 4th Chamber of the Appeals Court was ruled final on September 14, 2000; and,

(e) Argentina's Supreme Court took a year and a half to reject, *in limine,* and simply citing the *certiorari* power afforded to it under Article 280 of the Code of Civil and Commercial Procedure, the extraordinary appeal lodged by Mr. Kimel against the conviction handed down by the 4th Chamber of the Appeals Court for the crime of libel on March 17, 1999.

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[59] I/A Court H. R., *García Asto and Ramírez Rojas Case,* Judgment of November 25, 2005, Series C No. 137, paragraph 166; I/A Court H. R., *Case of Acosta Calderón,* Judgment of June 24, 2005, Series C No. 129, paragraph 105; I/A Court H. R., *Case of Ricardo Canese,* Judgment of August 31, 2004, Series C No. 111, paragraph 146. Also: ECHR, *Motta v. Italy*, Judgment of February 19, 1991, Series A No. 195-A, para. 30; and ECHR, *Ruiz-Mateos v. Spain,* Judgment of June 23, 1993, Series A No. 262, para. 30.

[60] I/A Court H. R., *García Asto and Ramírez Rojas Case,* Judgment of November 25, 2005, Series C No. 137, paragraph 167; I/A Court H. R., *Case of Tibi,* Judgment of September 7, 2004, Series C No. 114, paragraph 176.

135. Consequently, the Commission asks the Inter-American Court to declare that the State did violate Mr. Eduardo Kimel's right to be tried within a reasonable time as provided for in Article 8(1) of the American Convention, in conjunction with the general obligation of respecting and ensuring human rights contained in Article 1(1) thereof.

C. Noncompliance with the duty of adopting domestic legal effects (Article 2 of the Convention) and of the duty of ensuring human rights (Article 1(1) of the Convention)

136. Article 2 of the Convention states that:

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

137. In connection with this provision, the Inter-American Court has ruled that:

> The general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.[61]

138. The Court has also ruled that in accordance with Article 2 of the Convention, such adaptation implies the adoption of measures following two main guidelines, to wit: (i) the annulment of laws and practices of any kind whatsoever that may imply the violation of the rights protected by the Convention, and (ii) the passing of laws and the development of practices tending to achieve an effective observance of such guarantees.[62] It is necessary to reaffirm that the duty stated in (i) is only met when such reform is effectively made.[63]

139. The Commission is of the opinion that the provisions of criminal law applied in the trial of Mr. Eduardo Kimel unnecessarily and disproportionately restrict freedom of thought and expression with the claimed intent of protecting the honor of public officials.[64] The simple fact that they exist dissuades people from expressing critical opinions regarding the authorities' actions, on account of the threat of criminal sanctions and fines.

140. The Commission notes the State's willingness to amend its national law during the friendly settlement proceedings that went on for more than four years while the case itself was being processed.

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[61] I/A Court H. R., *"The Last Temptation of Christ" Case (Olmedo Bustos et al.),* Judgment of February 5, 2001, Series C No. 73, paragraph 85.

[62] I/A Court H. R., *Case of Almonacid Arellano,* Judgment of September 26, 2006, Series C No. 154, paragraph 118. I/A Court H. R., *Case of Ximenes Lopes,* Judgment of July 4, 2006, Series C No. 149, paragraph 83; I/A Court H. R., *Gómez Palomino Case,* Judgment of November 22, 2005, Series C No. 136, paragraph 91; I/A Court H. R., *Case of the "Mapiripán Massacre,"* Judgment of September 15, 2005, Series C No. 134, paragraph 109.

[63] I/A Court H. R., *Case of Almonacid Arellano,* Judgment of September 26, 2006, Series C No. 154, paragraph 118. I/A Court H. R., *Case of Raxcacó Reyes,* Judgment of September 15, 2005, Series C No. 133, paragraph 87; I/A Court H. R., *Case of the Indigenous Community Yakye Axa,* Judgment of June 17, 2005, Series C No. 125, paragraph 100; I/A Court H. R., *Case of Caesar,* Judgment of March 11, 2005, Series C No. 123, paragraphs 91 and 93.

[64] In this regard, see: IACHR, *Annual Report of the Inter-American Commission on Human Rights 1994*, OEA/Ser.L/V/II.88 Doc. 9 rev., February 17, 1995, Chapter V: Report on the Compatibility of *Desacato* Laws with the American Convention on Human Rights.

141. However, the Commission would like to point out that several years have passed since the bill was submitted, and it has not yet been made law.

142. If the State wishes to preserve its legislation punishing slander and libel, it must word it in such a way that it does not affect the free expression of disagreements with and protests about the actions of public agencies and the members thereof.

143. The IACHR recognizes that in 1993 the Argentine State enacted Law 24.198, which repealed Article 244 of Criminal Code, containing the definition of the crime of *desacato*, as a result of a friendly settlement agreement reached during the Commission's processing of another case.[65]

144. However, the criminal and civil conviction handed down against the victim in the instant case shows that that measure was not sufficient to guarantee the free expression of criticism against the action of public authorities without fear of reprisals.

145. Since ratifying the American Convention on September 5, 1984, the State has preserved the current criminalization of the offenses of slander and libel, whereby it imposes prison terms and/or fines on those who insult, offend, or express critical opinions about public officials or private citizens voluntarily involved in matters of public interest.

146. Irrespective of the above, when the legislature fails in its duty of setting aside and/or not enacting laws that contravene the American Convention, the judiciary remains subject to the duty of ensuring rights set out in Article 1(1) thereof and, consequently, must refrain from enforcing any provision that is contrary to its terms.[66]

147. Compliance by state agents or officials with a law that violates the Convention gives rise to the State's international responsibility, and it is a basic principle of the law governing the international liability of states, endorsed by the international human rights law, that every state is internationally responsible for acts or omissions by any of its branches or agencies in violation of the internationally recognized rights, pursuant to Article 1(1) of the American Convention.[67]

148. Domestic judges and courts are subject to the rule of law and, consequently, are required to enforce the provisions set out in current legislation. But when a state has ratified an international treaty, such as the American Convention, its judges, as a part of the state apparatus, are also subject to that treaty, which requires them to remain alert to the effects of its provisions.[68]

149. As the Court has said,

> The Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the

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[65] IACHR, Report No. 22/94 (friendly settlement), Case 11.012, *Horacio Verbitzky*, Argentina, September 20, 1994.

[66] See, in this regard: I/A Court H. R., *Case of Almonacid Arellano,* Judgment of September 26, 2006, Series C No. 154, paragraph 121.

[67] I/A Court H. R., *Case of Ximenes Lopes,* Judgment of July 4, 2006, Series C No. 149, paragraph 172; I/A Court H. R., *Case of Baldeón García,* Judgment of April 6, 2006, Series C No. 147, paragraph 140.

[68] See, in this regard: I/A Court H. R., *Case of Almonacid Arellano,* Judgment of September 26, 2006, Series C No. 154, paragraph 124.

interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[69]

150. In the case at hand, in compliance with their obligation of ensuring rights, the Argentine judicial authorities should have refrained from enforcing the crimes of slander and libel as currently defined, allowing the expression of opinions on the performance of the state official responsible for investigating the murder of the Pallottines.

151. But even in the provisions under study in this case had not been applied, that alone would not have been enough to satisfy the demands of Article 2 of the Convention as regards this matter. This is because, first of all, as stated above, Article 2 establishes the legislative obligation of repealing any provision that violates the Convention and, secondly, because the opinion of the domestic courts may change and they may decide to enforce anew a provision that still remains current within domestic law.[70]

152. In consideration whereof, the Commission asks the Court to declare that Argentina did fail to comply with its duty of bringing its domestic law into line with the object and purpose of the American Convention by not repealing provisions that place unreasonable restrictions on the free circulation of ideas regarding the actions of public authorities, as required by Article 2 of the Convention, and did fail to comply with its obligation of ensuring the right of free expression as established by Article 1(1) thereof.

VIII. REPARATIONS AND COSTS

153. In consideration of the claims made in this application and of the consistent jurisprudence of the Inter-American Court holding that "any violation of an international obligation that has produced damage entails the obligation to make adequate reparation,"[71] the IACHR presents the Court with its preliminary claims regarding the reparations that the Argentine State must grant as a consequence of its responsibility for the human rights violations committed with respect to Eduardo Kimel.

154. In line with the Court's Rules of Procedure, which grant individuals autonomous representation, the Commission will at this time simply outline the general guidelines related to reparations and costs that it believes the Court should apply in the case at hand. The Commission understands that it falls to the victims and their representatives to substantiate their claims, in compliance with Article 63 of the American Convention and the Articles 23 *et al.* of Rules of Procedure of the Court.

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[69] See, in this regard: I/A Court H. R., *Case of Almonacid Arellano,* Judgment of September 26, 2006, Series C No. 154, paragraph 124.

[70] See, in this regard: I/A Court H. R., *Case of Almonacid Arellano,* Judgment of September 26, 2006, Series C No. 154, paragraph 123.

[71] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraph 199; I/A Court H. R., *Case of the Miguel Castro Castro Prison,* Judgment of November 25, 2006, Series C No. 160, paragraph 413; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.),* Judgment on preliminary objections, merits, reparations, and costs, Judgment of November 24, 2006, Series C No. 158, paragraph 141.

A. Obligation of making reparations

155. One essential function of justice is to remedy the harm inflicted on the victim. This function must be expressed through rectification or restitution, and not only through compensation, which does not reset the moral balance nor return what was taken.

156. Article 63(1) of the American Convention provides as follows:

> If the Court finds that there has been a violation of a right or freedom protected by [the] Convention, the Court shall rule that the injured party be 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.

157. As the Court has consistently maintained in its jurisprudence, "Article 63(1) of the American Convention contains a rule of customary law that constitutes one of the fundamental principles of contemporary international law on State responsibility. According to it, when an illegal act attributable to the State takes place, the latter immediately incurs a responsibility for the violation of the international provision involved, with the attendant duty of providing reparations and of making the consequences of said violation cease."[72]

158. Reparations are crucial in ensuring that justice is done in a given case, and they are the mechanism whereby the Court's decisions move beyond the realm of mere moral condemnation. Reparations are those measures that tend to make the effects of past violations disappear. Reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution *(restitutio in integrum)*, which consists of restoring the situation that existed before the violation occurred.

159. A respondent state may not invoke domestic legal provisions to modify or avoid complying with its obligations to redress, which are regulated in all their aspects (scope, nature, modes, and establishment of the beneficiaries) by international law.[73]

160. In the case at hand, the Inter-American Commission has shown that the State incurred in international responsibility by violating, with respect to Eduardo Kimel, the right to a fair trial and to freedom of expression, and by failing to abide by its duty of bringing its domestic law into line with the object and purpose of the Convention.

B. Reparation measures

161. The United Nations Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights has classified the components of that right into four general categories: restitution, compensation, rehabilitation, and satisfaction and

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[72] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraph 200; I/A Court H. R., *Case of the Miguel Castro Castro Prison,* Judgment of November 25, 2006, Series C No. 160, paragraph 414; I/A Court H. R., *Case of Montero Aranguren et al. (Detention Center of Catia),* Judgment of July 5, 2006, Series C No. 150, paragraph 116.

[73] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraph 200; I/A Court H. R., *Case of the Miguel Castro Castro Prison,* Judgment of November 25, 2006, Series C No. 160, paragraph 415; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.),* Judgment on preliminary objections, merits, reparations, and costs, Judgment of November 24, 2006, Series C No. 158, paragraph 143.

guarantees of non-repetition.[74] In the opinion of the United Nations Special Rapporteur on the impunity of perpetrators of human rights violations, these measures include: the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; an official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim; an apology, including public acknowledgement of the facts and acceptance of responsibility, judicial or administrative sanctions against persons responsible for the violations; the prevention of further violations, etc.

162. Similarly, the Court has said that reparations tend to eliminate the effects of the violations committed.[75] These measures cover the different ways in which a state can meet the international responsibility in which it incurred and, in accordance with international law, can be measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition.[76]

163. The United Nations Commission on Human Rights has also ruled that:

> In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[77]

164. In consideration of the criteria established by inter-American and universal jurisprudence, the Commission presents its conclusions and claims regarding the redress measures for the material and nonmaterial damages and other forms of redress and satisfaction applicable in the case of Eduardo Kimel.

1. Compensation measures

165. The Court has established basic criteria that should guide fair compensation intended to make adequate and effective economic amends for harm arising from violations of human rights. The Court has also ruled that indemnification is merely compensatory in nature, and that it is to be

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[74] Principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Dr. Theodore Van Boven pursuant to Human Rights Sub-Commission decision 1995/117. E/CN.4/ sub.2/1997/17.

[75] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraph 202; I/A Court H. R., *Case of the Miguel Castro Castro Prison,* Judgment of November 25, 2006, Series C No. 160, paragraph 416; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.),* Judgment on preliminary objections, merits, reparations, and costs, Judgment of November 24, 2006, Series C No. 158, paragraph 144.

[76] See: United Nations, Final Report submitted by Theo Van Boven, Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, E/CN.4/Sub2/1990/10, July 26, 1990. See also: I/A Court H. R., *Blake Case,* Reparations (Art. 63.1 American Convention on Human Rights), Judgment of January 22, 1999, Series C No. 48, paragraph 31; I/A Court H. R., *Suárez Rosero Case,* Reparations (Art. 63.1 American Convention on Human Rights), Judgment of January 20, 1999, Series C No. 44, paragraph 41.

[77] United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/17, *The Administration of Justice and the Human Rights of Detainees: Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law,* prepared by Mr. Theo Van Boven pursuant to Sub-Commission decision 1995/117 of May 24, 1996, paragraph 7.

granted in volume and fashion sufficient to repair both the material and the nonmaterial harm inflicted.[78]

1.1. Material damages

166. In its jurisprudence on reparations, the Court has been consistent in maintaining that material damages include consequential damages and future losses, together with nonmaterial and moral damages, for both the victims and, in certain cases, their immediate families.[79]

167. Consequential damages have been defined as the direct and immediate effect of the incident on property. This notion includes the impact on property derived immediately and directly from the incident.[80]

168. As the Court will be able to see from the evidence in this case, Mr. Kimel made significant economic efforts to obtain justice domestically and to overcome the moral consequences that the actions of the Argentine State had on him.

169. In contrast, future losses are understood as the loss of economic income or benefits not accrued on account of a given circumstance, which can be quantified using certain measurable and objective indicators.[81]

170. Notwithstanding the claims that the victim's representatives may submit at the appropriate point in proceedings, the IACHR asks the Court to set an equitably determined sum of money as indemnification for the consequential damages and future losses, in exercise of its broad powers in this regard.

1.2. Nonmaterial damages

171. In the case at hand, Mr. Eduardo Kimel has been the victim of psychological suffering, anguish, uncertainty, and alterations in his lifestyle on account of his prosecution in an unjust criminal trial, his subsequent criminal conviction, the requirement that he make a compensatory payment for the simple exercise of his right of free expression, and the personal and professional consequences of that conviction.

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[78] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraph 210; I/A Court H. R., *Case of Hilaire, Constantine, Benjamin, et al.*, Judgment of June 21, 2002, Series C No. 94, paragraph 204; I/A Court H. R., *Garrido and Baigorria Case, Reparations* (Art. 63.1 American Convention on Human Rights), Judgment of August 27, 1998, Series C No. 39, paragraph 41.

[79] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraphs 213 and 214; I/A Court H. R., *Case of the Miguel Castro Castro Prison,* Judgment of November 25, 2006, Series C No. 160, paragraph 423; I/A Court H. R., Case *of Tibi,* Judgment of September 7, 2004, Series C No. 114.

[80] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraph 215; I/A Court H. R., *Loayza Tamayo Case,* Reparations (Art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998, Series C No. 42, paragraph 147; and I/A Court H. R., *Aloeboetoe et al. Case,* Reparations (Art. 63.1 American Convention on Human Rights), Judgment of September 10, 1993, Series C No. 15, paragraph 50.

[81] See, for example: I/A Court H. R., *Case of Carpio Nicolle et al.*, Judgment of November 22, 2004, Series C No. 117, paragraphs 105 *et seq;* I/A Court H. R., *Case of De la Cruz Flores,* Judgment of November 18, 2004, Series C No. 115, paragraphs 151 and 152.

172. The harm caused to Mr. Kimel justifies the Commission's request that the Court, in consideration of the nature of the case, order a compensation payment to cover nonmaterial damages.

2. Measures of cessation and satisfaction and guarantees of nonrepetition

173. Satisfaction has been defined as all measures that the perpetrator of a violation is required to adopt under international instruments or customary law with the purpose of acknowledging the commission of an illegal act.[82] Satisfaction takes place when three events occur, generally one after the other: apologies, or any other gesture showing acknowledgement of responsibility for the act in question; prosecution and punishment of the guilty; and the adoption of measures to prevent the harm from recurring.[83]

174. In the following paragraphs the IACHR will set out its position regarding the cessation and satisfaction measures and guarantees of nonrepetition required in the case at hand, reserving the right to expand, at a later time, its arguments on this point.

175. First of all, Argentina must adopt measures of rehabilitation on behalf of the victim. These measures must necessarily include the suspension of the effects of the criminal trial brought against him, including the criminal punishment and the order that he pay a compensation for moral damages, and the expunging of Mr. Eduardo Kimel's criminal record arising from this case.

176. Secondly, the nature of the facts in this case demand that the State take steps intended to restore the victim's dignity. In that connection, the Commission asks the Court to order, *inter alia:*

- The publication, in a national newspaper, of whatever judgment the Court may hand down; and

- An act publicly recognizing the State's responsibility for the harm inflicted and for the violations that occurred.

177. Finally, the Commission believes that the State is obliged to prevent the recurrence of human rights violations such as those of the instant case; consequently, it asks the Court to order the Argentine State to adopt, on a priority basis, the legislative, administrative, and other measures necessary to prevent any future criticisms of the actions of state officials from leading to criminal sanctions.

C. Beneficiary

178. Article 63(1) of the American Convention requires that the consequences of a violation be remedied and that "fair compensation be paid to the injured party." The persons entitled to this compensation are generally those who suffered direct harm as a result of the violation in question.

179. In the instant case, the beneficiary of the redress ordered by the Court is the victim, Mr. Eduardo Kimel.

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[82] Brownlie, *State Responsibility,* Part 1, Clarendon Press, Oxford, 1983, p. 208.

[83] *Ibid*.

D. Costs and expenses

180. In accordance with the Court's consistent jurisprudence, costs and expenses must be included in the reparations described in Article 63(1) of the American Convention. This is because the activities pursued by the injured parties, their heirs, or their representatives in securing access to international justice imply expenditures and financial commitments that must be compensated.[84] In addition, the Court has also ruled that the costs referred to in Article 55(1)(h) of its Rules of Procedure include the necessary and reasonable expenses incurred in securing access to the American Convention's supervisory bodies, with those expenses including the fees charged by those providing them with legal assistance.

181. In the case at hand, the Inter-American Commission asks the Court, after hearing the representatives of the victim, to order the Argentine State to pay duly evidenced costs and expenses.

IX. CONCLUSION

182. The one-year suspended prison term and the requirement that he pay twenty thousand pesos as compensation handed down against the historian, journalist, and writer Eduardo Kimel for referring in his book *La Masacre de San Patricio* to a former judge, criticizing him for his actions in investigating the murders of five members of the Pallottine religious order, and the failure to adapt its legislation to ensure, pursuant to the terms of the American Convention, the right of free expression through the journalistic criticism of state officials and, consequently, society's access to important information about the actions of its authorities, constitute violations of the rights protected by Articles 8 (right to a fair trial) and 13 (right of free expression) of the American Convention on Human Rights, in conjunction with the general obligation of respecting and ensuring human rights set out in Article 1(1) and the obligation of adopting domestic legal effects contained in Article 2 thereof.

X. LIST OF DEMANDS

183. Based on the considerations of fact and law set out above, the Inter-American Commission on Human Rights asks the Court to conclude and declare that:

a) The Argentine Republic is responsible for violating, with respect to Eduardo Kimel, the right to freedom of thought and expression enshrined in Article 13 of the American Convention on Human Rights, in conjunction with the general obligations of respecting and ensuring human rights and of adopting such legislative or other measures necessary to give effect to those protected rights, in accordance with Articles 1(1) and 2 of the Convention; and,

b) The Argentine Republic is responsible for violating, with respect to Eduardo Kimel, the right to a fair trial enshrined in Article 8 of the American Convention on Human Rights, in conjunction with the general obligation of respecting and ensuring human rights under Article 1(1) thereof.

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[84] I/A Court H. R., *Case of La Cantuta,* Judgment on merits, reparations, and costs, Judgment of November 29, 2006, Series C No. 162, paragraph 243; I/A Court H. R., *Case of the Miguel Castro Castro Prison,* Judgment of November 25, 2006, Series C No. 160, paragraph 455; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.),* Judgment on preliminary objections, merits, reparations, and costs, Judgment of November 24, 2006, Series C No. 158, paragraph 152.

And, consequently, to order the State:

a) to compensate Mr. Eduardo Kimel for the harm caused by the violation of his rights;
b) to adopt the judicial, administrative, and other measures necessary to render void of effect the criminal proceedings initiated against Mr. Eduardo Kimel and the judgments handed down therein, including the order that he pay compensation for moral damages;
c) to adopt the judicial, administrative, and other measures necessary to expunge Mr. Eduardo Kimel's criminal record arising from this case;
d) to amend its criminal legislation to bring it into line with Article 13 of the American Convention; and
e) to pay the legal costs and expenses incurred in pursuing this case at the national level, as well as those arising from its processing before the inter-American system.

XI. EVIDENCE

A. Documentary evidence

184. The documentary evidence available at this time is listed below:

APPENDIX 1. IACHR, Report No. 111/06 (merits), Case 12.450, *Eduardo Kimel,* Argentina, October 26, 2006.
APPENDIX 2. IACHR, Report No. 5/04 (admissibility), Petition 720/00, *Eduardo Kimel*, Argentina, February 24, 2004.
APPENDIX 3. Case file from the Inter-American Commission on Human Rights.
ANEXO 1. Judgment of September 25, 1995, issued by the 8th National First-Instance Court for Criminal and Correctional Matters of Buenos Aires.
ANEXO 2. Judgment of November 19, 1996, handed down by the 6th Chamber of the National Criminal and Correctional Appeals Court.
ANEXO 3. Judgment of December 22, 1998, handed down by the Supreme Court of Justice of the Argentine Nation.
ANEXO 4. Judgment of March 17, 1999, handed down by the 4th Chamber of the National Criminal and Correctional Appeals Court.
ANEXO 5. Deed filing for an extraordinary appeal with the Supreme Court of Justice of the Argentine Nation.
ANEXO 6. Resolution of September 14, 2000, handed down by the Supreme Court of Justice of the Argentine Nation.
ANEXO 7. Bills proposing amendments to the national Criminal Code and Civil Code:
(a) in file 0073-PE-01, published December 27, 2001;
(b) in file No. 1119-D-2001, published March 22, 2001;
(c) in file No. 4345-D-2004, published July 15, 2004;
(d) in file No. 1251/04, of May 5, 2004;
(e) in file No. 3234/05 of September 29, 2005; and
(f) in file No. 42-D-06, of March 1, 2006.
ANEXO 8. Eduardo Kimel, *La Masacre de San Patricio,* Ediciones LOHLÉ-LUMEN, Second Edition, 1995.
ANEXO 9. Copy of the power of attorney extended to the "Center for Legal and Social Studies" (CELS) and the "Center for Justice and International Law" (CEJIL) by Eduardo Kimel.

185. Additionally, the Commission asks the Honorable Court to request that the Argentine State submit certified copies of all the documents related to Mr. Eduardo Kimel's criminal trial, together with authenticated copies of the applicable legislation and regulatory provisions.

B. Witness evidence

186. The Commission asks the Court to take statements from the following witnesses:

- Eduardo Kimel, to give a statement on the criminal proceedings brought against him, the background to the trial, and its outcome; on the impact that the criminal and civil conviction handed down against him by the Argentine courts has had on his personal life and professional performance; and on other issues of relevance to the purpose and scope of this application.
- Carlos Elbert, a former member of the 6th Chamber of the National Criminal and Correctional Appeals Court, to give a statement on the proceedings that led to the November 1996 decision to acquit Mr. Eduardo Kimel; and on other issues of relevance to the purpose and scope of this application.

XII. INFORMATION ABOUT THE ORIGINAL PETITIONERS AND THE VICTIM

187. In compliance with Article 33 of the Court's Rules of Procedure, the Inter-American Commission submits the following information: The original complaint was filed by the "Center for Legal and Social Studies" (CELS) and the "Center for Justice and International Law" (CEJIL).

188. Mr. Eduardo Kimel has extended a power of attorney to the "Center for Legal and Social Studies" (CELS) and the "Center for Justice and International Law" (CEJIL) for them to represent him in the judicial phase of processing by the system, as witnessed by the copy of the document attached hereto.[85] The single address of the victims' representatives is [redacted].

Washington, D.C.
April 10, 2007

[85] Annex 9, copy of the power of attorney extended to CEJIL.