



INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINÉ DES DROITS DE L'HOMME



ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 USA

April 13, 2011

Ref.: Case No. 11.618
Oscar Alberto Mohamed
Argentina

Dear Mr. Secretary:

I am writing to you on behalf of the Inter-American Commission on Human Rights for the purpose of submitting to the jurisdiction of the Inter-American Court of Human Rights Case No. 11.618, *Oscar Alberto Mohamed* v. the Republic of Argentina (hereinafter the "State," "Argentine State" or "Argentina"). The case involves the prosecution and criminal conviction of Oscar Alberto Mohamed for the crime of negligent homicide as a result of a traffic accident that occurred on March 16, 1992. After being acquitted in the first instance, Mr. Mohamed was convicted for the first time in a second instance proceeding. In that proceeding, a series of guarantees were ignored, among them the principle of legality and non-retroactivity and the right to a defense. In addition, given that Mr. Mohamed's right to appeal the conviction was not guaranteed as provided in the Convention, he additionally did not have an effective remedy for rectifying those violations.

The State of Argentina ratified the American Convention on Human Rights (hereinafter "the American Convention," "Convention," or "ACHR") and accepted the contentious jurisdiction of the Inter-American Court on September 5, 1984.

The Commission has appointed Commissioner Luz Patricia Mejía and IACHR Executive Secretary Santiago A. Canton as its delegates. In addition, Elizabeth Abi-Mershed, Assistant Executive Secretary, María Claudia Pulido, Silvia Serrano Guzmán, and Marisol Blanchard will act as legal advisors.

Pursuant to Article 35 of the Rules of Procedure of the Inter-America Court, the Commission attaches hereto a copy of Report 173/10 prepared in accordance with Article 50 of the Convention, as well as copy of the entire case file before the Inter-American Commission (Appendix I) and the annexes used in preparing Report 173/10 (Annexes). The State of Argentina was informed of said report on the merits in a communication dated December 13, 2010, in which it was granted a period of two months to report on its compliance with the recommendations. In response to the State's request for an extension to submit that information, the IACHR granted a one-month extension in a decision adopted on March 9, 2011. On April 1, 2011 the State submitted a report presenting information on some recommendations.

Pablo Saavedra Alessandri, Secretary
Inter-American Court of Human Rights
Apartado 6906-1000
San José, Costa Rica

Annexes

The Commission is submitting the case to the jurisdiction of the Inter-American Court based on the need to obtain justice for the victim given the State of Argentina's failure to make substantial progress in complying with the recommendations.

With respect to the recommendation to **"provide the measures necessary so that Oscar Alberto Mohamed can promptly file an appeal so as to obtain a full review of the conviction, in accordance with Article 8.2. h. of the American Convention"** the State referred to a Draft Law reforming Argentina's Code of Criminal Procedure that was submitted by the Ministry of Justice and Human Rights in order to add a new grounds for the admissibility of a review in cases where the Inter-American Commission or Court issue decisions with respect to the Argentine State. The State referred to the "favorable opinion" of the legal divisions of various ministries and offices, as well as the unfavorable opinion of the Treasury Counsel. The Inter-American Commission notes first that the draft law referred to by the State is still under consideration by the legislature. In addition, the State did not provide information explaining how that remedy would satisfy the requirements of Article 8.2.h of the Convention, nor whether, if the Code of Criminal Procedure were reformed, the new legislation would be retroactively applicable to the victim in the instant case. In summary, the IACHR feels that to date Oscar Alberto Mohamed has not had a remedy with which to obtain a full review of the conviction against him.

With respect to the recommendation to **"provide legislative and other measures to ensure the effective fulfillment of the right enshrined in Article 8.2.h of the American Convention in accordance with the standards described"** in the report on the merits, the State indicated that the Executive Branch is currently reviewing a draft law related to Article 8.2.h of the Convention. This draft law was submitted by a group of petitioners in the context of a petition now before the IACHR. The information provided by the State does not indicate that Argentine authorities have adopted concrete measures designed to adapt its domestic legislation to the provisions of Article 8.2.h of the Convention. In particular, the State did not report on legislative and other measures to ensure that individuals convicted for the first time in a second instance decision, as in Mr. Mohamed's case, have a remedy consistent with the terms of the referenced standard under the Convention.

With respect to the recommendation to **"adopt the measures necessary so that Oscar Alberto Mohamed will receive adequate and timely reparation for the human rights violations established"** in the report on the merits, the State indicated that the Secretariat of Human Rights and the Legal Office of the Ministry of Justice suggested forming an Arbitration Panel to establish the "headings" and "amounts" that should be recognized and paid for violations found by the IACHR. In this regard, the Commission notes that no progress has been made on implementing that proposal and that, according to the information available, the victim has not yet been contacted by the State. To date, Oscar Alberto Mohamed continues to be uncompensated for the violations committed against him.

Based on the above considerations, the Commission feels that the State of Argentina has not made progress on complying with the recommendations made in the report on the merits. Accordingly, the IACHR deems it appropriate to submit this case to the jurisdiction of the Court.

The Inter-American Commission submits to the jurisdiction of the Court all the facts and human rights violations described in report on the merits 173/10. As a result, the IACHR asks the Court to conclude and declare that:

- a) The State of Argentina violated the principle of legality and non-retroactivity, the right to a defense, the right to appeal the decision, and the right to judicial protection enshrined in Articles 9, 8.2 c), 8.2 h), and 25.1 of the American Convention as they relate to the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of Oscar Alberto Mohamed.

REPORT No. 173/10
CASE 11.618
OSCAR ALBERTO MOHAMED
MERITS
ARGENTINA
November 2, 2010

I. SUMMARY

1. On March 18, 1996, the Inter-American Commission on Human Rights (hereinafter "Inter-American Commission," "Commission," or "IACHR") received a petition filed by Oscar Alberto Mohamed and attorney Roque J. Mantione (hereinafter "the petitioners"), which it registered with number 11.618.

2. The petition alleged the international responsibility of the Republic of Argentina (hereinafter "the Argentine State" or "the State") because the courts allegedly applied a criminal law retroactively in Mr. Mohamed's trial for negligent homicide arising from a traffic accident. It alleged that the State had failed to guarantee Mr. Mohamed's right to a review of his conviction, since he was acquitted at first instance and then convicted at second instance, allegedly without any access to further judicial review.

3. The State, for its part, indicates that Mr. Mohamed was convicted in accordance with the requirements of national and international law. It maintains that Mr. Mohamed had access to two instances of review, namely before the courts of first and second instance. The State maintains that the conviction was imposed in accordance with the terms of its Criminal Code, adopted prior to the facts.

4. In Report No. 02/05, approved on February 22, 2005, the Commission concluded that petition 11.618 was admissible, because "the petitioners have stated claims concerning alleged violations of the right to appeal a judgment to a higher court, as well as to freedom from ex post facto laws, which, if consistent with other requirements and shown to be true, could tend to establish the violation of rights protected under Articles 8, 9, and 1.1 of the American Convention." It also concluded that "bearing in mind the claims raised concerning the right to judicial guarantees, protection and review, and the principle of *jura novit curia*, in its decision on the merits the Commission will, to the extent relevant, also examine the potential application of Article 25 of the American Convention, concerning the right to judicial protection, and Article 2, concerning the obligation to give domestic legal effect to the rights set forth therein."

5. Based on the considerations of fact and law presented in the present report, the Inter-American Commission, at its 140th regular session, concludes that the Argentine State violated Oscar Alberto Mohamed's right to respect for the principle of legality, to due process, and to judicial protection established in articles 9, 8.2.h and c., and 25.1 of the American Convention in connection with Article 1.1 of the same treaty. The Commission also concludes that the Argentine State violated Article 2 of the American Convention.

II. PROCESSING SUBSEQUENT TO ADMISSIBILITY REPORT No. 02/05

6. On February 22, 2005, the IACHR adopted Report No. 02/05, which declared the admissibility of petition 11.618 concerning Oscar Alberto Mohamed. The parties were notified of the decision by note of March 11, 2005, with a request for its merits observations within two months to the petitioners. At the same time, the IACHR placed itself at the disposal

of the parties with a view to reaching a friendly settlement of the matter, as provided in Article 48.1.f of the American Convention.

7. The petitioners requested an extension until May 20, 2005, which was granted, and on April 14 of the same year they accepted the proposal to start a friendly settlement process. On June 15, 2005, they submitted their observations on the merits. The petitioners submitted additional information on April 13 and October 16, 2006; September 25, 2007; and June 5, 2008. All communications mentioned in this paragraph were duly forwarded to the State.

8. On September 19, 2006, the State asked to initiate a dialogue to explore the possibility of reaching a friendly settlement with the petitioners. On November 29, 2007, it requested an extension, which was granted. It presented observations on November 21, 2008, and February 25, 2009. The communications mentioned in this paragraph were duly forwarded to the petitioners.

9. On January 5, 2009, the petitioners gave written notice of their decision to consider the friendly settlement process terminated. On March 13, 2009, they submitted additional information. All communications mentioned in this paragraph were duly forwarded to the State.

III. POSITIONS OF THE PARTIES

A. The petitioners

10. The petitioners indicate that, on March 16, 1992, Oscar Alberto Mohamed, a bus driver in the City of Buenos Aires, struck a pedestrian at the intersection of Belgrano and Piedras, who died of her injuries. They add that as a result Mr. Mohamed was charged and tried for negligent homicide (*homicidio culposo*).

11. The first instance judgment, issued on August 30, 1994, absolved Mr. Mohamed of criminal responsibility. The prosecution and the private claimant appealed the acquittal before the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters. The defense appealed only with respect to the allocation of attorneys' fees. In its sentence of February 22, 1995, the First Chamber revoked the judgment at first instance, sentenced Mr. Mohamed to a three-year suspended prison sentence, and disqualified him from driving any vehicle for eight years.

12. The defense filed a special appeal with the First Chamber of the Chamber of Appeals based on claims that the conviction violated the right to due process and that the court had erroneously applied transit regulations that had not been in effect at the time of the accident. On July 4, 1995, the First Chamber of the Chamber of Appeals handed down a judgment rejecting the special appeal, stating that although the defense had presented what amounted to a material error, the verdict was based on a principle of objective responsibility, established in the Penal Code, which could not be challenged. The defense then presented a complaint motion to the Supreme Court, alleging the Chamber's express recognition that it had violated the *ex post facto* principle. In a decision of September 19, 1995, the Supreme Court rejected the appeal as inadmissible, in application of Article 280 of the federal Civil and Commercial Procedure Code.

13. The defense then filed an appeal for revocation with the Supreme Court based on violation of the *ex post facto* principle and the right to a fair trial, established in Argentina's Constitution, the Universal Declaration of Human Rights, and the American Convention. That appeal was dismissed via a decision of October 19, 1995, indicating that the challenged

decision was not subject to such an appeal. The petitioners note in this regard that in 1992 the very same composition of the Supreme Court had accepted such a request in a similar case.

14. The petitioners consider that Mr. Mohamed's conviction violated Article 9 of the American Convention, which prohibits the imposition of *ex post facto* laws. They contend that the First Chamber of the National Chamber of Appeals based its conviction on violations of three provisions of the transit regulations that were issued on April 27, 1992, subsequent to the traffic accident that took place on March 16, 1992. They consider that the criminalization of conduct at the time of sentencing, when it was not illegal at the time of the facts, violates Article 9 of the American Convention.

15. The petitioners note that, when the First Chamber of the Court of Appeals rejected their special appeal, it admitted that it had made a "material error" in referring to the 1992 regulations, which had not been in force at the time of the accident. The Chamber went on, however, to indicate that the penalty imposed had been based principally on an objective duty of care under the Criminal Code. The petitioners maintain that no such crime exists under the national legal order. The petitioners emphasize that Argentine law contains no express norm indicating that a person who violates the "objective duty of care" shall be convicted and penalized, and that the legal system does not permit the application of law by analogy or in abstract.

16. The petitioners maintain that the National Chamber of Appeals applied the Criminal Code not based on a general principle, but by establishing violations of the transit regulations of 1992. The abovementioned article 84 of the Criminal Code in force at the time of the facts provided for a penalty ranging from six months to three years for any person who "through imprudence, negligence or lack of expertise in his or her art or profession, or failure to observe the regulations or duties under his or her responsibility, causes the death of another."

17. With respect to the State's argument that the conviction was based on Article 84 of the Criminal Code and not on retroactive application of the regulations, the petitioners argue that punishable conduct cannot be defined at the judges' discretion, but only by regulations that integrate the criminal law provision. They add that the definition of negligent offences tends to be more or less loose, but this does not empower judges to make their own definition of offenses, and these activities are therefore regulated. In this regard, they note that the doctrine clearly distinguishes between negligent and intentional offenses. Intentional offenses always imply the violation of a primary duty of the principal norm; e.g., in homicide, it is the norm that prohibits killing. Negligent crimes, on the other hand, are the violation of another different duty before the obligation not to kill; the law prohibits other actions besides killing because they endanger the protected asset, which in this case is life. They are norms of prudence, generally contained in police regulations and others that regulate daily life. This was established in the Chamber's judgment that cited Decree 692/92 to punish Mr. Mohamed's conduct. The petitioners argue that using Article 84 alone to establish the offense of failure to exercise the "objective duty to care" violates the prohibition of retroactive laws established in Article 9 of the American Convention.

18. Concerning the State's argument that Articles 37, 39, and 40 of Decree 692/92 impose the same obligations on drivers as Articles 41, 42, 47, and 49 of Decree 12.689/45, which was superseded by Law 23.181/85, the petitioners say this is not true. They say that even though some aspects may be similar, the overall legislation of both regulations is quite different. The petitioners state that despite the similarities, this does not authorize the legislator to apply them by analogy especially when this is not established in any of the judgments.¹ In

⁰¹ The petitioners add that at the time of Decree 12.689 of 1945, there were no traffic lights in the city of Buenos Aires, and there were no one-way streets, as is the case Belgrano St. (which was designated one-way on December 29, 1967 and had traffic lights approved on December 10, 1996). Therefore, the principles of said

summary, the petitioners say that even if it were true that Mr. Mohamed passed another vehicle at the intersection, there is no regulation that would prohibit this on a one-way street with traffic lights, so it is illegal to convict him of this.

19. With respect to Article 8, the petitioners state that the appropriate remedy to challenge the type of constitutional violations mentioned in the above paragraphs was the extraordinary appeal to the Supreme Court, according to Article 14 of Law 48, enacted in 1863. This provision gives the Supreme Court jurisdiction to consider challenges to decisions that are allegedly unconstitutional. However, they argue that the remedy was not effective, because it was rejected without consideration of the merits. They maintain that, under the terms of Article 8 of the American Convention, Mr. Mohamed had a right to have his conviction reviewed. They contend that the Supreme Court's rejection of their appeal, absent examination of the merits, violated Mr. Mohamed's right to be heard with due process. They note that the Supreme Court rejected the special appeal as "insubstantial and lacking transcendence," when what had been placed before it was a violation of rights under both national and international law.

20. The petitioners note that when they filed a further motion seeking to revoke that decision of rejection, the Supreme Court rejected the motion as inapplicable, invoking Article 280 of the federal Civil and Commercial Procedure Code. They say that in 1992 the Supreme Court itself had accepted this remedy in a similar case. Therefore, they consider that the lack of access to a remedy violated Mr. Mohamed's right as recognized in Article 8 of the American Convention.

21. They state that as a result of the verdict that revoked Mr. Mohamed's acquittal, gave him a three-year suspended prison sentence, and disqualified him from driving any vehicle for eight years, he was fired from his job, causing great suffering to him and his family. They say that in view of the foregoing, he could not provide for his children, who were bereft of minimum resources for their support.

22. As reparations, the petitioners request, *inter alia*, compensation for the harm suffered by Mr. Mohamed and his four sons, including emotional and psychological damage, loss of present and future income; and legislation to amend Article 280 of the Civil and Commercial Procedure Code.

B. The State

23. The State maintains that there was no *ex post facto* imposition of liability in the present case, and that the judicial proceedings respected the requirements of due process.

24. With respect to the right to freedom from *ex post facto* laws, the State affirms that Mr. Mohamed was convicted, not on the basis of transit regulations, but on the basis of Article 84 of the Criminal Code. It adds that Mr. Mohamed was convicted for failure to carry out his responsibilities as a motorist; objective duties of care that are a matter of international practice. The State notes that the conduct in question, namely passing another vehicle at an intersection, is prohibited precisely to preserve all drivers' visibility and control. A pedestrian died as a result of this illegal conduct. It says this conduct was prohibited in general under the terms of Article 84 of the Criminal Code, in full effect at the time of the facts. This was confirmed in the text of the verdict, which said that the following facts were noted in connection with the death of a third party: "violation of the objective duty of care was punishable because Mohamed failed to observe the law that prohibits passing another vehicle at an intersection, precisely to

law are inapplicable to the facts of the present case. They add that Article 42 of Decree 692/92 says that "common regulations on intersections do not apply" to streets with traffic lights. They also cite jurisprudence of Argentine courts (the Ghirardi decision of 1975) which declared the 1948 ordinance inapplicable.

ensure that drivers have the necessary visibility at all times and be in control of their action." In other words, the Appeals Court found that Mr. Mohamed's driving at the time of the accident violated the objective duty of care that must apply to all persons who drive a vehicle on the public streets, which implies the existence of negligence, imprudence, or lack of expertise.

25. The State adds that Article 84 does not have a loose definition of the offense as alleged by the petitioners, because it clearly describes the punishable offense (killing another person) and contains the penalty to be applied, without prejudice to leaving to the court's discretion the specific conditions of the punishable actions and the range of the penalties between a maximum and minimum.

26. The State notes that, while it was unfortunate that the judgment of the Chamber of Appeals cited traffic regulations contained in Decree 692/92 that was adopted after the traffic accident, this did not constitute retroactive application of criminal law. The regulations referred to generally applicable citizen's duties reflected already in the traffic regulations contained in Decree 689/45, of 1945 (revalidated in 1985) which establishes the same obligations for motorists in Articles 41, 42, 47, and 49. The State stresses that the error of the National Chamber of Appeals in no way relieved Mr. Mohamed of his responsibilities as a driver, given that both sets of transit regulations prohibited the conduct in question, and that a certain general duty of care clearly existed at the time of the accident.

27. With respect to the petitioners' observations that the principles of objective responsibility established in the General Traffic Regulations for roads and streets in the Republic of Argentina (Decree Law No. 12.689/45)² are inapplicable because there are other more recent regulations on one-way streets and traffic lights, the State says this is not so because Article 99 of the regulations stipulates that "the provisions of these regulations shall not preclude competent local authorities from issuing stricter regulations than those established herein within their respective jurisdictions in the interest of safety, public order or traffic control (...)." The State argues that this text shows that the General Traffic Regulations contained in Decree Law 12.689/45 were, at the time of the facts, the legal norm that established the principles and conduct that all vehicle drivers in Argentina must observe, and that later norms, cited by the petitioners, were issued in accordance with the concepts and spirit of the General Traffic Regulations.

28. The State reiterates that the verdict is not based on the convicted person's violation of Articles 37, 39, and 40 of Decree Law No. 692/92, but that at the time of the verdict the norm also contains the abovementioned principles of objective responsibility. Therefore, it maintains that the verdict does not violate rights guaranteed by Article 9 of the American Convention.

29. With respect to the right to appeal and to be heard, established in Article 8, the State maintains that Mr. Mohamed was prosecuted at two instances in which all due process guarantees were observed. Accordingly, it considers that the terms of Article 8 were fully respected. The State notes that the special appeal filed subsequent to Mr. Mohamed's conviction was rejected for failing to present a federal question or to challenge an arbitrary sentence. The State cites Article 2 of Protocol 7 to the European Convention and Article 14.5 of

² Decree 12.689/45 Article 65: "Any driver of a vehicle or mount must drive it under full control based on the width of the road or street, traffic density, signage, weather, visibility, and other conditions of the road or street, and the degree of development in the area."

⁰ Article 47: "(...) Additional serious infractions against the safety of persons are (...) overtaking in alleys, intersections, curves, hilltops, and in general overtaking another vehicle in any circumstances when the maneuver may disrupt the normal flow of other vehicles and could thereby or by other means jeopardize third parties."

the International Covenant on Civil and Political Rights in support of its contention that international law does not require a further instance of review in the case of convictions originating at the appellate level.

IV. ESTABLISHED FACTS

30. At the time of the facts, Mr. Oscar Alberto Mohamed was employed as a driver on bus line No. 2,3 with a monthly salary of 500.75 Argentine pesos.⁴ He was married to Julia Potenza, with whom he had four sons: Javier Oscar, born December 8, 1977; Ariel Alberto, born June 3, 1980; Damián Darío, born August 18, 1982; and Daniel Alexis, born July 12, 1986, all with the surnames Mohamed Potenza.⁵

31. On March 16, 1992, Oscar Alberto Mohamed was involved in a traffic accident at the intersection of Belgrano Avenue and Piedras Street in the city of Buenos Aires, Republic of Argentina, as driver of bus number 22. As a result of said accident, Mr. Mohamed struck Adela Vidarte de Urli, who sustained serious injuries. In the hospital to which she was taken, she died from a skull fracture, contusion, and brain hemorrhage.⁶

32. Mr. Mohamed was tried for negligent homicide for the facts in a proceeding in Correctional Court No.3, Secretariat No. 60.⁷ On August 30, 1994, the judge in the case handed down a decision "absolving Oscar Alberto Mohamed of blame and charges for the crime of negligent homicide defined and punished in Article 84 of the Criminal Code (...)."⁸ The prosecutor and the counsel for Oscar Alberto Mohamed appealed the judgment. The defense appealed with respect to the allocation of attorney's fees.⁹ The appeal was considered in the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters.¹⁰

33. On February 22, 1996, the Chamber decided the matter, resolving, in the relevant part:

(...) II) To revoke operative point I of the appealed judgment (...) and CONVICT OSCAR ALBERTO MOHAMED of the other personal conditions in the instant case because of his criminal responsibility for the crime of negligent homicide, and to sentence him to three years

¹³ Petitioners' note of April 1, 1996.

²⁴ Petitioners' note of June 25, 1996. Annex: receipt for payment to Mr. Mohamed in April 1995.

³⁵ Petitioners' note of June 25, 1996. Annexes: marriage certificate; birth certificates of Javier Oscar, Ariel Alberto, Damián Darío, and Daniel Alexis, all with the surnames Mohamed Potenza.

⁴⁶ Petitioners' note of April 1, 1996. Annex, Judgment on the appeal rendered by the First Chamber of the Criminal and Correctional Appeals Chamber, of February 22, 1995. The State's note of May 19, 1997, which presents the same copy of the ruling.

⁵⁷ Petitioners' note of April 1, 1996. Annex. Certificate of notification of judgment of the Correctional Court No. 3 Secretariat No. 60 of September 7, 1994.

⁶⁸ Petitioners' note of April 1, 1996. Annex. Certificate of notification of judgment of the Correctional Court No. 3 Secretariat No. 60 of September 7, 1994.

⁷⁹ Petitioners' note of April 1, 1996. Annexes, Judgment on the appeal handed down by the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters on February 22, 1995 and brief filed by Roque J. Martione appealing to the Chamber of Appeals for Criminal and Correctional Matters.

¹⁰ Petitioners' note of April 1, 1996. Annexes, Judgment on the appeal handed down by the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters on February 22, 1995 and brief filed by Roque J. Martione appealing to the Chamber of Appeals for Criminal and Correctional Matters.

in prison, suspended, and to disqualify him from driving any vehicle for eight years. (Articles 2611 and 84 of the Criminal Code) (...).¹²

34. The preamble of the Chamber's verdict analyzes its discrepancy with the first instance verdict, based on an analysis of witness testimonies and Mr. Mohamed's lack of prudence in the facts:

(...) I must state here that I endorse the sentence appealed only in that it has proved the defendant's striking the victim in this incident and that it caused her death. I do not share the trial judge's disqualification of the testimony of the eyewitness to the accident (...) nor do I consider that testimony sufficient to substantiate whether the defendant in this case did or did not commit an imprudent action that at least contributed to the socially improper outcome. To assess blame, the trial judge focused exclusively on whether the defendant or the victim had the green light, as if that municipal authorization could absolve the defendant of all responsibility and obviate the need for determining what actually was the conduct that violated the objective duty of care when Mohamed failed to observe the law that prohibits passing another vehicle at an intersection, precisely to ensure that drivers have the necessary visibility at all times and be in control of their action.

(...)The defendant's own statements are sufficient evidence of imprudent action that was the decisive cause of the reproachable outcome being analyzed. Mohamed (...) said he stopped his bus at the bus stop on Belgrano, between Tacuarí and Piedras, behind a bus of line 103, so that when the defendant started up he changed lanes, because the bus of line 103 was in the lane to his right and passed halfway by him when they arrived at the intersection of Belgrano and Piedras, where the light was green; he saw the 103 bus brake and he saw a woman running in front of him, so he also braked, but he struck her with his bumper, making her stumble, fall, and strike her head on the ground.

(...) I think that this account suffices to demonstrate the defendant's lack of prudence in driving the vehicle for which he was responsible. Norms for care, as objective prevention regulations, are not available for private parties, nor abrogable for lack of use. Among the internationally accepted norms that apply to this case is the duty of one who creates a risk for third parties to act with full control of that risk at all times, in order to prevent any damage to others, which could result from possible and foreseeable circumstances; a related obligation is for one who passes another vehicle to maintain sufficient visibility, not to start passing at an intersection, curve, bridge, or other dangerous place; and a third duty is to yield to pedestrians in the crosswalk, at all times in areas where there are no traffic lights, and as indicated where there are traffic lights. In our legislation, these principles are contained in Articles 37, 39, and 40 of Decree Law No. 692/92, which regulates automobile traffic. (...)

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

This suffices to demonstrate the criminal liability of the conduct. But there is more (...). [Witness testimony is reasonable and indicates] that the victim started crossing with the

¹¹ Art. 26.- In cases of a first sentence to prison that does not exceed three years, courts shall have the authority to suspend the sentence in the same ruling (...) There shall not be conditional sentencing for penalties of fines or disqualification.

¹² Petitioners' note of April 1, 1996. Annex, Judgment on the appeal handed down by the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters on February 22, 1995. The State's note of May 19, 1997, presents the same copy of the judgment.

red light about to change, arriving at the intersection and passing the other bus, and the defendant anticipating the yellow light, which explains why the other driver could brake and avoid colliding with the victim, unlike the defendant's vehicle. This shows not only the obstructed vision described by the defendant, but also a certain unwarranted speed of his bus to reach the corner and pass the other bus, which is not idle speculation because the fracture of the left clavicle and the fracture of all the ribs on the left side—the side on which the victim was hit—and the fracture of the second and seventh ribs on the right side and the open wound in the right occipital 9...0 region obviously could not have been caused by a simple touch of the front bumper, especially when, as Mohamed claims, he was only going 10 km/h and applied his brakes before the "touch."

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

(...) As a corollary, I feel that Mohamed's characteristic, illegal, and punishable conduct, without mitigating grounds of justification, non-prosecution, inculpability, or impunity, must be sanctioned with a penalty (...). I propose that points I and II of the verdict be revoked and be applied to the defendant, as author of the crime of negligent homicide (...)¹³

35. Mr. Mohamed filed a special appeal against this sentence with the First Chamber of the Appeals Chamber.¹⁴ On July 4, 1995, the court ruled, rejecting the appeal in the following terms and ordering the appellant to pay costs:

The arguments with which Mohamed's counsel seeks to introduce the federal question refer to matters of fact, evidence, and common law that were weighed and debated at the time of the challenged judgment, and that verdict has sufficient grounds so as not be considered arbitrary. This doctrine does not seek to make the Supreme Court a third regular instance, nor to correct erroneous or allegedly erroneous decisions, but to address exceptional cases in which a total lack of law prevents regarding the decision of trial judges as a sentence based on law, as prescribed in Articles 17 and 18 of the federal Constitution. (...) Although the court has made a material error in citing traffic regulatory decree 692/92, which was not in force at the time of the facts, the conviction of the defendant is based on his violation of the objective duty of care, a circumstance that is duly demonstrated in the proceedings, and as noted above, is not a subject for discussion by this means (...).¹⁵

36. Mr. Mohamed filed a complaint motion (*recurso de queja*) with the Supreme Court to challenge this resolution.¹⁶ On September 19, 1995, the Court resolved the following: "Whereas: The special appeal, whose denial gave rise to this complaint, is inadmissible (Art. 280

¹¹³ Petitioners' note of April 1, 1996. Annex, Judgment on the appeal handed down by the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters on February 22, 1995. The State's note of May 19, 1997, presents the same copy of the judgment.

²¹⁴ Petitioners' note of April 1, 1996.

³¹⁵ Petitioners' note of April 1, 1996. Annex, Judgment on the special appeal handed down by the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters on July 4, 1995.

⁴¹⁶ Petitioners' note of April 1, 1996.

of the federal Commercial and Civil Procedure Code). Therefore, the complaint is rejected (...)."¹⁷

37. To challenge that decision, Mr. Mohamed filed a request for revocation with the same Supreme Court.¹⁸ On October 19, 1995, the Court resolved: "Whereas: In this case the well-known doctrine that the Court's judgments are final and irrevocable applies (...) The motion is therefore denied."¹⁹

38. Mr. Mohamed was fired from his job as a bus driver on July 17, 1995, in the following terms: "Due to criminal loss of driving privilege. Work contract terminated. Your fault."²⁰

39. Decree 692/92, which establishes the Traffic and Transportation Regulations, entered into force on April 27, 2002.²¹

V. ANALYSIS OF LAW

A. Oscar Alberto Mohamed's right with respect to the principle of legality. (Article 9, in connection with Article 1.1 of the American Convention)

40. Article 9 of the American Convention establishes that:

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

41. The petitioners allege that the Appeals Court verdict that convicted Mr. Mohamed of negligent homicide violated the principle of legality recognized in Article 9 of the American Convention, because the decision was based on a violation of Articles 37, 39, and 40 of Decree 692/92 to regulate traffic and transportation, which was approved on April 27, 1992, after the traffic accident that occurred on March 16, 1992.

42. The State, for its part, argues that the conviction was not based on the cited articles of the regulations, but on Article 84 of the Criminal Code, which establishes a norm of objective care that was fully in force at the time of the facts. Moreover, the State says that at the time of the facts Decree 12.689/45 was in force, which establishes the same traffic obligations as Decree 692/92.

43. The Inter-American Court has stated that:

Under the rule of law, the principles of legality and non-retroactivity govern the actions of all the State's bodies in their respective fields, particularly when the exercise of its

⁵¹⁷ Petitioners' note of April 1, 1996. Annex, Judgment on the complaint motion delivered by the Supreme Court on September 19 1995.

⁶¹⁸ Petitioners' note of April 1, 1996.

⁷¹⁹ Petitioners' note of April 1, 1996. Annex, Judgment on the appeal for revocation delivered by the Supreme Court on October 19, 1995.

⁸²⁰ Petitioners' note of June 25, 1996.. Annex: telegram of July 17, 1995, notifying Mr. Mohamed of his dismissal.

⁹²¹ Petitioners' note of April 1, 1996, and the State's note of October 24, 1996. Annex. Text of Decree 696/92.

punitive power is at issue.

In a democratic system, precautions must be strengthened to ensure that punitive measures are adopted with absolute respect for the basic rights of the individual, and subject to careful verification of whether or not unlawful behavior exists.

In this regard, when applying criminal legislation, the judge of the criminal court is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behavior of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by law.²²

44. Based on the foregoing, the IACHR will analyze whether the Argentine State, in the verdict of the Appeals Chamber that convicted Mr. Mohamed, complied with the principles of legality and non-retroactivity of criminal law, recognized by Article 9 of the Convention.

45. The principle of non-retroactivity established in Article 9 of the American Convention embraces the basic principles of *nullum crimen sine lege* and *nulla poena sine lege*, which prohibit states from prosecuting or punishing persons for acts or omissions that did not constitute criminal offenses, under applicable law, at the time they were committed.²³ As inter-American jurisprudence has interpreted,²⁴ this principle requires states to classify and describe crimes in precise and unambiguous language that narrowly defines the punishable offense, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable by other penalties,²⁵ in order to clearly define what conduct people must refrain from.²⁶ The IACHR has established that “The principle of legality has a specific role in the definition of crimes; on the one hand, it guarantees individual liberty

¹⁰²² Inter-American Court, *Case of de la Cruz Flores v. Peru*, Judgment of November 18, 2004 (merits, reparations, and costs) Series C. No. 115, paras. 80, 81, and 82.

¹¹²³ IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc 5 Rev. 1, corr., October 22, 2002, para. 225.

¹²²⁴ I/A Court H. R., *Case of Castillo Petrucci et al.*, Judgment of May 30, 1999 (merits, reparations, and costs), Series C No 52; IACHR, *Report on the Human Rights Situation in Peru* (2000), OEA/Ser.L./V/II.106, Doc.59 rev. 2, June 2, 2000, paras. 80 and 168; IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc 5 Rev. 1, corr., October 22, 2002, para. 225.

²⁵ I/A Court H. R., *Case of De La Cruz Flores v. Peru*, Judgment of November 18, 2004 (merits, reparations, and costs) Series C. No. 115, para. 79: “Concerning the principle of legality in the penal sphere, the Court has indicated that the elaboration of criminal categories involves a clear definition of the criminalized conduct, establishing its elements, and the factors that distinguish it from behaviors that are either not punishable or punishable but not with imprisonment.” See also: I/A Court H. R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 174; I/A Court H. R., *Caso of Castillo Petrucci et al. v. Peru. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para.121; I/A Court H. R., *Caso of Cantoral Benavides v. Peru*. Judgment of August 18, 2000. Series C No. 69, para. 157.

²⁰²⁶ IACHR. *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc 5 Rev. 1, corr., October 22, 2002, para. 17.

and safety by pre-establishing the behavior that is penalized clearly and unambiguously and, on the other hand, it protects legal certainty.”²⁷

46. The Commission notes that for negligent offences the definition of what is prohibited is only partial with regard to the elements, so it must be completed or closed to establish the criminal offense.²⁸ Article 84 of the federal Criminal Code criminalizes negligent homicide as part of this specific category of negligent offenses:

ARTICLE 84. - (text according to Law 21.338). “Any person who, through imprudence, negligence or lack of expertise in his or her art or profession, or failure to observe the regulations or duties under his or her responsibility, causes the death of another shall be punished by six months to three years in prison and special disqualification, as appropriate, for five to ten years.”²⁹

47. As stated by Argentina’s federal Chamber of Appeals for Criminal and Correctional Matters: “The offense established in Article 84 of the Criminal Code—as is the case with all negligent crimes—is an open description that requires a care norm for closure, from which one may deduce that its content is built on dogmatic and logical rules previously established in the specific case (...).”³⁰

48. This norm that “completes” the description of the offense can have various sources, as established for example, by the Criminal Chamber of Colombia’s Supreme Court:

(...) Violation of the objective duty of care. The author must act as a reasonable and prudent individual acting as an agent; failure to observe these requirements would violate the objective duty of care. Observance of the care requirements is expected to minimize risks to legal assets from the exercise of dangerous activities, which is known as permissible risk (in areas such as traffic, medicine, and labor) Since there is no list of care duties, the judicial officer must have recourse to the various sources that define the nature of the violation of the care obligation in each case. Among them: 4.1.4.1. Statutory or regulatory norms governing land, sea, air, and river traffic, and labor regulations intended for proper operation of sources of risk. (...) 4.1.4.3. The criteria of the average person (...).³¹

49. Based on the foregoing, the IACHR notes that the essence of the punishable conduct of negligent homicide established in Article 84, consists not only in the conduct set forth by Article 84, but also in the violation of the objective duty of care, i.e., the difference

²⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of De La Cruz Flores v. Peru*, cited in: Inter-American Court, *Case of De La Cruz Flores v. Peru*, Judgment of November 18, 2004 (merits, reparations, and costs) Series C. No. 115, para. 74.f.

²⁸ See in general: *Lecciones de Derecho Penal* (Volumen I) Juan J. Bustos Ramírez and Hernán Hormazábal Malarée. Editorial Trotta, 1997, p. 92; *Derecho Penal, Parte General*, Volume I, Second updated edition, Enrique Cury Urzúa, Editorial Jurídica de Chile, 1992, p. 326; and *Derecho Penal, Parte General*, Volume I, Third revised and updated edition, Alfredo Etcheberry, Editorial Jurídica de Chile, 1997, p. 83.

²⁹ Article 84 of the Criminal Code was subsequently replaced by Article 1 of Law 25.189 of October 28, 1999: Any person who, through imprudence, negligence or lack of expertise in his or her art or profession, or failure to observe the regulations or duties under his or her responsibility, causes the death of another shall be punished by six months to five years in prison and special disqualification, as appropriate, for five to ten years.

³⁰ The minimum sentence was increased to two years if there is more than one fatal victim or the fact is caused by imprudent, negligent, unqualified, or illegal driving of a motor vehicle.

³¹ Appeal to the Chamber of Appeals for Criminal and Correctional Matters. Chamber V no 28.602 of June 2, 2006. RISK, Néstor et al.

³² Supreme Court of Colombia, Criminal Chamber, Case No 19746 MP Edgar Lombana Trujillo. Similarly, Judgment of July 18, 2008, approved in act number 162, MP Julio Enrique Socha Salamanca.

between the action done and that which should be done according to a normative pre-established standard. The normative elements in this duty, which determine its scope and content, are the rules of prudence established in laws, administrative standards, technical standards, or procedures that govern specific professions (*lex artis*) and care norms for the conduct of a prudent individual acting as an agent from a perspective of prior assessment.³²

50. In the same regard, doctrine has stated “in the area of imprudence, the starting point is the general mandate to respect the legal assets of others. Therefore, the basis for punishment for negligent offenses is the author’s failure of attention regarding them. The grounds for charging a person with the offense of imprudence, especially in cases of liability with representation, are knowingly creating a risk for the legally protected asset through violation of a care duty that in most risk contexts is defined in regulations.”³³

51. In this case the judgment of the Chamber of Appeals that convicted Oscar Alberto Mohamed combined the offense of negligent homicide established in Article 84 of the Criminal Code with the traffic regulation norms of Decree No 692/9234 when it considered that the elements that generated the responsibility for the alleged victim³⁵ were the provisions of Articles 37, 39, and 40 of the traffic regulations, which stipulate the duty to have due control of this risk at all times when driving; the obligation to maintain necessary visibility when attempting to overtake another vehicle, and not to start this maneuver in an intersection, curve, bridge, or other dangerous place, and the obligation to yield to pedestrians in the crosswalk.³⁶

³³² See in this regard, *Derecho Penal*. Muñoz Conde and García Aran, p. 301.

⁴³³ *Derecho Penal, Parte General*. Maximiliano Rusconi. Editorial Ad-Hoc, Buenos Aires, 2007.

⁵³⁴ Petitioners’ note of April 1, 1996. Annex, Judgment on the appeal rendered by the First Chamber of the Criminal and Correctional Appeals Chamber, of February 22, 1995. The State’s note of May 19, 1997, which presents the same copy of the ruling.

⁶³⁵ In this regard, see Inter-American Court, *Case of De La Cruz Flores v. Peru*, Judgment of November 18, 2004 (merits, reparations, and costs) Series C. No. 115, para. 88.

³⁶ Decree 692/92 of April 27, 2002

Article 37: Conditions for driving. Drivers must: a) before entering a public street, confirm that they and their vehicle are in proper safe condition, in accordance with legal requirements, under their responsibility. However, in the case of vehicles for hire, responsibility for safety conditions shall be in accordance with paragraph a of Art. 51; b) Drive with care on public streets, maintaining at all times effective control of the vehicle or animal, bearing mind the inherent risks of driving and the other circumstances of the traffic. Any maneuver must be signaled in advance, and executed cautiously in order not to create risks or affect the traffic flow. Drivers shall remain on the pavement, to the right and in the direction posted, respecting restricted lanes and established times for traffic.

Article 39: Yielding. Right of way of pedestrians and drivers. Any pedestrian or vehicle driver who reaches an intersection or crossroads shall respect the instructions of the traffic officer or those provided by mechanical or fixed signals.

Absent such instructions, pedestrians and drivers shall be governed by the following provisions: a) In urban areas pedestrians have the right of way over vehicles when crossing streets on a pedestrian crosswalk. Drivers must slow when approaching the crosswalk. At corners without traffic lights, when necessary, drivers must completely stop their vehicle to yield spontaneously to the passage of pedestrians so that they can cross at their normal speed. Any accident in said zone is presumed to be the driver’s responsibility. In rural areas pedestrians are subject to the provisions of paragraph d) of this same article. b) Drivers arriving at an intersection or crossroads must at all times yield to any vehicle approaching on a public street to their right. This right of way is absolute and is only lost in the case of: 1. signage to the contrary; 2. trains; 3. public service vehicles responding to emergencies; 4. vehicles traveling on a higher-ranking artery. Before entering it or crossing it they must always stop; 5. pedestrians crossing legally on the crosswalk or in a dangerous area that is so marked; 6. special rules for traffic circles; 7. any circumstance when: a) a dirt road enters a paved one; b) the vehicle has stopped or is going to turn; c) animal herds or horse-drawn vehicles. If various exceptions apply, the order of precedence indicated above shall be followed. For any other

52. The Inter-American Court has established that the judgment is the text that must be considered when deciding whether the principle of legality has been observed, so despite the existence of other current norms, only those that were considered in the judgment are relevant for determining compliance with the principle that norms must be specific and not applied retroactively.³⁷

53. In view of the above, the existence or non-existence of Traffic Regulations 12.689/45, as alleged by the State, is irrelevant for the present case because it was not considered in the sentence of conviction. The IACHR recalls that the judgment must comply with the principle of legality as written, and not as it could have been written, so it will make no reference to said Traffic Regulations 12.689/45.

54. The cited Regulations 672/92 took effect on April 27, 1992, after the traffic accident, which occurred on March 16, 1992. The Commission therefore notes that the Chamber of Appeals, when considering the offense of negligent homicide of which Oscar Alberto Mohamed was convicted, included norms that were not in force at the time of the facts. As has been noted, according to jurisprudence of the inter-American system, an individual cannot be punished for an act that was not a crime or was not punishable or prosecutable when it was done.³⁸ In the instant case, therefore, by completing the characterization of negligent homicide with regulations that were not in effect at the time of the facts, the Argentine State violated Oscar Alberto Mohamed's right to have no retroactive application of criminal law, as established in Article 9 of the American Convention.

55. The IACHR notes that when the Chamber of Appeals rejected the special appeal that was filed, it attempted to correct that violation, stating that the application of Decree 692

maneuver the person to the right has the right of way. On steep hills the one descending must back up, unless pulling a trailer.

Article 40: Overtaking. Overtaking must be done on the left in accordance with the following rules: a) The person who is overtaking must verify first that the road to their left is clear for a sufficient distance to avoid any risk, and that no one following them is also overtaking; b) The driver must have sufficient visibility and not start the maneuver if approaching an intersection, curve, bridge, hilltop, or dangerous place; c) The driver must signal to the vehicle the intention to pass it, by flashing the headlights or using a horn in rural areas. In all cases, the driver must use the left turn signal until the lateral displacement is concluded; d) The driver must complete the overtaking rapidly in order to return to the right side without impeding the flow of the passed vehicle; this must be done with the right turn signal; e) Once the vehicle to be overtaken is notified of the intention to pass, it must take necessary steps to facilitate it, driving to the right of the street and maintaining and possibly reducing speed; f) To indicate to vehicles behind that it is dangerous to pass, drivers shall use the left turn signal, and vehicles behind shall not overtake them. On the other hand, use of the right turn signal indicates that passing is possible; g) Trucks and special machinery shall facilitate overtaking on narrow roads, riding periodically on the shoulder; h) Under exceptional circumstances passing on the right is permitted when: 1. The driver of the vehicle ahead has signaled the intention to turn or stop on the left; 2. In a traffic jam when the left lane is not moving or is moving more slowly.

037 In this regard, see Inter-American Court, *Case of De La Cruz Flores v. Peru*, Judgment of November 18, 2004 (merits, reparations, and costs) Series C. No. 115, para. 88: "(...) However, membership in an organization and failure to report are the specific elements that the domestic court considers have given rise to the criminal liability of the alleged victim in the judgment of November 21, 1996. These behaviors are not included in Article 4 of Decree Law No. 25,475, which is the only substantive article on which the judgment against Mrs. De La Cruz Flores was based." The Court therefore found, in para. 102: "the State violated the principle of legality: by taking into account as elements that gave rise to criminal liability, membership in a terrorist organization and failure to comply with the reporting obligation, but only applying an article that did not define these behaviors (...)." "

38 I/A Court H. R., *Case of De La Cruz Flores v. Peru*, Judgment of November 18, 2004 (merits, reparations, and costs) Series C. No. 115, para.105; Inter-American Court, *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para.175.

was a “material error,” because the element that generated criminal liability was the objective duty of care. It added that “as noted above [this] is not a subject for discussion by this means.” The Commission notes that the judgment did not deal with the substance of the case, as established in the text of the judgment, and nevertheless indicated a new motivation, without explaining what the imputable behavior was.

56. The resolution merely states that said objective duty of care was duly accredited without specifying how, or the normative elements of the objective duty of care. So although its resolution rejecting the special appeal should have been an analysis on admissibility of the appeal, the Court, without considering the appeal, interpreted the conviction, changing its justification, without indicating the legal precepts on which it was based. This fails to comply with the requirement for defining offenses, under which the State’s criminal code must classify and describe crimes in precise and unambiguous language that narrowly defines the punishable offense, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable by other penalties,³⁹ as required by Article 9 of the American Convention.

57. Therefore, the IACHR concludes that the violation of Article 9 was not corrected by the special appeal.

58. Based on arguments of fact and law, the Commission concludes that the second-instance judgment of the Chamber of Appeals, which convicted Oscar Alberto Mohamed, by completing the criminal definition of negligent homicide with norms of a regulation that was not in force at the time of the facts, violated Oscar Alberto Mohamed’s right to no retroactive application of criminal law, set forth in Article 9 of the American Convention. This was not corrected by the verdict of the Chamber of Appeals, which declared the special appeal inadmissible, because it only changed the source of the criminal charge without establishing the elements of the objective duty of care on which it based its decision.

B. Oscar Alberto Mohamed’s right to defense (Article 8.2.c in connection with Article 1.1 of the American Convention).

59. As indicated in the preceding chapter, the verdict that declared the special appeal inadmissible changed the justification for the conviction, indicating a new basis for the charge against Oscar Alberto Mohamed. It said that the application of a decree that was not in force was a material error and interprets that he was convicted of violation of the objective duty of care. The Commission notes that Mr. Mohamed had no due process opportunity to be heard regarding his allegations with respect to the new justification, either during the processing of the appeal or subsequently, because all the appeals filed were rejected *in limine*.

60. Article 8.2.c of the American Convention establishes:

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

³⁹ I/A Court H. R., *Case of De La Cruz Flores v. Peru*, Judgment of November 18, 2004 (merits, reparations, and costs) Series C. No. 115, para. 79: “Concerning the principle of legality in the penal sphere, the Court has indicated that the elaboration of criminal categories involves a clear definition of the criminalized conduct, establishing its elements, and the factors that distinguish it from behaviors that are either not punishable or punishable but not with imprisonment.” See also: I/A Court H. R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para.174; I I/A Court H. R., *Case of Castillo Petruzzi et al. v. Peru. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para.121; I/A Court H. R., *Case of Cantoral Benavides v. Peru*. Judgment of August 18, 2000. Series C No. 69, para. 157.

61. The Commission has stated that every proceeding must have the necessary elements for proper balance between the parties, for the adequate defense of their interests and rights. This implies, among other things, that the adversarial principle prevail.⁴⁰ In the same sense, the European Court of Human Rights has established that the principle of equal arms in the criminal proceeding is one of the implications of a fair trial, in which each party has a reasonable opportunity to present its case in circumstances that do not place it at a disadvantage vis-à-vis its adversary.⁴¹ In other words, courts have the authority to modify the legal charges in the proceeding, provided that they have guaranteed the defendant an adequate opportunity for his defense; i.e. he should be notified of the change and given a chance to testify again or present evidence or rebuttals.⁴²

62. In the case of *Pélissier and Sassi v. France* the European Court ruled that the petitioners were not afforded an opportunity to prepare their defense with respect to the new charge made against them, because they did not learn of the reappraisal of the facts until they received the appeals court's judgment.⁴³

63. In the instant case, the justification for the judgment was changed without affording an opportunity in the proceeding for Mr. Mohamed to exercise his right to defense because both the complaint appeal and the one for revocation that he filed later were rejected *in limine*. The Commission therefore concludes that his right to defense was violated, according to the terms of Article 8.2.c of the American Convention.

C. Oscar Alberto Mohamed's right to appeal (Article 8.2.h in connection with Article 1.1 of the American Convention)

64. Article 8.2.h of the American Convention states:

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

65. Article 1.1 of the Convention states:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

66. The petitioners argue that since Mr. Mohamed was acquitted at the first instance and convicted at the second instance, he had a right to a review of his conviction by the First Chamber of the National Chamber of Appeals. They say they filed the appropriate remedy, which

⁴⁰ See in this sense, ECHR. *Laukkanen and Manninen v. Finland*, N°. 50230/99, § 34, 3 February 2004; *Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, § 52, 22 July 2003; *Öcalan v. Turkey*, no. 46221/99, § 146, 12 March 2003.

⁴¹ ECHR. *Öcalan v. Turkey*. 46221/99, 12 March 2003, para. 140.

⁴² I/A Court H. R., *Case of Fermín Ramírez v. Guatemala*. Judgment of June 20, 2005. Series C No. 126, paras. 73 and 74.

⁴³ I/A Court H. R., *Case of Fermín Ramírez v. Guatemala*. Judgment of June 20, 2005. Series C No. 126, para. 69: has a translation of the Judgment in *Pelissier and Sassi v. France* 25444/94 [1999] ECHR, paras. 51-54. The original text is in English.

was the special appeal, since the conviction violated constitutional guarantees. The petitioners argue that rejection of this appeal without analyzing its merits violated Mr. Mohamed's due process guarantees, specifically his right to appeal to a higher court. They say they then filed a complaint motion and appeal for revocation of this judgment of rejection, seeking to have it annulled, but they were also denied, the first as inapplicable and the second as out of order.

67. For its part the State argues that Mr. Mohamed was tried at two instances that fully respected his due process guarantees, so there was no violation of Article 8. The State says there is no requirement in international law for states to provide a higher instance for review of a sentence handed down by an appeals court. It adds that the special appeal was rejected because it did not address a federal issue or challenge an arbitrary sentence, so none of Mr. Mohamed's rights was violated.

68. The IACHR will now analyze the scope of the right to appeal the judgment to a higher judge or court, recognized in Article 8.2.h of the Convention, specifically as regards review of a conviction handed down at the second instance. Based on this analysis, it will decide whether in this case the special appeal satisfied the requirements established in Article 8.2.h.

69. The right to appeal a judgment to a different and higher judge or court is a basic guarantee of due process, to prevent consolidation of a situation of injustice. According to inter-American jurisprudence, the aim of this right is "to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final."⁴⁴ Due process of law would lack efficacy without the right of defense at trial and the opportunity to defend oneself against a sentence by means of a proper review.⁴⁵

70. In the instant case, the analysis includes Mr. Mohamed's right to review of his conviction at the second instance, after being acquitted at the first instance. The IACHR notes that Article 8.2.h. makes no explicit distinction between procedural stages for exercising the right to appeal the judgment in the case of a conviction.

71. It should be noted that the preparatory work for this article reflects the specific intent to include the right to appeal a second-instance sentence. The preliminary draft of the American Convention on Human Rights prepared by the IACHR⁴⁶ established in Article 7(i) "the right to appeal a first-instance judgment to a higher court." On a motion from the delegate of Ecuador, who suggested deleting the reference to first instance, it was decided to change that provision and give it the current language of Article 8.2.h. According to the acts of the Specialized Conference, one delegate said "some countries have two instances, but perhaps others may have as many as three."⁴⁷

72. The right to appeal a second-instance judgment has also been recognized by the UN Human Rights Committee:

Article 14, paragraph 5 is violated not only if the decision by the court of first instance is

⁴⁴ I/A Court H. R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158.

⁴⁵ IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella (Argentina), November 18, 1997, para. 252.

⁴⁶ Preliminary draft presented by the Inter-American Commission, transmitted to the Council of the Organization of American States on July 18, 1968.

⁴⁷ OEA/Ser.K/XVI/1.2. Inter-American Specialized Conference on Human Rights, Acts and Documents, General Secretariat, Organization of American States, Washington DC. San José, Costa Rica, November 7-22, 1969, p. 202.

final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.⁴⁸

73. The guarantee established in Article 8.2.h in this case is not limited to a single procedural stage, but requires that a higher court review a conviction regardless of the instance at which it was rendered, whether it is a sentence issued in first, second or sole instance.

74. Based on the foregoing analysis, the IACHR considers that Article 8.2.h recognizes Mr. Mohamed's right to appeal the judgment of the Chamber of Appeals that convicted him of negligent homicide. The IACHR will now proceed to analyze whether the special appeal filed by Mr. Mohamed satisfied the requirements of Article 8.2.h.

75. For international human rights law the label or name given to this remedy is irrelevant.⁴⁹ What matters is that it meet specific standards. Firstly, it must be guaranteed before the judgment becomes *res judicata*⁵⁰ and it must be resolved within a reasonable period, i.e., it must be *timely*. It must also be an *effective* remedy, i.e., it must provide results or responses to the end that they were intended to serve,⁵¹ which is to prevent consolidation of an unjust situation. It must also be *accessible*, without requiring the kind of complex formalities that would render this right illusory.⁵²

76. The Commission must underscore the point that the efficacy of a remedy is closely linked to the scope of the review. This is so because judicial authorities are fallible and can make mistakes that result in injustice. Judicial error is not confined to the application of the law, but may happen in other aspects of the process such as the determination of the facts or the weighing of evidence. Hence, the remedy of appeal will be effective in accomplishing the purpose for which it was conceived if it makes possible a review of such issues without *a priori* limiting that review to certain aspects of the court proceedings.

77. In this regard, the Inter-American Commission said in the *Abella* case:

Article 8.2.h refers to the minimum characteristics of a remedy that serves as a check to ensure a proper ruling in both substantive and formal terms. From the formal standpoint the right to appeal the judgment to a higher court to which the American Convention refers should, in the first place, apply [...] with the purpose of examining the unlawful application, the lack of application, or the erroneous interpretation of rules of law based on the operative part of the judgment. The Commission also considers that to guarantee the full right of

³⁴⁸ United Nations Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, para.47.

⁴⁹ Inter-American Court, *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 165; UN Human Rights Committee. Communication No. 701/1996, Gómez Vázquez c. España, Resolution of August 11, 2000., para. 11.1.

⁵⁰ I/A Court H. R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158. In the same sense, see ICCPR Human Rights Committee, Communication No. 1100/202, Bandajevsky v. Belarús, Resolution of April 18, 2006, para. 11.13.

⁵¹ I/A Court H. R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 161.

⁵² I/A Court H. R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 164.

defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of those rules.

[...]

The remedy should also allow the higher court a relatively simple means to examine the validity of the judgment appealed in general, as well as to monitor the respect for fundamental rights of the accused, especially the right of defense and the right to due process.⁵³

78. The ICCPR Human Rights Committee has repeatedly established that:⁵⁴

The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.⁵⁵

79. The African Commission has said that for an appeal to be effective, the jurisdiction appealed to must give objective and impartial consideration to the elements of fact and law presented.⁵⁶

80. The IACHR echoes the observation by the ICCPR's Human Rights Committee to the effect that the right of appeal does not necessarily mean a retrial or a new "hearing" if the court that hears the appeal is not prevented to study the facts of the case.⁵⁷ What the norm requires is the opportunity to point out and get an answer to possible errors of various kinds that the judge or the court may have made, without *a priori* excluding certain categories such as the facts, the law and the admission and the weighing and analysis of evidence. The manner and means through which the review is conducted will depend on the nature of the questions raised and the characteristics of the criminal procedural system in the State in question.

81. It should be noted that the American Convention "does not endorse any specific criminal procedural system. It gives the States the liberty to determine which one they prefer, as long as they respect the guarantees established in the Convention itself, the internal legislation,

¹⁵³ IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997. paras. 261-262.

²⁵⁴ The language of Article 14.5 of the ICCPR is essentially the same as that of Article 8.2.h of the American Convention, so the UN Human Rights Committee's interpretations of the content and scope of that article are relevant as guidelines for interpretation of 8.2.h of the American Convention.

³⁵⁵ United Nations Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, para. 48. See also: Aliboev v. Tajikistan, Communication No. 985/2001, Decision of October 18, 2005; Khalilov v. Tajikistan, Communication No. 973/2001, Decision adopted on March 30, 2005; Domukovsky et al. v. Georgia, Communications No. 623-627/1995, Decision adopted on April 8, 1998, and Saidova v. Tajikistan, Communication No. 964/2001, Decision adopted on July 8, 2004.

⁵⁶ African Commission on Human and People's Rights, case of Malawi African Association et al. v. Mauritania. Spanish translation by the IACHR, original in French.

⁰⁵⁷ UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, para. 48.

other applicable international treaties, the unwritten norms, and the imperative stipulations of international law.”⁵⁸

82. It is up to the State to order the measures necessary to ensure that its criminal procedural system conforms to its international obligations in the area of human rights, especially the minimum guarantees of due process as set forth in Article 8 of the American Convention. Thus, for example, in the case of criminal procedural systems like Argentina’s, which operates mainly by the principles of the orality and immediacy of the proceedings, States are required to ensure that those principles do not involve exclusions or restrictions of the scope of the review that the court authorities have the authority to perform. Furthermore, a court’s review of a ruling ought not to pervert the principles of orality and immediacy.

83. On another point, with respect to the *accessibility* of the remedy, the Commission considers that in principle the regulation of some minimum requirements for the origin of the appeal is not incompatible with the right expressed in Article 8.2.h of the Convention. Some of these requirements are, for example, the presentation of the appeal itself—given that Article 8.2.h does not stipulate automatic review—or the regulation of a reasonable period within which it must be filed. However, in some circumstances rejection of appeals based on failure to comply with formal requirements established by statute or defined in the judicial practice of a given region may be a violation of the right to appeal a judgment.

84. Firstly, the Commission notes that in the present case, given the applicable legal framework, the only remedy was the extraordinary appeal (*recurso extraordinario*) of the conviction issued by the Chamber of Appeals. That remedy does not grant a timely, accessible, and effective review in accordance with the standards explained in the previous paragraphs. The IACHR therefore notes that the reasons for the appeal, i.e., patent unconstitutionality and arbitrariness, offer limited or restricted prospects for review from the start.

85. Hence it is understandable that the victim’s defense counsel, in an effort to have the appeal admitted and decided, did not request review of questions of fact or evidence but presented arguments based on the unconstitutionality of the process or its manifest arbitrariness. It is not up to the Commission to indicate which questions could have been raised, but given the legal framework the Commission considers that the analysis should not be limited to whether the judicial authorities that considered the special appeal responded to the arguments presented by the appeal, but that they should take into account that the victims started the appeal stage with an *a priori* limitation with respect to the allegations they could present. This is so because there was no remedy other than the extraordinary appeal at the time of the facts, so there was a real restriction as to the subject and accessibility of the remedy.

86. Based on the foregoing, the IACHR points out that a finding of whether the right to appeal the judgment has been violated requires a case-by-case analysis to evaluate the specific circumstances of the case presented to the Commission, in light of the general criteria outlined in the preceding paragraphs. Therefore, and given that Mr. Mohamed had no other remedy, the IACHR will proceed to analyze whether the extraordinary appeal filed satisfied the requirements of Article 8.2.h of the Convention.

87. The extraordinary appeal to Argentina’s Supreme Court is governed by the federal Civil and Commercial Procedure Code and by Law 48 of 1863. It can be filed against final judgments by superior provincial courts under the conditions specified in Article 14 of Law 48, i.e.,

⁵⁸ I/A Court H. R., *Case of Fermín Ramírez v. Guatemala*. Judgment of June 20, 2005. Series C No. 126, para. 66.

When a question has been raised in a case concerning the validity of a treaty or law approved by Congress or of authority exercised on behalf of the federal government and the decision has been against its validity. 2. When a question has been raised concerning the validity of provincial law, decree, or authority on the grounds that it is contrary to the Constitution or to a treaty or law approved by Congress and the decision has been in favor of the validity of the provincial law or authority. 3. When the meaning of a clause of the Constitution or a treaty or law of Congress, or an assignment exercised on behalf of the national authority has been questioned and the decision has been against the validity of the title, right, privilege, or exemption based on that clause and is the subject of litigation.

88. The appeal is filed with the court that rendered the final judgment, which decides on its admissibility. If it is ruled inadmissible, a complaint motion can be filed with the Supreme Court, which can then grant or deny the appeal under Article 280 of the federal Civil and Commercial Procedure Code, which says: "at its sole discretion, and based only on this norm, [the Court] may reject the [special] appeal for lack of sufficient federal harm or when the questions raised are insubstantial or lacking transcendence."⁵⁹

89. The Inter-American Commission already had the opportunity to analyze the compatibility of the extraordinary appeal with Article 8.2.h. in the cited case of Juan Carlos Abella, in 1997. In that report it said that it is an exceptional remedy limited to the federal courts for arbitrary sentences, and its purpose is to guarantee the Constitution's supremacy:

Based on the foregoing, it is clear that the special appeal does not have the purpose of remedying decisions supposedly in error, but only extremely serious omissions or blunders. Bearing in mind that the jurisprudence of the Supreme Court holds that the special appeal does not encompass a review of the procedure, and that the doctrine of arbitrariness imposes a particularly narrow criterion for analyzing its applicability, in practice the special remedy does not allow for legal review by a higher court of the decision or of all important procedural rulings, including the sufficiency and legality of the evidence, nor does it allow for examining the validity of the judgment appealed in a relatively simple fashion. It is a remedy of limited scope, available only on an exceptional basis, whose application is narrow, and therefore it does not satisfy the guarantee whereby the accused may challenge the judgment.⁶⁰

59 Civil and Commercial Procedure Code of the Nation

Article 256: CONSIDERATION.- The special appeal to the Supreme Court shall be considered in the conditions specified in Article 14 of Law 48.

Article 257: FORM, PERIOD AND PROCESSING.- The special appeal shall be filed in writing, substantiated as provided in Article 15 of Law 48, with the judge, court, or administrative organ that issued the resolution appealed, within the period of TEN (10) days from the time of notification. After presentation the appeal shall be forwarded for TEN (10) days to the interested parties, notifying them in person or in writing. When the parties reply, or when the time for their reply has expired, the court shall decide on admissibility of the appeal. (...)

Article 280.- ORDER FOR ALL PERTINENT FILES. DENIAL OF THE EXTRAORDINARY APPEAL. BRIEFS IN THE ORDINARY APPEAL.- When the Supreme Court is seized of a case by special appeal it shall issue an order for all pertinent files. At the Court's sole discretion, and based only on this norm, it may reject the special appeal for lack of sufficient federal harm or when the questions raised are insubstantial or lacking transcendence. In the case of an ordinary appeal under Article 254, the file shall be given to the secretariat upon receipt and the source that orders it shall be notified personally or in writing. The appellant must present a brief with TEN (10) which shall be forwarded to the other party for the same period. Lack of presentation of the brief or its inadequacy will signify abandonment of the appeal. After the transfer has been answered or the period for it has expired, all pertinent files will be ordered. In no circumstance shall the case be opened for evidence or the allegation of new facts.

90. The Commission notes that the Supreme Court's scope for review of the extraordinary appeal is limited to questions concerning the validity of a law, treaty, or constitutional provision, or arbitrariness of a judgment, and not to a review of the facts and the law considered in the judgment. It is an exceptional remedy "with a total lack of legal basis that prevents consideration of the ruling of regular judges as a judgment based on law (...)."61 Moreover, Article 280 of the Civil Procedure Code gives the Court broad power to reject it without examining the merits of the case, so the review that the Supreme Court makes is discretionary.

91. In the instant case, Oscar Alberto Mohamed's special appeal was rejected by the Chamber of Appeals *in limine*, precisely because it was not an appeal for review of questions of fact, evidence, or law. The Court said in its decision that "This doctrine does not seek to make the Supreme Court a third regular instance, nor to correct erroneous or allegedly erroneous decisions (...)." Inadmissibility was ratified later by the Supreme Court in its rejection of the complaint and revocation motions.

92. From the foregoing, it is evident that the consideration of admissibility was limited to establish the existence or nonexistence of a violation of constitutional guarantees or manifest arbitrariness, not to review the questions of fact, evidence, and law that were alleged.

93. In light of the standards described above, it is incompatible with Article 8.2.h of the American Convention for the right to review to be contingent upon the existence of a violation of constitutional guarantees or manifest arbitrariness. Apart from such violations or arbitrariness, every individual who is convicted, even at the second instance following acquittal at the first instance, has the right to request a review of various questions and to have them effectively analyzed by the higher court that does the revision, precisely in order to correct possible errors of interpretation, weighing of evidence or analysis, just as Mr. Mohamed's counsel argued at each instance to which he appealed.

94. In conclusion, in the instant case, given the limitations imposed by the Chamber of Appeals and the Supreme Court, Oscar Alberto Mohamed did not get a review of his conviction in order to correct possible errors by the respective judge, and the State therefore violated to his detriment the right established in Article 8.2.h of the Convention, in connection to the obligations established in Article 1.1 of the same instrument.

95. Finally, the Commission notes that the right to appeal the judgment is part of the body of procedural guarantees that ensures the due process of law, which are inextricably inter-linked.⁶² Therefore, the right to appeal the judgment must be interpreted together with other procedural guarantees if the characteristics of the case require it. An example is the close connection between the right to appeal the judgment and the opportunity to have the full acts of the file, including trial acts in the case of oral systems.⁶³ There is an especially relevant link between the guarantee set forth in Article 8.2.h of the American Convention and access to adequate counsel, also enshrined in article 8.2 of the Convention. In this regard the CCPR Human Rights Committee has established that "The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative

161 Petitioners' note of April 1, 1996. Annex, Judgment on the special appeal handed down by the First Chamber of the Chamber of Appeals for Criminal and Correctional Matters on July 4, 1995.

2 62 I/A Court H. R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para.120.

363 In this sense, see United Nations Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, paras. 47, 48, 49, and 50.

representation, in order that their concerns may be ventilated at the appeal level.”⁶⁴ Access to an adequate defense is especially relevant to the present case.

96. Based on the foregoing considerations of fact and law, particularly since the extraordinary appeal—the only appeal available against Mr. Mohamed’s conviction—limits the examination to certain specific cases, without affording timely, effective, and accessible review, the Commission concludes that the Argentine State violated Oscar Alberto Mohamed’s right to appeal his conviction, as guaranteed in Article 8.2.h of the American Convention.

C. Oscar Alberto Mohamed’s right to judicial protection

97. Article 25.1 of the American Convention states:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

98. The IACHR will now analyze whether the courts denied Mr. Mohamed’s right to simple and prompt recourse by declaring the special appeal inadmissible, and rejecting the complaint and revocation motions.

99. In this case the Commission notes that in addition to the failure to review the conviction, the special appeal argued the violation of the principle of non-retroactive application of criminal law, a right established in the American Convention. In this regard, the Inter-American Court has established that “the terms of Article 25.1 (...) imply the obligation of the States to provide to all persons within their jurisdiction, an effective judicial remedy for violations of their fundamental rights [... and] for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recognized by the Constitution or laws.⁶⁵

100. The resolution that declared the special appeal inadmissible, although a resolution of inadmissibility, considered the allegations *in limine* and decided that inclusion of the cited traffic regulations was a “material error” in the conviction; it interpreted that the conviction was based on violation of the objective duty of care. However, the resolution did not specify the legal grounds for the conviction, or the elements that constitute the objective duty of care. Hence, the resolution did not correct the violation of the principle of legality, and precluded access to an effective remedy that would correct the violation of Article 9 of the American Convention.

101. Based on the foregoing, the IACHR concludes that in the instant case there was a violation of Oscar Alberto Mohamed’s right to simple and prompt recourse for protection against the violation of his right to non-retroactive application of criminal law.

⁶⁴ In this sense see United Nations Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial*, para. 51.

⁶⁵ Inter-American Court, *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, para. 122; Inter-American Court, *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151, para. 128; Inter-American Court, *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, para. 167.

D. The State's obligation to adopt domestic legal provisions in favor of Oscar Alberto Mohamed

102. Article 2 of the American Convention states:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in 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.

103. The Inter-American Court has stated that under the law of nations, a customary law prescribes that a State that has signed an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken. This principle is universally valid and has been characterized in case law as an evident principle.⁶⁶

104. The Court has also said that this principle, reflected in Article 2 of the Convention, sets forth the general duty of each State Party to adjust its domestic law to the provisions of the Convention to guarantee the rights enshrined therein,⁶⁷ which implies that the domestic legal measures must be effective (*effet utile* principle).⁶⁸

105. As repeatedly established in the Court's jurisprudence, Article 2 of the Convention fails to define which measures are appropriate to adjust the domestic law to the Convention; obviously, this is so because it depends on the nature of the rule requiring adjustments and on the circumstances of each specific situation. Therefore, the Court has interpreted that such adjustment implies adopting two sets of measures: (i) repealing rules and practices of any nature entailing violations of the guarantees provided for in the Convention or disregarding the rights enshrined therein or impeding the exercise of such rights, and (ii) adopting rules and developing practices aimed at effectively ensuring the said guarantees.⁶⁹ The Court has taken the view that the first set of duties is breached while the rule or practice running counter to the Convention remains in the

legal system⁷⁰ and is therefore satisfied by modifying,⁷¹ derogating, or otherwise annulling,⁷² or amending⁷³ such rules or practices, as appropriate.⁷⁴

⁶⁶ I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 55; *Case of Garrido and Baigorria. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 68. See also *Case of La Cantuta*. Judgment of November 29, 2006. Series C No. 162, para. 170, and *Case of Almonacid Arellano et al.* Judgment of September 26, 2006. Series C No. 154, para. 117.

⁶⁷ I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 56; *Case of La Cantuta*. Judgment of November 29, 2006. Series C No. 162, para. 171; and *Case of Almonacid Arellano et al.* Judgment of September 26, 2006. Series C No. 154, para. 117.

⁶⁸ I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 57; *Case of La Cantuta*. Judgment of November 29, 2006. Series C No. 162, para. 171; and *Case of the "Juvenile Reeducation Institute."* Judgment of September 2, 2004. Series C No. 112, para. 205.

⁶⁹ I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 57; *Case of La Cantuta*. Judgment of November 29, 2006. Series C No. 162, para. 172, and *Case of Almonacid Arellano et al.* Judgment of September 26, 2006. Series C No. 154, para. 118.

⁷⁰ I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 57; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, para. 172.

⁷¹ I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 57;

106. With respect to the scope of international responsibility on this subject, the Court has said that:

The observance by State agents or officials of a law which violates the Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1.1 of the American Convention.

107. The Commission recognizes that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that do not have any legal effects since their inception. In other words, the Judiciary must exercise a sort of "consistency 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 interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.⁷⁵

108. In this report, the Commission concludes that the Argentine State violated the right to appeal a judgment to the detriment of Mr. Mohamed, because it did not afford him a remedy for comprehensive review of his conviction by the Chamber of Appeals, revoking the acquittal at the first instance in violation of Article 8.2.h of the Convention.

109. The absence of an effective remedy for review in accordance with the parameters established in this report is a violation of the State's duty to adopt provisions of domestic law as established in Article 2 of the American Convention.⁷⁶

Case of Fermín Ramírez. Judgment of June 20, 2005. Series C No. 126, paras. 97 and 130.

⁷² I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 57; *Case of Yatama.* Judgment of June 23, 2005. Series C No. 127, para. 254.

⁷³ I/A Court H. R., *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 57; *Case of Raxcacó Reyes.* Judgment of September 15, 2005. Series C No. 133, paras. 87 and 125.

⁷⁴ Inter-American Court, *Case of Zambrano Vélez et al.* Judgment of July 4, 2004. Series C No. 166, para. 57; *Case of La Cantuta.* Judgment of November 29, 2006. Series C No. 162, para. 172.

⁷⁵ I/A Court H. R., *Case of La Cantuta.* Judgment of November 29, 2006. Series C No. 162, para. 173; *Case of Almonacid Arellano et al.* Judgment of September 26, 2006. Series C No. 154, paras. 123 to 125.

⁷⁶ On the violation of Article 2 of the Convention despite the fact that laws inconsistent with the Convention were repealed before the Court rendered its judgment, see I/A Court H. R., *Case of Montero Aranguren et al. (Detention Center of Catia).* Judgment of July 5, 2006. Series C No. 150, para. 135.

VI. CONCLUSIONS

110. Based on the considerations of fact and law presented in the present report, the Inter-American Commission, at its 140th regular session, concludes that the Argentine State violated Oscar Alberto Mohamed's right to respect for the principle of legality, to due process, and to judicial protection established in articles 9, 8.2.h and c., and 25.1 of the American Convention in connection with Article 1.1 of the same treaty. The Commission also concludes that the Argentine State violated Article 2 of the American Convention.

VII. RECOMMENDATIONS

The Commission therefore recommends that the Argentine State:

1. Take the necessary measures so that Oscar Alberto Mohamed can file an appeal for comprehensive review of his conviction in compliance with 8.2.h of the American Convention.

2. Adopt such legislative or other measures as may be necessary to give effect to the right established in Article 8.2.h of the American Convention in accordance with the standards described in this report.

3. Take the necessary measures so that Oscar Alberto Mohamed receives adequate and timely reparation for the human rights violations established in this report.