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REPORT No. 268/21
CASE 12.681
MERITS (PUBLICATION)

MARCOS ALEJANDRO MARTÍN
ARGENTINA

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I. SUMMARY

1. On February 15, 2001, the Inter-American Commission on Human Rights (hereinafter "the Commission", "the Inter-American Commission" or "the IACHR") received a petition from the Office of the Ombudsman (hereinafter "the petitioners") against the Republic of Argentina (hereinafter "the State", "the Argentine State" or "Argentina") given the violation of the right to defense to the detriment of Marcos Alejandro Martín (hereinafter "the alleged victim") in the context of a criminal proceedings against him. It was alleged that the conviction in such process is arbitrary given that a statement made at the stage of investigation had been taken into account as substantial evidence and incorporated in the public hearing by reading without prior control of the defense. The violation of the right to appeal against the conviction was also alleged. Finally, it was argued that for the above reasons, Mr. Martín's deprivation of liberty became arbitrary.

2. The State alleged that it has no international responsibility given that the criminal proceedings followed against Mr. Martín complied with all judicial guarantees. It indicated that according to its internal regulations it was possible to incorporate by reading the statement rendered by the principal witness during the investigation stage. The State added that the condemnatory decision also assessed the various means of evidence that were presented during the process.

3. The Commission concluded that the State of Argentina is responsible for violating the rights to personal liberty, judicial guarantees and judicial protection set out in Articles 7.1, 7.3, 8.1, 8.2, 8.2.c, 8.2.f, 8.2.h and 25.1 of the American Convention, in relation to the obligations established in Article 1.1 of the same instrument, to the detriment of Marcos Alejandro Martín.

II. PROCEEDINGS BEFORE THE COMMISSION

4. The processing of the petition until the issuance of the admissibility report is documented in Report No. 79/08 of October 17, 2008.¹ On November 11, 2008, the Commission notified the parties of said report and their willingness to come to a friendly settlement. On January 9, 2009, the petitioner submitted its observations on the merits. On February 10, 2009, the IACHR transmitted these observations to the State and granted the regulatory period to submit its additional observations on the merits. On September 25, 2009, the State expressed interest in initiating a friendly settlement procedure. On August 10, 2016, the petitioner sent a communication to the IACHR stating that to date no friendly settlement agreement has been reached and, if the State does not have the will to proceed with the procedure, to continue with the merits procedure. As of the date of adoption of this report, the State did not submit any written response to the petitioner's observations, nor did it submit its additional observations on the merits.

III. POSITION OF THE PARTIES

A. Petitioners

5. The petitioner alleged that the State of Argentina is responsible internationally for the violation of the right to defense to the detriment of Marcos Alejandro Martín in the criminal proceedings initiated in 1998 for the alleged crime of robbery. It was alleged that during the public hearing, the statement of the allegedly assaulted person, rendered at the stage of the investigation, was accepted as substantial evidence and by reading, which was not submitted to the prior control of the defense. It was held that this statement was rendered only before police officers and not before judicial authorities, and that it also presented inconsistencies on the manner, time and place of the alleged robbery.

6. The petitioner argued that this situation violates the right of defense established in Articles 8.2.d, 8.2.f and 8.5 of the American Convention, given that the alleged victim could not be questioned or challenge his statement. The petitioner sustained that although the Code of Criminal Procedure allows the incorporation of statements made at the stage of investigation when the witness's whereabouts are unknown, this incorporation was made without the consent of the defense.

¹ IACHR, Report No. 79/08, Petition 95-01, Admissibility, Marcos Alejandro Martín, Argentina, October 17, 2008.

7. The petitioner added that since the criminal proceedings suffered from this serious violation of the right to defense, Mr. Martín's deprivation of liberty became arbitrary. He maintained that this situation violated Article 7.3 of the American Convention.

8. Finally, the petitioner alleged that the right to appeal the judgment, established in Article 8.2.h of the American Convention, was affected. He indicated that the National Chamber of Criminal Cassation did not conduct a comprehensive examination of the factual and legal issues presented by the defense, but declared inadmissible the appeal against the conviction.

B. State

9. As indicated above, to date, the State has not submitted its additional observations on the merits. Notwithstanding this, the Commission proceeds to recapitulate the allegations submitted by Argentina during the stage of admissibility which are related to the merits.

10. The State alleged that it has no international responsibility given that the criminal proceedings followed against Mr. Martín complied with all judicial guarantees. He indicated that according to its internal regulations it was possible to incorporate by reading the statement rendered by the main witness during the investigation stage. This, given that it was not possible to locate him for the purpose of rendering his statement at the public hearing. The State added that the conviction also valued other means of evidence that were presented during the process, such as statements by a police officer and two witnesses.

11. Argentina argued that the petitioner intends that the IACHR act "as a fourth judicial body and review the assessments of fact and law issued by the judges and courts that intervened in the process of the case." It indicated that what exists is the nonconformity of the petitioner with the conviction against Mr. Martín, which cannot be enough to declare the international responsibility of the State.

IV. ESTABLISHED FACTS

12. The facts described below are derived from the parts of the file before the IACHR and are not disputed.

13. On August 30, 1998 Alfredo Martín Cugat was on a public transport in Buenos Aires when two unidentified young persons threatened him with a penknife, and stole his money and a coat.² Mr. Cugat said in his criminal complaint that he got out of the car and started running down the street until he found a police officer.³ He sustained that he saw a patrolman and that, after reporting the incident to the police officers inside, he climbed into it.⁴ He expressed that he intercepted a public transport where he identified one of the aggressors.⁵ The petitioners reported that Mr. Cugat identified Marcos Alejandro Martín as one of the aggressors.⁶ He added that the police officer found a penknife and his coat under the seat where Mr. Martín sat.⁷ Mr. Cugat sustained that one of the police officers arrested Mr. Martín and proceeded "to the subsequent reading of rights."⁸

14. The Commission does not have the complete documentation on the criminal proceedings against Mr. Martín. From the available information, the IACHR takes note of the following statements that were made in the process:

² Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

³ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

⁴ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

⁵ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

⁶ Initial petition.

⁷ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

⁸ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

- The police officer who arrested Mr. Martín, Daniel Priolo, stated that when Mr. Cugat identified Marcos Alejandro Martín as one of the aggressors, he proceeded with his arrest.⁹ He sustained that "he does not remember exactly who was the one who seized the weapon and how much was the amount that was stolen, but those details should arise from [the] statement [of Mr. Cugat]."¹⁰
- The witness, Fernando Bernal, stated that he was on public transport when a police officer and Mr. Cugat boarded such transportation.¹¹ He indicated that the police officer found a penknife and a coat near the alleged aggressor.¹² He sustained that "they arrested a person to whom they read his rights in his presence."¹³
- The public transport driver stated that he saw Mr. Cugat and a police officer come aboard.¹⁴ He expressed that he saw when a person was stopped inside the vehicle and a penknife and a coat were confiscated.¹⁵

15. The State reported that on September 1, 1998, preventive detention was ordered against Mr. Martín.¹⁶ The IACHR does not have information on the motivation to apply such detention. That same day, Mr. Martín gave his statement at the introductory stage.¹⁷ Mr. Martín denied the facts and as reported in the decision:

He claimed that after leaving River's court with his girlfriend they approach the bus (...); who noticed that some guys who boarded it were nervous and one made a strange movement in the back of the bus and then he descended it with his partner; that next to him he had neither the coat nor the confiscated penknife.¹⁸

16. On February 16, 1999, the public hearing was held.¹⁹ Mr. Cugat did not attend.²⁰ The Prosecutors Office requested that the statement of Mr. Cugat rendered at the stage of investigation be incorporated.²¹ Mr. Martín's defense objected to this "arguing that it was an essential evidence, which had not been controlled by the accused who ... had denied his participation in the event."²² The defense indicated that accepting the inclusion of said statement would violate the right of defense established in Article 8.2.f of the American Convention.²³ The petitioner indicated that at the hearing the Court "ordered the incorporation by reading of the statement provided during the police prevention."²⁴

17. On February 25, 1999, the Federal Criminal Court No. 15 of the Federal Capital issued a conviction against Mr. Martín for co-authoring the crime of armed robbery.²⁵ The Court sentenced him to five years' imprisonment.²⁶

18. In its judgment, the Court incorporated the statement that Mr. Cugat made during the investigation stage.²⁷ The Tribunal, in response to the questions raised by Mr. Martín's defense regarding said

⁹ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹⁰ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹¹ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹² Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹³ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹⁴ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹⁵ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹⁶ Communication submitted by the State on October 10, 2006.

¹⁷ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹⁸ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

¹⁹ Cassation Appeal, undated. Attached to the initial petition.

²⁰ Cassation Appeal, undated. Attached to the initial petition.

²¹ Cassation Appeal, undated. Attached to the initial petition.

²² Cassation Appeal, undated. Attached to the initial petition.

²³ Cassation Appeal, undated. Attached to the initial petition.

²⁴ Communication submitted by the petitioner, January 9, 2009.

²⁵ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

²⁶ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

²⁷ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

situation, stated that this document was incorporated and read during the hearing, based on Article 391 of the Criminal Procedure Code of the Nation²⁸ because "it was impossible to locate" Mr. Cugat "to declare in the debate."²⁹ The Court added:

To suppose otherwise would be to admit an unacceptable equation; in the absence of a complainant's location - for any reason - it corresponds to absolve him. To admit this premise would mean leaving in the most absolute defencelessness' the victims who would be the target of any outrage. (...) [The] absence of a witness is compensated with a coherent probative outline, as it occurs in this case. The gathered evidence is highly reliable.

(...)

We thus found a solid picture by three witnesses [Mr. Cugat, the police officer and the driver of the vehicle] who appeared to the Tribunal as highly reliable. They expose with sincerity, without observing the slightest predisposition against the innocent (...). [Mr. Cugat's complaint] fully agrees with the versions received at the hearing. (...) [T]he finding of the weapon is fully accredited.³⁰

19. Mr. Martín's defense filed an appeal against the conviction.³¹ It was alleged that the inclusion of Mr. Cugat's statement at the pre-trial stage affected Mr. Martin's right to defense.³² The defense added the following:

From the integral reading of the ruling, Cugat's (...) sayings are the basis of the conviction (...) because the remaining evidence (the theft of a jacket thrown in the corridor of the bus where more than thirty people travelled and a stiletto, which the victim found, under the seat where my defendant was traveling, and statements by the driver, the police (...) and the other passenger (...)) are only relevant from the first sayings of the complainant.

(...)

There is no independent means of evidence to determine with certainty the participation of my defendant in the fact that is the subject of the investigation, since the people who testified in court only witnessed the detention (peaceful, not in flagrante delicto) of a person who was sitting in the bus (...). [No] element was confiscated in his possession, and it was also demonstrated during the debate that the accusation against Martin (without a criminal record, with an excellent impression of his neighbors who consider him a young worker, and who declared himself innocent from the first opportunity) was produced by a person who was "nervous" and after having already gone on another opportunity to the bus without having indicated to anyone.³³

²⁸ Article 391 of the Code of Criminal Procedure of the Nation: Testimonial statements may not be supplemented, under penalty of nullity, by reading those received during the investigation, except in the following cases and provided that the formalities of the instruction have been observed:

1°) When the public prosecutor and the parties have rendered their agreement or render it when the witness whose summons was ordered is not present.

2°) When contradictions or variations between them and the ones lent in the debate are trying to be demonstrated, or it is necessary to help the memory of the witness.

3°) When the witness has died, is absent from the country, his residence is ignored or he is disabled for any reason to testify.

4°) When the witness has declared by means of a warrant or report, provided that his testimony had been offered in accordance with the provisions of Articles 357 or 386.

²⁹ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

³⁰ Judgment of the Oral Criminal Court No. 15 of the Federal Capital, February 25, 1999. Attached to the initial petition.

³¹ Cassation Appeal, undated. Attached to the initial petition.

³² Cassation Appeal, undated. Attached to the initial petition.

³³ Cassation Appeal, undated. Attached to the initial petition.

20. On April 23, 1999, the National Chamber of Criminal Cassation declared inadmissible the cassation appeal filed.³⁴ Regarding the incorporation by reading of the statement rendered during the investigation stage, the National Chamber indicated the following:

(...) That although this Chamber has said that such control (referring to the defense regarding the production of the testimony of the victim) "useful and effective" could not be fulfilled because the statements were received at a procedural stage in which the defense did not yet exist as a party, if the preventive court did not arbitrate any means that would allow further interrogation nor ensure that the complainants remained in their jurisdiction, the incorporation by reading of the said incriminating evidence violates the rights enshrined in the American Convention on Human Rights and the International Covenant on Civil and Political Rights, which's constitutional rank (...) implies that its violation is those provided for in art. 167, inc. 3, and 168 of C.P.P.N. and that it entails the disqualification of the procedural act and the pronouncement that has been its consequence when, as here, the remaining evidence does not enable a certainty judgment about the guilt of the accused (...) the situation in the case is not analogous, given that in this case, it has not been shown that, excluding the victim's statement, the remaining evidence collected, prevents certainty about the form in which the event occurred and the criminal responsibility of the accused that allowed the magistrates to form their conviction to condemn.

21. Following this reasoning, the Chamber made its assessment of the available evidence indicating that:

[The declarations] coincided in their fundamental lines with the complaint made by Cugat (...) which forms a coherent probative outline (...). Thus, it has not been shown that the contested judgment proves to be arbitrary or in violation of the rights invoked by the appellant, since it is based on evidence whose incorporation into the proceedings has not been challenged, distinct and independent of the testimony of the victim, whose elimination - by the hypothetical method of mental suppression - does not show - nor has it been shown - that it affects the incriminating merit that led to the state of certainty of the judges with respect to the factual and subjective aspects of the imputation.³⁵

22. In response to an extraordinary appeal lodged by Mr. Martín's defense, on June 3, 1999, the Chamber declared the appeal inadmissible.³⁶ The Chamber held that:

The appellant maintains that it was essential that the victim be present in the debate, since he was the only person who acknowledged his assistant Martín, and, without the identification made by the victim, the remaining evidence - testimonial statements ... and theft of the coat and the stiletto - lacked aptitude and relevance for the determination of the perpetrator. (...) (...) The grievances expressed by the appellant (...) refer to the assessment of matters of fact and evidence already decided (...) by this Chamber with sufficient grounds.³⁷

23. In response to a complaint filed by Mr. Martín's defense, on August 2, 2000, the Supreme Court of Justice of the Nation declared inadmissible the appeal filed.³⁸ The Supreme Court stated:

That the extraordinary appeal, which's denial gave rise to the present complaint, is inadmissible (Article 290 of the Civil and Commercial Procedural Code of the Nation). Therefore, the complaint is dismissed.³⁹

³⁴ Resolution of the National Chamber of Criminal Cassation, April 23, 1999. Attached to the initial petition.

³⁵ Resolution of the National Chamber of Criminal Cassation, April 23, 1999. Attached to the initial petition.

³⁶ Resolution of the National Chamber of Criminal Cassation, April 23, 1999. Attached to the initial petition.

³⁷ Resolution of the National Chamber of Criminal Cassation, April 23, 1999. Attached to the initial petition.

³⁸ Resolution of the Supreme Court of the Nation, August 2, 2000. Attached to the initial petition.

³⁹ Resolution of the Supreme Court of the Nation, August 2, 2000. Attached to the initial petition.

24. The petitioner indicated that Mr. Martín served his sentence ⁴⁰. The State did not dispute this information.

V. ANALYSIS OF THE MERITS

A. Rights to a fair trial and judicial protection (Articles 8⁴¹ y 25⁴² of the American Convention)

25. The Commission considers that the present case requires a joint analysis of the rights of the defense, the principle of presumption of innocence, the right to duly motivated decisions, the right to be heard appeal the judgment and the right to judicial protection. In that regard, the Commission will, first of all, make some general considerations on such rights and then analyze the specific case.

1. General considerations on the rights of the defense, the principle of presumption of innocence, the right to have duly motivated decisions, the right to appeal against judgment and the right to judicial protection

26. The Commission has indicated that the right to judicial guarantees includes the right to adequate time and facilities for the preparation of the defense, which is broadly established in Article 8 (2) (c) of the Convention.⁴³ The Court has pointed out that the right to defense must necessarily be exercised since a person is identified as a possible perpetrator or participant in a punishable act and only ends when the process ends.⁴⁴

27. Regarding the relationship between the evidence and the right of defense, the IACHR has emphasized the principle of contradictory, which implies the intervention of the accused in the receipt and control of the evidence.⁴⁵ For its part, the Court has considered as a violation of the right of defense, the fact that the legal defense could not be present in the performance of a fundamental diligence in criminal proceedings.⁴⁶

28. One of the specific manifestations of this right is regulated in Article 8.2(f) of the Convention, related to the right of the defense to question witnesses present in the court and to obtain the appearance, as witnesses or experts, of other people who can shed light on the facts. The Court has pointed out that among the

⁴⁰ Communication submitted by the petitioner, January 9, 2009.

⁴¹ Article 8. Right to a Fair Trial.

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

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;

(...)

f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(...)

h) der the right to appeal the judgment to a higher court.

(...)

⁴² Article 25. Right to Judicial Protection.

1. 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(...).

⁴³ IACHR. Report No. 76/11. Case 11.769 A. Merits. J. Peru. July 20, 2011. Par. 248; IACHR, Report No. 78/15, Case 12.831. Merits (Publication), Kevin Cooper, United States. October 28, 2015, Par.129.

⁴⁴ I.A. Court, *Case Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgement of November 17, 2009. Series C No. 206. Par. 29.

⁴⁵ ACHR. Report No. 76/11. Case 11.769 A. Merits. J. Peru. July 20, 2011. Par. 248; IACHR, Report No. 78/15, Case 12.831. Merits (Publication), Kevin Cooper, United States. October 28, 2015, Par.129.

⁴⁶ I.A. Court. *Case Chaparro Álvarez and Lapo Ñíguez v. Ecuador*. Judgement of November 21, 2007, Par. 154.

guarantees granted to those accused is to examine witnesses against and on their behalf under the same conditions for the purpose of exercising their defense.⁴⁷ The IACHR has declared the violation of the right of defense by the admission of a written statement considered as one of the fundamental evidence for a conviction, and the impossibility of questioning that evidence throughout the process.⁴⁸

29. The European Court of Human Rights has held that it is important for the State to ensure that the judicial authority has the opportunity to observe the behavior of the witness during the interrogation so that he can form his own impression about their reliability and their statement. It has also indicated that the defense should have sufficient opportunity to directly question the witness.⁴⁹ In a similar sense, the same Court indicated that oral or immediacy when questioning witnesses is fundamental in order that the defense can appreciate the behavior of the witness under interrogation, so that it can discredit or at least raise doubts about the reliability of your statement.⁵⁰

30. In *the Luca v. Italy* case, the European Court ruled on the conviction of a person on the basis of a witness's statement, which was given during the investigation, without the presence of the defendant's defense. In that case, the Court held that the State violated the right to a defense and the right to be presumed innocent since such evidence could not be rebutted by the defense and was a substantial evidence used for the victim's conviction.⁵¹

31. Furthermore, another fundamental element of due process is the principle of presumption of innocence, which is closely related to the right to have duly motivated decisions.

32. The presumption of innocence implies that the accused enjoys a legal status of innocence or non-guilt while resolving about his criminal responsibility, so that he must receive treatment from the State in accordance with his status as an un-convicted person.⁵² The Court has held that this implies that the accused person must not demonstrate that he has not committed the crime attributed to him, since the *onus probandi* corresponds to the accuser.⁵³ Hence, the IACHR has emphasized that a reliable demonstration of guilt is an indispensable requirement for criminal sanction, so that the burden of proof lies with the accusing party and not with the accused person.⁵⁴

33. In accordance with the foregoing, international human rights law provides that no person may be convicted until there is full proof of his criminal responsibility. In the words of the Court, "if there is incomplete or insufficient proof, it is not appropriate to condemn the person, but to absolve him."⁵⁵ Similarly, the Commission has considered that the lack of full proof of criminal responsibility in a conviction constitutes a violation of the principle of presumption of innocence.⁵⁶

34. In its recent judgment in the case *Zegarra Marín Vs. Peru*, the Court referred to the guarantee of motivation in relation to the principle of presumption of innocence, in the following terms:

the relevance of the motivation, in order to guarantee the principle of presumption of innocence, mainly in a condemnatory sentence, which must express the sufficiency of proof of charge to confirm the accusatory hypothesis; the observance of the rules of legal reasoning in

⁴⁷ I.A. Court. *Case Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgement of May 29, 2014. Series C No. 279, Par. 242.

⁴⁸ IACHR. Report No. 82/13. Case 12.679. Merits. José Agapito Ruano Torres and family. El Salvador. November 4, 2013, Par. 141.

⁴⁹ European Court of Human Rights (ECHR). *Kostovski v. The Netherlands*. Judgement of November 20, 1989, Pars. 42-43; and *Windisch v. Austria*. Judgement of September 27, 1990, Pars. 28-29.

⁵⁰ ECHR. *Doorson v. The Netherlands*. Judgment of May 26, 1996, Par. 73; and *Van Mechelen et al. v. The Netherlands*. Judgement of April 23, 1997, Pars. 59-60.

⁵¹ ECHR. *Luca v. Italia*. Judgment of February 27, 2001, Par. 40.

⁵² I.A. Court. *Case Ruano Torres et al. v. El Salvador*. Merits, Reparations and Costs. Judgement of October 5, 2015. Series C No. 303, par. 126.

⁵³ I.A. Court. *Case Ricardo Canese v. Paraguay*. Judgement of August 31, 2004. Series C No. 111, par. 154.

⁵⁴ IACHR. Report No. 82/13. Case 12.679. Merits. José Agapito Ruano Torres et al. El Salvador. November 4, 2013, par. 118.

⁵⁵ I.A. Court. *Case Cantoral Benavides v Peru*. Judgment of August 18, 2000. Series C No. 69, par. 120; *Case Ricardo Canese v. Paraguay*. Judgement of August 31, 2004. Series C No. 111, par 153.

⁵⁶ IACHR. Report No. 82/13. Case 12.679. Merits. José Agapito Ruano Torres and family. El Salvador. November 4, 2013, par. 130.

the assessment of the evidence, including those that could generate doubt of the criminal responsibility; and the final judgment that derives from this assessment. In this case, it should reflect the reasons for which it was possible to obtain conviction on the imputation and the criminal responsibility, as well as the appreciation of the tests to deface any hypothesis of innocence, and only thus to be able to confirm or to refute the accusatory hypothesis. This would make it possible to misrepresent the presumption of innocence and to establish criminal responsibility beyond any reasonable doubt. In the face of doubt, the presumption of innocence and the principle in *dubio pro reo*, operate as a decisive criterion at the time of issuing the ruling.⁵⁷

35. Regarding the right to appeal the ruling, the IACHR has held that this right is a primary guarantee in the framework of due process of law, which's purpose is to prevent a situation of injustice being consolidated.⁵⁸ The purpose of this right is to allow an adverse judgment to be reviewed by a different judge or tribunal and of superior organic hierarchy⁵⁹ and to prevent a decision to become definitive which has been adopted in error and which contains errors which would unduly prejudice the interests of a person.⁶⁰ The Court has held that "double judicial conformity, expressed through access to a remedy that affords the possibility of a full review of the conviction, confirms the foundation and gives greater credibility to the State's judicial act, while providing greater security and protect the rights of the condemned."⁶¹

36. Moreover, under Article 25 of the Convention, States must provide an adequate and effective remedy against acts violating their rights, both those established in the Convention and in the Constitution and the law.⁶²

2. Analysis of the case

37. The Commission reiterates that it is for domestic authorities and, in cases such as the present, for criminal judges, who are primarily responsible for assessing domestic evidence and for determining its effects on the possible criminal liability of a person with regard to which is the punitive power.⁶³ However, it is the role of the IACHR to establish whether, during a criminal proceeding, the guarantees provided for in Article 8 of the American Convention were met, which necessarily implies a review of the actions of the State authorities in charge of said process, including, in certain cases, the manner in which the available evidence was received and analyzed.

38. There is no dispute between the parties regarding the fact that Alfredo Cugat's testimonial statement was rendered at the preliminary stage by the police authority, without the presence or participation of Marcos Alejandro Martin's defense counsel. According to the above standards, the right of defense must be guaranteed from the moment a person is identified as a possible person responsible for a crime, so that the absence of his lawyer in the practice of this test, violates the right enshrined in the Article 8.2 c) of the Convention.

⁵⁷ I.A. Court. *Case Zegarra Marín v. Peru*. Preliminary Exceptions, Merits, Reparations and Costs. Judgement of February 15, 2017. Series C No. 331. Par. 147.

⁵⁸ IACHR. Report No. 33/14, Case 12.820. Merits. Manfred Amrhein et al.. Costa Rica. April 4, 2014, par. 186.

⁵⁹ I.A. Court. *Case Mendoza et al. v. Argentina*. Judgment of Preliminary Exceptions, Merits and Reparations. May 14, 2013. Series C No. 260, par. 242; *Case Herrera Ulloa v. Costa Rica*. Judgement of Preliminary Exceptions, Merits, Reparations and Costs. Judgement of July 2, 2004. Series C No. 107, par. 158, and *Case Mohamed v. Argentina*. Judgement of Preliminary Exceptions, Merits, Reparations and Costs. November 23, 2012. Series C No. 255, par. 97.

⁶⁰ I.A. Court *Case Herrera Ulloa v. Costa Rica*. Judgement of Preliminary Exceptions, Merits, Reparations and Costs. Judgement of July 2, 2004. Series C No. 107, par. 158.

⁶¹ I.A. Court. *Case Mendoza et al. v. Argentina*. Judgment of Preliminary Exceptions, Merits and Reparations. May 14, 2013. Series C No. 260, par. 242; *Case Barreto Leiva v. Venezuela*. Judgement of Merits, Reparations and Costs. November 17, 2009. Series C No. 206, par. 89; *Case Mohamed v. Argentina*. Judgement of Preliminary Exceptions, Merits, Reparations and Costs. November 23, 2012. Series C No. 255, par. 97; *Case Liakat Ali Alibux v. Suriname*. Preliminary Exceptions, Merits, Reparations and Costs. Judgement of January 30, 2014. Series C No. 276, par. 85.

⁶² I. A. Court. *Case Castillo Páez v. Peru*. Fondo. Judgement of November 3, 1997. Series C No. 34, par. 82; *Case Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgement of September 19, 2006. Series C No. 151, par. 131, and *Case Castañeda Gutman v. México*. Preliminary Exceptions, Merits, Reparations and Costs. Judgement of August 6, 2008. Series C No. 183, par. 78. IACHR. Report No. 82/13. Case 12.679. Merits. José Agapito Ruano Torres and family. El Salvador. November 4, 2013, par. 119.

39. Likewise, taking into account that the evidence carried out without the participation of the defense was a testimonial statement, this situation also constituted a violation of Article 8.2 f) of the Convention, which enshrines, among others, the right of any person prosecuted to cross-examine witnesses. This includes evidently witnesses both charge and discharge.

40. These violations, originated in the practice of testimony, continued throughout the process, specifically through the incorporation at the hearing of the testimonial statement in writing, with no possibility of any control by the defense. In addition, as discussed below, this situation was consolidated through the conviction and rulings issued on the occasion of the appeals filed by Mr. Martin.

41. While it is true that, according to the aforementioned standards, the right to question witnesses may be restricted in exceptional circumstances, such a limitation must be based on weighty reasons, such as the risk to life and personal integrity of the declarants, and provided that compensatory measures regarding the right of defense of the person processed are available. In the present case, the State of Argentina merely indicated that the incorporation of the testimonial statement was allowed by domestic law, but did not claim compelling reasons to justify such incorporation in the light of the American Convention, even though it affected the right of defense of Mr. Martin. The Commission considers that the mere reference to which it was not possible to locate the detainee in a case of this nature does not constitute a situation justifying the restriction in the right of defense and specifically in the right to question witnesses. The Commission has no information on additional efforts to locate it and no indication of any other exceptional situation.

42. Having established the above, the Commission considers it pertinent to refer to the relevance of Alfredo Cugat's statement in the conviction of Mr. Martin.

43. From the established facts, the evidence on which the judicial decision was based was: (i) the statement of Alfredo Cugat, who identified Mr. Martin as the person who assaulted him, and indicated that at the time of the arrest he had under his power the coat and the penknife; and (ii) the testimony of three persons (the police officer who arrested Mr. Cugat, the driver of the vehicle where the arrest occurred, and a passenger who was present during the detention).

44. Regarding the content of the statements made by the three persons who appear in the file before the Commission, the police officer stated that he arrested Marcos Alejandro Martin, but that he did not remember who confiscated the weapon, hence relying on the statement of Mr. Cugat. The passenger stated that, while on public transport, he was present when the police and Mr. Cugat went upstairs and found the penknife and the jacket "near" Marcos Alejandro Martin, whom they arrested and read his rights. The public transport driver stated that he saw the police and Mr. Cugat as well as the arrest of a person and that a penknife and a cap had been confiscated.

45. It therefore follows that none of these three persons witnessed the occurrence of the crime, but only witnessed Mr. Cugat with the police to the public transport, as well as the arrest. Regarding the location of the penknife and the coat, the IACHR emphasizes that none of these persons stated that such objects were held by Mr. Martin, but that, according to one of the witnesses, they were found "near" and the police officer said he did not remember who confiscated such objects. Therefore, it is clear that Mr. Cugat's testimonial statement constituted the fundamental evidence as to the identification of Marcos Alejandro Martin as the author of the crime, as well as the fact that the coat and the penknife were in his possession, both central elements for the determination of his criminal responsibility.

46. The Commission reiterates that it is not for it to assess the evidence for the criminal responsibility of Marcos Alejandro Martin. However, it is incumbent upon it to assess, in the light of the principle of presumption of innocence and the right of defense, whether the test carried out with serious limitations to that right had a fundamental value in the judgement. As indicated above, the Inter-American

Court and the European Court have pointed out that the conviction cannot be based "solely or decisively" on statements by witnesses in which the accused's rights have been limited.⁶⁴

47. Based on the above information, the Commission considers that the violation of the right of defense was particularly serious in the present case, taking into account that Mr. Cugat's testimonial statement had a fundamental value in the sentence. Likewise, the Commission considers that to give a strong probative value to evidence in violation of the rights of the defense, and essentially to condemn on the basis of such evidence, when there are no other elements of corroboration on aspects essential to determine the criminal responsibility of a person, also violates the principle of presumption of innocence.

48. Mr. Martín filed an appeal against the conviction, which was declared inadmissible by the National Chamber of Criminal Cassation. In this regard, the IACHR notes that the Chamber recognized that, according to its own precedent, the inability to question a witness and the subsequent incorporation of "incriminating statements" by reading is a violation of the American Convention. However, he indicated that such a precedent was not applicable to the case. In support of this assertion, the Chamber referred to the "hypothetical method of mental suppression", according to which "the incriminating merit which led to the state of certainty [of conviction]" is not observed or proven to be affected. The Commission makes the following observations on this decision.

49. First, the Commission considers that the decision of the National Chamber of Criminal Cassation consolidates violations of the right to defense, the right to question witnesses and the principle of presumption of innocence, in the terms analyzed.

50. The Commission considers that, in order to guarantee the right of defense and the principle of presumption of innocence, in situations in which it is determined in the second instance that an evidence was received in violation of due process, the authority is to declare such a situation and return the case to the lower authority so that it excludes said evidence from the decision-making process and makes a new determination on the criminal liability in the light of the remaining evidence or whether acquittal corresponds. This new determination must be able to count on a double conform.

51. Second, the Commission stresses the language used by the Chamber in stating that "it has not been proven" that by eliminating Mr. Cugat's statement, "incriminating merit" is affected. The Chamber did not explain how the three statements coincided with what Mr. Cugat had pointed out. This, despite the fact that the statements of those persons are only relevant on the basis of Mr. Cugat's testimony, since, as indicated, none of them witnessed the robbery or stated that the weapon and coat were actually in Mr. Martín's possession. In that sense, the Chamber not only consolidated the violation of the principle of presumption of innocence, but from language of the judgement, it is possible to affirm that it reversed the burden of proof.

52. The Commission considers that neither the cassation remedy nor the subsequent appeals constituted effective remedies to remedy the violations of due process against Marcos Alejandro Martín, which constituted a violation of the right to judicial protection.

53. In the light of the foregoing, the Commission concludes that the State of Argentina is responsible for violating the rights of the defense, the principle of presumption of innocence, the right to question witnesses, the right to duly motivated decisions, right to appeal against the judgment and right to judicial protection, established in Articles 8.1, 8.2, 8.2 c), 8.2 f), 8.2 h) and 25.1 of the American Convention, in relation to Article 1 (1) thereof, in detriment of Marcos Alejandro Martín.

B. Right to personal liberty (Article 7⁶⁵ of the American Convention, in relation to Article 1.1 of such instrument)

⁶⁴ I.A. Court. *Case Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgement of May 29, 2014. Series C No. 279, Par. 247. ECHR. *Doorson v. The Netherlands*. Judgment of May 26, 1996, Par. 76.

⁶⁵ Article 7. Right to personal liberty.

1 Every person has the right to personal liberty and security (...).

3. No one shall be subject to arbitrary arrest or imprisonment.

54. The Commission has argued that, under certain circumstances, human rights violations when making decisions related to the freedom of a person may render arbitrary the detention that may result from such decisions.⁶⁶ In a similar way, the Court has considered that the violation of judicial guarantees may have the effect of vitiating the process, as well as the consequences thereof, including the detention of a person.⁶⁷ For example, one of the criteria taken into account by the UN Working Group on Arbitrary Detention to determine when a deprivation of liberty may be considered arbitrary is defined in the following terms:

[T]he failure to comply, in whole or in part, with the international standards relating to the right to a fair trial, established in the relevant international instruments accepted by the States concerned, is of such serious gravity that it provided the imprisonment with the character of arbitrary.⁶⁸

55. Therefore, the Commission finds that although the deprivation of liberty of Marcos Alejandro Martín was based on a conviction issued by a judicial authority, it became arbitrary.⁶⁹ The Commission has pointed out that individuals can only be subject to a restriction of their freedom by means of a judgment based on criminal proceedings during which they have had the opportunity to defend themselves,⁷⁰ situation that was not presented in the current case, as discussed in the previous section. In this regard, the Commission concludes that the State violated Articles 7.1 and 7.3 of the American Convention, in relation to Article 1.1 thereof, to the detriment of Marcos Alejandro Martín.

56. The Commission adopted the merits report No. 95/17 on September 5, 2017 and transmitted it to the State on September 28 of the same year. In said report, the Commission recommended:

1. Adopt the necessary measures to render ineffective the sentence against Marcos Alejandro Martín.
2. To fully remedy the human rights violations declared in this report, both in material and non-material terms. To this end, the State must adopt measures of economic compensation and satisfaction in favor of the victim.

57. In the process followed after the notification of the merits report, the Commission received several reports from the State and briefs from the petitioners regarding the compliance with the recommendations established by the IACHR. During this period, the Commission granted six extensions to the State for the suspension of the term established in Article 51 of the American Convention. In these requests for extension the Argentine State reiterated its willingness to comply with the recommendations. Likewise, it expressly waived its right to file preliminary objections for breach of the aforementioned deadline in the event that the case were submitted to the Inter-American Court.

58. The IACHR notes that on June 12, 2018, the parties signed an "Agreement on Compliance with Recommendations." Likewise, the Commission observes that on March 18, 2019 said agreement was approved by Executive Decree No. 201/2019 and published the next day in the Official Gazette.

59. The Commission observes that the Agreement on Compliance with Recommendations states that the State will adopt the following measures: i) an ad-hoc tribunal will be set up to determine the amount of compensation that corresponds; ii) the agreement will be published in a newspaper of national scope; and iii) medical and/or psychological attention will be provided to the victim if requested. Likewise, the State

⁶⁶ IACH. Report No. 172/10. Case 12.561. Merits. César Alberto Mendoza et al. (juveniles sentenced to life time imprisonment). Argentina. November 2, 2000, par. 175.

⁶⁷ I.A. Court. *Case Usón Ramírez v. Venezuela*. Judgement of November 20, 2009. Series C No. 207, par. 148.

⁶⁸ Working Group on Arbitrary Detention of the Office of the United Nations High Commissioner for Human Rights. Information leaflet No. 26: "No one shall be arbitrarily detained, imprisoned or exiled."

⁶⁹ For more information, see: IACHR. Report No. 172/10. Case 12.561. Merits. César Alberto Mendoza et al. (juveniles sentenced to life time imprisonment). Argentina. November 2, 2000, par. 179.

⁷⁰ IACHR. Report No. 64/99. Case 11.778. Merits. Ruth del Rosario Garcés Valladares. Ecuador. April 13, 1999, par. 51.

reported that the record of the sentence imposed on the victim expired and that neither the National Recidivism Registry nor the Argentine Federal Police have records on said conviction. It added that without prejudice to this, it undertakes to inform any court that the petitioners indicate that the sentence against the victim is rendered null and void.

60. The IACHR values the measures adopted by the State to reach an agreement on compliance with recommendations with the petitioners. The Commission observes that, as the petitioners has argued and has not been contested by the State, said measures are pending compliance.

61. After evaluating the information available on the status of compliance with the recommendations, the Commission decided on April 26, 2019, by absolute majority, not to send the case to the Inter-American Court and to proceed with the publication of the merits report.

VI. PROCEEDINGS SUBSEQUENT TO REPORT No. 98/19 AND INFORMATION ABOUT COMPLIANCE

62. The Commission adopted Merits Report No. 98/19 (final) on June 17, 2019 and transmitted it to the State on July 3 of the same year, granting it a period of two months to inform the IACHR on the measures adopted to comply with its recommendations.

63. In the proceedings subsequent to the notification of the final merits report, the Commission received reports from the State and briefs from the petitioner regarding compliance with the recommendations, the adoption of the Rules of Procedure of the Ad Hoc Arbitral Tribunal to determine the amount of the pecuniary reparation to be awarded to the petitioner in the instant case and its composition, communications that were duly transmitted to the parties.

64. On September 14, 2021, the State forwarded the Arbitral Award adopted by the Ad Hoc Arbitral Tribunal mentioned above on September 7, 2021, which was transmitted to the petitioner for its observations. In said Award the Arbitral Tribunal unanimously decided that:

1. The respondent State must pay Mr. Marcos Alejandro Martín, in Argentine currency, at the official exchange rate in effect on the day before the payment is made, as compensation for material damages - consequential damages and loss of earnings - the amount of US\$10,000 (ten thousand United States dollars).
2. The respondent State shall pay Mr. Marcos Alejandro Martín, in Argentine currency, at the official exchange rate in effect on the day before the payment is made, as compensation for non-pecuniary damage -material damage-, the amount of US\$ 35,000 (thirty-five thousand United States dollars).
3. The Respondent State shall pay the amount of US\$ 2,000 (two thousand United States dollars), at the official exchange rate in effect on the day before payment is made, for expenses, in accordance with the terms of paragraph 105 of this award.
[...]
4. The Respondent State shall pay the compensation and reimbursement of costs and expenses ordered in this award within three months from the date of notification of this award by the Inter-American Commission on Human Rights.
5. The compensation for material damages, non-material damages and expenses established in the present award shall not be subject to any tax, levy or charge currently existing or that may be decreed in the future.
6. In the event that the respondent State incurs in default, it shall pay interest on the amount owed, which shall correspond to the judicial interest rate used in accordance with the

usual practice in proceedings for the enforcement of judgments against the State in the Argentine Republic.

7. To notify the Honorable Inter-American Commission on Human Rights of the present award for the purposes determined in the framework of the Agreement on Compliance with Recommendations made by the Inter-American Commission on Human Rights in Report 95/17, entered into between the Argentine Republic and the petitioner in the Martín Case, processed before it, which was contained in its Final Report 98-19.
[...]

65. On September 20, 2021, the petitioner informed the IACHR of "its great satisfaction with the work carried out by the Ad Hoc Arbitral Tribunal, especially for the speed with which it conducted the proceedings, for its disinterested action and for the adoption of the award in a timely manner for the victim". It concluded: "(a) that the arguments of the parties and the evidence offered were adequately considered, (b) that the analysis of facts and law carried out by the IACHR in the case was respected, and (c) that the determination of the items to be compensated, their economic quantification and the method of payment was carried out in a manner compatible with the international parameters governing the matter and in accordance with the practices of the Inter-American Human Rights System".

66. Based on all the information available, the Commission takes a very positive view of the Argentine State's efforts to comply with the recommendations and welcomes the Award adopted by the Ad Hoc Arbitral Tribunal that determined the amount of the pecuniary reparation for Mr. Marcos Alejandro Martín in a manner compatible with the reparations determined in the merits report. The Commission calls for the necessary steps to be taken to achieve full compliance with the recommendations.

VII. CONCLUSIONS AND FINAL RECOMMENDATIONS

67. Based on the factual and legal considerations, the Inter-American Commission concluded on its merits report No. 95/17 that the State of Argentina was responsible for violating the rights to personal liberty, judicial guarantees and judicial protection established in Articles 7.1, 7.3, 8.1, 8.2, 8.2 c), 8.2 f), 8.2 h) and 25.1 of the American Convention, in relation to the obligations established in Articles 1.1 of the same instrument, to the detriment of Marcos Alejandro Martín.

68. In light of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE STATE OF ARGENTINA THE FOLLOWING RECOMMENDATIONS, WITH A VIEW TO THEIR FULL IMPLEMENTATION

1. Adopt the necessary measures to render ineffective the sentence against Marcos Alejandro Martín.
2. To fully remedy the human rights violations declared in this report, both in material and non-material terms. To this end, the State must adopt measures of economic compensation and satisfaction in favor of the victim.

VIII. PUBLICATION

69. Pursuant to the foregoing and in accordance with the provisions of Article 51(3) of the American Convention, the Inter-American Commission on Human Rights decides to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, in accordance with the norms established in the instruments that regulate its mandate, will continue to evaluate the measures adopted by the State of Argentina with respect to the above recommendations, until it determines that they have been fully complied with.

Approved by the Inter-American Commission on Human Rights on the 5th day of October 2021.
(Signed): Antonia Urrejola, Chair; Julissa Mantilla Falcón, First Vice-Chair; Flávia Piovesan, Second Vice-Chair; Margarette May Macaulay, Esmeralda Arosemena de Troitiño and Stuardo Ralón Orellana, Members of the Commission.