REPORT No. 129/17
CASE 12.315
MERITS
CARLOS ALBERTO FERNÁNDEZ PRIETO AND CARLOS ALEJANDRO TUMBEIRO
MERITS
ARGENTINA
OCTOBER 25, 2017

I. SUMMARY

1. On July 30, 1999, and March 31, 2003, the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") received two petitions that alleged the international responsibility of the Argentine Republic (hereinafter "the State," "the Argentine State," or "Argentina") for the alleged illegal and arbitrary arrests to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro in May 1992 and January 1998, respectively, by agents of the Buenos Aires Police. The Office of Public Defense of the Nation (Defensoría General de la Nación), as the petitioner, indicated that the arrests were not authorized by an arrest warrant nor were they carried out in a situation of flagrancy, but were based exclusively on purported suspicious attitudes on the part of the alleged victims.

2. The State argued that it is not internationally responsible insofar as the arrests were legal and in keeping with the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"). The State held that the decision of the police agents to intercept the vehicles in which Messrs. Fernández and Tumbeiro were riding was due to their "suspicious attitude." It indicated that the arrest and subsequent institution of criminal proceedings against the alleged victims were due to the seizure of drugs and weapons in their vehicles. It added that the criminal proceedings and consequent convictions were accompanied by respect for due process guarantees.

3. After analyzing the information available, the Commission concluded that the Argentine State is responsible for violating the rights to personal liberty, judicial guarantees, and judicial protection, established at Articles 7(1), 7(2), 7(3), 7(5), 8(1), 11(2) and 25(1) of the American Convention, in relation to the obligations established at Articles 1(1) and 2 of the same instrument to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro.

II. PROCESSING BEFORE THE COMMISSION

4. The processing of the two petitions – which were joined given the similarity of the facts – up to the issuance of the admissibility report is described in Report No. 5/12 of March 19, 2012.[1] On April 11, 2012, the Commission notified the parties of that report and placed itself at the disposal of the parties to pursue a friendly settlement. On July 24, 2012, the petitioner presented its observations on the merits. On August 8, 2012, the IACHR forwarded those observations to the State and gave it four months as provided in the Rules of Procedure to submit its observations on the merits. To this day the State has not presented those observations. The petitioner has submitted several briefs, which were forwarded to the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

5. The petitioner alleged that the Argentine State is responsible internationally for the alleged illegal and arbitrary arrests to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro in May 1992 and January 1998, respectively, by agents of the Buenos Aires Police. The petitioner indicated that their detentions were not pursuant to any judicial order, nor did they occur in a situation of flagrancy, but were due exclusively to purported suspicious attitudes on the part of the alleged victims.

[1] IACHR, Report No. 5/12, Case 12,315, Admissibility, Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, Argentina, March 19, 2012.

6. The petitioner indicated that the situation of Messrs. Fernández and Tumbeiro fits within a context in which police agents in Argentina, based on the argument of "suspicious attitude," arrest persons who have a similar profile: youths from poor families, street vendors, immigrants, and beggars. The petitioner alleged that such practices make it clear that there are persons from certain social sectors, or who due to their physical appearance, are more exposed to being detained by the police, which is a clear sign of the selective nature of the criminal justice system and mainly of the current police apparatus.

7. Regarding the alleged violation of the **right to personal liberty**, the petitioner indicated that the detentions of Messrs. Fernández and Tumbeiro were illegal and arbitrary and, as indicated, were not based on a judicial warrant or a situation of flagrancy. It added that the criterion put forward by the State, a "suspicious attitude," is not established in Argentine legislation. It also noted that this practice leaves a wide margin of police discretion for making arrests.

8. With respect to the alleged violation of the **rights to judicial guarantees and judicial protection**, the petitioner alleged that the judicial authorities did not offer the alleged victims an effective remedy for reviewing the illegality and arbitrariness of the arrests. It added that this led to the institution of criminal proceedings which, in each case, culminated in convictions.

B. Position of the State

9. The State has not submitted its observations on the merits. The IACHR recapitulates the arguments presented during the admissibility phase to the extent relevant for the analysis on the merits.

10. The Argentine State argued that it is not internationally responsible insofar as the arrests of the alleged victims were legal and in keeping with the American Convention. The State argued that the decision of the police agents to intercept the vehicles in which Messrs. Fernández and Tumbeiro were traveling was due to their "suspicious attitude." It added that the police agents had the experience for identifying irregular activities based on persons' conduct, information received, or complaints, thus the alleged victims' identification was requested, and their automobiles were searched.

11. The State argued that the arrest and subsequent institution of criminal proceedings against the alleged victims was due to the seizure of drugs and weapons that were in their vehicles. It argued that this was on record in a report and that the alleged victims were informed of the reasons for their arrest.

12. The State also said that the criminal proceedings and consequent convictions all took place respecting due process guarantees. It indicated that the IACHR cannot rule on the judgments handed down in those proceedings, for in that case it would be sitting as a court of fourth instance.

IV. FACTS PROVEN

A. Relevant law

13. Article 18 of the Constitution of Argentina provides:

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

> Death penalty for political causes, any kind of tortures and whipping, are forever abolished. (…).[2]

14. As of 1992, when Mr. Fernández was arrested, Law 2372, Code of Criminal Procedure, regulated detentions without a judicial warrant in the federal jurisdiction in the following terms:

> Article 4: The chief of the Police of the Capital and his agents have the duty to arrest persons who they catch *in flagrante delicto* and those against whom are vehement indicia or *prima facie* conclusive evidence of guilt, and should immediately bring them before a competent judge.
> …
> Article 184.4: … in public offenses, the officers shall have the following obligations and powers: To proceed to the arrest of the purportedly guilty person in the cases mentioned in Article 4.[3]

15. Law 23,950 of 1991 – Limitation of police authority – amended the Statute of the Federal Police and indicated as follows:

> Article 1: Apart from the cases established in the Code of Criminal Procedure, persons may not be arrested without the order of a competent judge. Nonetheless, if there are duly founded circumstances that make one presume that someone has committed or may commit a criminal act or a breach and does not show clearly his or her identity, he or she may be taken to the corresponding police station with notice to the judge with jurisdiction over criminal matters on duty and kept for the minimum time necessary for establishing his or her identity, which in no case may exceed ten hours.[4]

16. In addition, after 1992 the Federal Code of Criminal Procedure was amended. Article 284 of that law establishes as follows:

> … police officers and auxiliaries have the duty to arrest, even without judicial warrant: 1. One who attempts to carry out a crime prosecutable at the initiative of the authorities that is punished by a penalty of deprivation of liberty at the moment of preparing to commit it.
> 2. One who flees, being legally under arrest.
> 3. On an exceptional basis the person against whom there are vehement indicia of guilt, and when there is imminent danger of flight or of a serious thwarting of the investigation and for the sole purpose of bringing him or her before the competent judge immediately to resolve his or her arrest.
> 4. One who is caught in flagrancy committing a crime prosecutable at the initiative of the authorities that is punished by a penalty of deprivation of liberty.[5]

B. Context on arrests without judicial warrant or situation of flagrancy in Argentina

17. The IACHR takes note that several mechanisms of the universal human rights system have issued pronouncements on arrests in Argentina without judicial order or a situation of flagrancy. In this respect, the United Nations Working Group on Arbitrary Detention made a visit to Argentina in 2003 and noted as follows:

> Article 18 of the National Constitution stipulates that "no one may be arrested without a written order from the competent authorities." However, in some provinces, such as Buenos Aires and Salta, police officers have the authority to arrest or apprehend individuals whom

[2] Senate of Argentina. National Constitution, First Part, recovered from http://www.senado.gov.ar/Constitucion/capitulo1.
[3] Federal Judicial Branch, Criminal Clerk No. 2, Pretrial detention order Fernández Prieto, June 16, 1992 (Attached to the initial petition of Fernández Prieto, July 12, 1999).
[4] Amendment of the Organic Law of the Federal Police, published in official bulletin November 11, 1991.
[5] Brief of Petitioners' observations on the merits of the case, July 24, 2012.

> they believe are intending to commit an offence…. Provincial legislation on criminal procedure set out the grounds and conditions for this kind of arrest. There must be reasonable suspicion or probable cause with regard to the commission of an offence.…
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> A number of NGOs complained … that police officers tended to abuse this power of detention. Act No. 23.950 of 1991 gives police officers broad discretion to detain individuals. However, this authority is contingent on the police officer's ability to demonstrate that there is a reasonable degree of suspicion. In practice, many individuals are arrested simply for loitering, or because they cannot give a good reason for being in a particular place or because they have no money in their pockets. The most common cases involve identity checks….
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> According to the representatives of various social groups, this kind of police action has the effect of intimidating average citizens. It is alleged that the police stop and search vehicles and make the passengers get out of public transport vehicles in order to check their identities and search their belongings….
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> … [There are] many cases involving police officers who, eager to demonstrate their effectiveness in combating the crime wave, had invented and fabricated cases by detaining innocent individuals after reporting the successful prosecution of an offence…. The ability of the victims of such situations to defend themselves is virtually non-existent, since most of them are from the most vulnerable groups on the fringes of society: the unemployed, beggars, illegal immigrants or individuals with a police record. The pattern in these cases is to take the individuals to a particular place, "plant" evidence, accuse them of theft, and so on….[6]

18. Based on this information received, the Working Group recommended to the Argentine State:

> … to monitor closely the behaviour of senior and junior police officers, particularly with regard to their powers of arrest and detention. Particular attention should be paid to the criminal practice of falsifying procedures with the aim of improving the police's public image at the cost of sending innocent civilians to prison. The efforts of officials of the Public Prosecutor's Office to deal with this problem should be encouraged and supported. In addition, any manifestation of racist, xenophobic, homophobic or other behaviour that is incompatible with the full observance of human rights - which the police are expected to enforce - should be punished.[7]

19. In addition, the Human Rights Committee, in its Concluding Observations on Argentina in 2010, informed regarding the persistence of the situation:

> The Committee reiterates its concern at the subsistence of legislation giving the police the power to detain persons … without a warrant or subsequent judicial review, for the sole stated purpose of verifying their identity, in violation of, *inter alia*, the principle of the presumption of innocence…. The State party should take measures to withdraw the power of the police to detain persons when their detention is not related to the commission of an offence and is in violation of the principles set out in article 9 of the [International] Covenant [on Civil and Political Rights, which enshrines the right to personal liberty].[8]

20. Subsequently, in its Concluding Observations on Argentina in 2016, the Committee indicated as follows:

> The Committee reiterates its concern about the police practice, and the regulation under which it is permitted, of taking people into custody without a warrant in order to verify their

[6] United Nations, Working Group on Arbitrary Detention, Report on visit to Argentina, December 23, 2003, paras. 42-47.
[7] United Nations, Working Group on Arbitrary Detention, Report on visit to Argentina, December 23, 2003, para. 71.
[8] United Nations, Human Rights Committee, Concluding Observations on Argentina, March 31, 2010, para. 15.

> identity and then detaining them for lengthy periods of time… The State party should take all necessary steps, including the adoption of legislative measures, to put an end to the practice of detaining persons when such detention is not related to the commission of an offence….[9]

21. The Commission also takes note that in the inter-American system, the Inter-American Court indicated in the *Case of Bulacio v. Argentina*:

> … at the time of the facts [1991], there were indiscriminate police detention practices, including the so-called *razzias*, detentions to establish identity and detentions in accordance with police edicts on misdemeanors.[10]

22. The IACHR takes note that several civil society organizations, both Argentine and international, have also expressed their concern over the practices described above. In this respect, the Centro de Estudios Legales (CELS) and *Human Rights Watch* indicated the following in their 1998 joint report on police insecurity:

> The police have … powers that give them discretion to detain persons, by judging misdemeanors and the power to detain to conduct an identity or background check. These powers are based on the presumption of a pre-criminal state in broad sectors of society and on the assumption that the police have the capacity to assess and intervene in the situation. As a result, this police function of security ends up "contaminating" the judicial investigation tasks, applying the arbitrariness of the criteria used to stop and hold persons stereotyped as "suspicious."[11]
>
> …
>
> The detentions by personnel at police stations are in the vast majority of cases are explained by adducing that the person "does not justify his or her being in the place" or that he or she is "prowling about with a suspicious attitude" or that "cannot show his identity," or else that "displays attitudes of nervousness/unease, attempting to go unnoticed in the presence of the police," as appears in the courts' books. These are all cases of young men who gather at corners with their friends…, in pairs in plazas, poor persons waiting for busses, etc., that is, situations that in the police vocabulary generally can be classified as "pre-criminal state" or "suspicious state."[12]

23. The IACHR also notes that Argentine institutions have issued pronouncements regarding this situation. For example, the Office of the Human Rights Ombudsperson (Defensoría del Pueblo) of the city of Buenos Aires issued a resolution in 2012 in which it indicated as follows:

> … in most of the cases analyzed the use of this power (conferred by federal law 23,950, called "arrest to check identity") is automatic. The persons identified were not committing, nor it is understood that they could commit, a crime or misdemeanor, thus there was no reason to require identification, they were just poor persons living on the street and it would appear that said status, in the facts, authorized the police officers to act.[13]

C. Carlos Alberto Fernández Prieto

1. The events of May 26, 1992

[9] United Nations, Human Rights Committee, Concluding Observations on Argentina, August 10, 2016, paras. 17-18.

[10] I/A Court HR. *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 69.

[11] CELS and *Human Rights Watch*, La inseguridad policial: Violencia de las fuerzas de seguridad en la Argentina, 1998, p. 45.

[12] CELS and *Human Rights Watch*, La inseguridad policial: Violencia de las fuerzas de seguridad en la Argentina, 1998, p. 49.

[13] Office of the Human Rights Ombudsperson for the City of Buenos Aires, Resolution 1135/2012.

24. At approximately 7:00 pm on May 26, 1992 police officer Inspector and First Sergeant were circulating in their jurisdiction in an unpopulated area between the Federal Capital and Mar del Plata when they identified a vehicle in which Mr. Fernández – then 52 years old – was traveling with two other persons.[14] According to the arrest report the police agents decided to intercept that vehicle as they considered that the passengers had a "suspicious attitude."[15]

25. The police agents asked Mr. Fernández and the other two persons to step out of the vehicle and proceeded to search it.[16] According to the arrest report, several packages were found "which, based on the aroma and the characteristics … might be … marijuana."[17] A revolver and dozens of projectiles were also found.[18]

26. Mr. Fernández and the other two persons were taken to the closest police station.[19] Police agent stated that Mr. Fernández accepted responsibility for the packages that he was carrying.[20] Officer Norberto stated that after the packages were found in the car Mr. Fernández, in a clear state of "nervousness and startled, stated aloud, as if justifying his action, that he was to deliver the drugs to a certain Guillermo …, and that said person would pay him in cash, then and there, for the merchandise."[21]

27. One of the persons accompanying Mr. Fernández stated that the two weapons seized were his property, and that he had the respective permit.[22] He said that he was unaware of the contents of the packages seized since they belonged to Mr. Fernández.[23] Mr. Fernández stated that a person with the alias "Pantera" called him to offer him the possibility of earning 500 dollars if he transported some merchandise to Mar del Plata.[24] He said that the two persons accompanying him were not aware of that situation.[25]

28. Mr. Fernández clarified that the material seized was not in the trunk, and that therefore there was an error in the arrest report.[26] He clarified that he signed the arrest report in "good faith because one could not see anything that night."[27]

2. The criminal proceeding against Mr. Fernández

29. On June 16, 1992 the federal judge ordered that Mr. Fernández be held in pretrial detention.[28] The judge stated that he considered the evidence, and the place and the manner in which the narcotics were found, thus there are elements to characterize the act as the crime of transporting narcotics.[29]

30. On November 8, 1995, the subrogating federal prosecutor (*procurador fiscal federal subrogante*) filed charges against Mr. Fernández, which he characterized as the perpetrator criminally responsible for the crime of transporting 2,370 grams of cut marijuana distributed in six "loaves" that he was taking from the Federal Capital to Mar de Plata.[30] It was argued that where exactly the packages were situated was irrelevant, given that Mr. Fernández had assumed full responsibility for the custody of the items taken.[31]

[14] Arrest report, Carlos Alberto Fernández Prieto, May 26, 1992 (Annex to the initial petition of July 30, 1999).
[15] Arrest report, Carlos Alberto Fernández Prieto, May 26, 1992 (Annex to the initial petition of July 30, 1999).
[16] Arrest report, Carlos Alberto Fernández Prieto, May 26, 1992 (Annex to the initial petition of July 30, 1999).
[17] Arrest report, Carlos Alberto Fernández Prieto, May 26, 1992 (Annex to the initial petition of July 30, 1999).
[18] Arrest report, Carlos Alberto Fernández Prieto, May 26, 1992 (Annex to the initial petition of July 30, 1999).
[19] Arrest report, Carlos Alberto Fernández Prieto, May 26, 1992 (Annex to the initial petition of July 30, 1999).
[20] Statement by Fabián Raúl Casanova, June 16, 1992 (Annex to the initial petition of July 30, 1999).
[21] Statement by Juan Carlos Norberto, June 16, 1992 (Annex to the initial petition of July 30, 1999).
[22] Signed Statement, Alberto José Julián Argente, May 27, 1992 (Annex to the initial petition of July 30, 1999).
[23] Signed Statement, Alberto José Julián Argente, May 27, 1992 (Annex to the initial petition of July 30, 1999).
[24] Signed Statement, Alberto José Julián Argente, May 27, 1992 (Annex to the initial petition of July 30, 1999).
[25] Signed Statement, Alberto José Julián Argente, May 27, 1992 (Annex to the initial petition of July 30, 1999).
[26] Signed Statement, Alberto José Julián Argente, May 27, 1992 (Annex to the initial petition of July 30, 1999).
[27] Signed Statement, Alberto José Julián Argente, May 27, 1992 (Annex to the initial petition of July 30, 1999).
[28] Resolution 93/95, Pretrial detention order, Fernández Prieto, June 16, 1992 (Annex to the initial petition of July 30, 1999).
[29] Resolution 93/95, Pretrial detention order, Fernández Prieto, June 16, 1992 (Annex to the initial petition of July 30, 1999).
[30] Bill of indictment of Fernández Prieto of December 14, 1995 (Annex to the initial petition of July 30, 1999).
[31] Bill of indictment of Fernández Prieto of December 14, 1995 (Annex to the initial petition of July 30, 1999).

31. On May 26, 1996 the defense asked that its client be acquitted and that the proceeding be declared null.[32] The defense argued that the stop and search were conducted arbitrarily, violating constitutional guarantees.[33] It explained that mere suspicion is not grounds for authorizing the actions carried out by the police.[34]

32. On July 19, 1996, the federal judge issued a judgment against Mr. Fernández and sentenced him to five years in prison as the perpetrator criminally liable for the crime of transporting narcotics.[35] The judgment took into account: (i) the statements by officers Carranza and Norberto, and by Mr. Fernández and the other occupants of the vehicle; and (ii) that the Provincial Police of Buenos Aires (Technical Records Investigations Office) identified the packages obtained as "Cannabis Sativa."[36] In addition, it was indicated that the place where the packages attributed to Mr. Fernández were found does not change the quality of the confession in his initial statement to the authorities.[37]

33. Defense counsel for Mr. Fernández filed an appellate brief against the conviction.[38] The validity of the evidence obtained was called into question insofar as the search of the car in which Mr. Fernández was traveling was carried out without a judicial warrant.[39] It was argued once again that mere suspicion on the part of the police agents does not suffice to arrest a person and proceed to search his vehicle.[40] Defense counsel noted that the record does not include indicators to support the concept of "suspiciousness" ("*estado de sospecha*") nor its glosses.[41]

34. On November 23, 1996, the Federal Court of Appeals dismissed the motion and affirmed the conviction.[42] The Court indicated that the search was legal due to the "prior suspiciousness" ("*estado de sospecha previa*") that led the police officers to stop the vehicle in which Mr. Fernández was traveling.[43] It held that ruling favorably on the arguments of the defense would impede the crime prevention work of police agents.[44]

35. On December 12, 1996, defense counsel for Mr. Fernández filed a federal extraordinary appeal against the judgment of the Federal Court of Appeals.[45] It was alleged that there was no prior suspiciousness for the police officers to stop and search Mr. Fernández and the arrest report does not indicate the components of the purported suspicious attitude of the citizens.[46] He added that the search was based on "spurious or ideological criteria that did not correspond to the rule of law."[47]

36. On February 14, 1997, the Federal Court of Appeals of Mar de Plata rejected the argument presented.[48] The Court indicated as follows:

> … having analyzed the grounds for being able to proceed set forth by the appellant, no issue of constitutional seriousness was noted that would allow for a favorable ruling, nor that the ruling on appeal does not result in a reasoned derivation of current law and entails a violation of constitutional guarantees and substantive laws….[49]

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[32] Defense brief of Fernández Prieto of May 26, 1996 (Annex to the initial petition of July 30, 1999).
[33] Defense brief of Fernández Prieto of May 26, 1996 (Annex to the initial petition of July 30, 1999).
[34] Defense brief of Fernández Prieto of May 26, 1996 (Annex to the initial petition of July 30, 1999).
[35] Judgment convicting Fernández Prieto, July 19, 1996 (Annex to the initial petition of July 30, 1999).
[36] Judgment convicting Fernández Prieto, July 19, 1996 (Annex to the initial petition of July 30, 1999).
[37] Judgment convicting Fernández Prieto, July 19, 1996 (Annex to the initial petition of July 30, 1999).
[38] Appellate brief against the judgment of first instance of Fernández Prieto (Annex to the initial petition of July 30, 1999).
[39] Appellate brief against the judgment of first instance of Fernández Prieto (Annex to the initial petition of July 30, 1999).
[40] Appellate brief against the judgment of first instance of Fernández Prieto (Annex to the initial petition of July 30, 1999).
[41] Appellate brief against the judgment of first instance of Fernández Prieto (Annex to the initial petition of July 30, 1999).
[42] Judgment of the Federal Court of Appeals, November 23, 1996 (Annex to the initial petition of July 30, 1999).
[43] Judgment of the Federal Court of Appeals, November 23, 1996 (Annex to the initial petition of July 30, 1999).
[44] Judgment of the Federal Court of Appeals, November 23, 1996 (Annex to the initial petition of July 30, 1999).
[45] Federal Extraordinary Appeal of December 12, 1996 (Annex to the initial petition of July 30, 1999).
[46] Federal Extraordinary Appeal of December 12, 1996 (Annex to the initial petition of July 30, 1999).
[47] Federal Extraordinary Appeal of December 12, 1996 (Annex to the initial petition of July 30, 1999).
[48] Order of the Federal Court of Appeals of Mar de Plata of February 14, 1997 (Annex to the initial petition of July 30, 1999).
[49] Order of the Federal Court of Appeals of Mar de Plata of February 14, 1997 (Annex to the initial petition of July 30, 1999).

37. On February 28, 1997, defense counsel for Mr. Fernández filed a complaint appeal (*recurso de queja*) against the ruling of the Federal Court of Appeals of Mar de Plata.[50] It was indicated that the appeal filed with the Court did satisfy the admissibility requirements established in the domestic legal system.[51]

38. On November 12, 1998, the Supreme Court of Justice of the Nation rejected the appeal filed and upheld the conviction.[52] The Supreme Court considered that the police agents who stopped the car in which Mr. Fernández was traveling were commissioned to cover the radius of a given jurisdiction with the task of preventing any crime.[53] It added that in that context they intercepted the automobile on noting that the persons inside had a suspicious attitude suggesting the commission of a crime.[54] It added that said suspicion was corroborated once effects related to narcotics trafficking were found.[55]

39. The Supreme Court also concluded that the arrest occurred in the context of prudent and reasonable action by the police personnel in the performance of their functions in urgent circumstances.[56] The Court added the following:

> … a different solution would not imply an assurance for the defense at trial, but rather would have been tantamount to ignoring the material truth revealed in the proceeding, as the evidence is not at all tainted, especially if one considers that the defendant, in his initial statement, recognized that when he was stopped he was transporting narcotics.[57]

D. Carlos Alejandro Tumbeiro

1. What happened on January 15, 1998

40. On January 15, 1998, at midday, Mr. Tumbeiro was walking along a street in the city of Buenos Aires.[58] According to the petitioner's narrative, Federal Police agents intercepted him and asked what he was doing in the area.[59] It indicated that Mr. Tumbeiro answered that he was looking for electronic material for replacement parts.[60] The police agents stated that they saw that Mr. Tumbeiro was nervous, especially because the electronic material alluded to was totally foreign to what one might find in the commercial establishments in the zone.[61]

41. The police agents declared that Mr. Tumbeiro had a newspaper with him in which they found a transparent bag that contained a white substance similar to cocaine hydrochloride.[62] They added that in response, it was asked that witnesses be present for the purpose of arresting Mr. Tumbeiro.[63] The petitioner said that the police agents accompanied Mr. Tumbeiro to their official vehicle, and they proceeded to lower his

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[50] Extraordinary Complaint Appeal of February 28, 1997 (Annex to the initial petition of July 30, 1999).
[51] Extraordinary Complaint Appeal of February 28, 1997 (Annex to the initial petition of July 30, 1999).
[52] Supreme Court of Justice of the Nation, November 12, 1998 (Annex to the initial petition of July 30, 1999).
[53] Supreme Court of Justice of the Nation, November 12, 1998 (Annex to the initial petition of July 30, 1999).
[54] Supreme Court of Justice of the Nation, November 12, 1998 (Annex to the initial petition of July 30, 1999).
[55] Supreme Court of Justice of the Nation, November 12, 1998 (Annex to the initial petition of July 30, 1999).
[56] Supreme Court of Justice of the Nation, Judgment of November 12, 1998 (Annex to the initial petition of July 30, 1999).
[57] Supreme Court of Justice of the Nation, Judgment of November 12, 1998 (Annex to the initial petition of July 30, 1999).
[58] Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.
[59] Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.
[60] Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.
[61] Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.
Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.
[63] Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.

pants and underwear.[64] It indicated that afterwards they called two witnesses and indicated to them that drugs were found in a newspaper that Mr. Tumbeiro was carrying. The petitioner stated that said newspaper was in the back seat of the police car, and added that the police agents justified the search of Mr. Tumbeiro "because he was nervous and hesitant in their presence and because of the way he was dressed, which was not consistent with the apparel of the people in that place."[65] The State did not dispute this narrative put forth by the petitioner.

2. The criminal proceeding against Mr. Tumbeiro

42. On August 26, 1998, Oral Court for Federal Criminal Matters No. 1 of the Federal Capital convicted Mr. Tumbeiro and sentenced him to one year and six months in prison for the crime of possession of narcotics.[66]

43. Defense counsel for Mr. Tumbeiro filed a motion for cassation against that judgment alleging that the arrest of Mr. Tumbeiro could not be justified by "mere subjective assessments by the police agents." It was argued that the way he dressed or purported expressions of nervousness are not sufficient indicia to allow police agents to search and arrest a person.[67]

44. On March 15, 1999, the First Chamber of the Federal Court of Appeals for Criminal Cassation handed down a judgment acquitting Mr. Tumbeiro of the crime of possession of narcotics.[68] The Chamber considered that intercepting a person in a public place to check his identity and subsequently placing him in a police vehicle while waiting for the results of a criminal background check was a detention not regulated in the domestic legislation.[69] The Chamber added that the detention to run a criminal background check was not justified in this case, in which there was no duly justified circumstance to lead one to presume that someone had committed a crime or misdemeanor.[70]

45. The Attorney General filed an extraordinary appeal against this judgment, arguing that the decision of the Federal Court of Appeals for Criminal Cassation annulled a crime prevention initiative that enjoyed legal support.[71] He argued that the evidence obtained in that search was valid insofar as the police agents identified the following: (i) based on his behavior and apparel Mr. Tumbeiro did not appear to be from the area; and (ii) when asked what he was doing in the area, he made reference to looking for some replacement electronics, not something one might obtain in the neighboring commercial establishments, for it was a poor area.[72]

46. On October 3, 2002, the Supreme Court of Justice of the Nation overturned the judgment of the Federal Court of Appeals for Criminal Cassation.[73] The Supreme Court considered that the concepts of "probable cause" and "reasonable suspicion" used by the Supreme Court of the United States apply to this matter, insofar as the identity check procedure performed by the police officers was legitimate, as they had

[64] Petition of Carlos Alejandro Tumbeiro, P.1181/2003.

[65] Petition of Carlos Alejandro Tumbeiro, P.1181/2003.

[66] Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.

[67] Motion for Extraordinary Appeal, Case No. 2100, First Chamber, Tumbeiro Carlos Alejandro re:/motion for cassation of March 30, 1999, Annex to the petitioners' brief of observations of October 6, 2006.

[68] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

[69] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/ extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

[70] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/ extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

[71] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/ extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

[72] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/ extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

[73] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

been commissioned to perform the function of preventing crime in the radius of their jurisdiction.[74] The Supreme Court considered that it was in the performance of these functions that Mr. Tumbeiro was intercepted due to his suspicious attitude, which was corroborated when narcotics were found on his person.[75]

V. LEGAL ANALYSIS

A. Rights to personal liberty, privacy[76], judicial guarantees, and judicial protection (Articles 7[77], 8(1)[78], 11, and 25[79] of the American Convention in relation to Articles 1(1) and 2 of the same instrument)

47. Regarding the right to not be deprived of liberty illegally, established at Article 7(2) of the Convention, the Inter-American Court has indicated that it "recognizes the main guarantee of the right to physical liberty: the legal exception, according to which the right to personal liberty can only be affected by a law."[80] The legal exception that is required to affect the right to personal liberty as per Article 7(2) of the Convention is that it must necessarily be accompanied by the principle that only legally defined conduct be punished, which requires states to establish, as concretely as possible, and "beforehand," the "causes" and "conditions" of the deprivation of physical liberty. Accordingly, any requirement established in domestic law that does not meet with compliance on depriving a person of his or her liberty will result in that deprivation being illegal and at odds with the American Convention.[81]

48. The IACHR emphasizes that incorrect procedures by the police forces is one of the main threats to individual liberty and security.[82] For this reason states must adopt measures aimed at ensuring that the police agents perform their functions in a manner that guarantees human rights, and in particular that arrests are carried out in keeping with the domestic legislation. The Commission recalls that this does not mean limiting police activity legitimately aimed at protecting citizen security as an expression of the common good in a democratic society.[83]

49. The European Court of Human Rights (hereinafter "the European Court") has indicated that in relation to the deprivation of liberty, it is particularly important to heed the general principle of juridical

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[74] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/ extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

[75] Judgment of the Supreme Court of Justice of the Nation, Tumbeiro Carlos Alejandro re/extraordinary appeal, T135. CCCV of October 3, 2002, Annex to petitioners' brief of observations of October 16, 2002.

[76] Article 11 of the American Convention indicates, at the relevant parts: "1. Everyone has the right to have his honor respected and his dignity recognized; 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

[77] Article 7 of the American Convention establishes: "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment…; 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial…."

[78] Article 8 of the American Convention states, at the relevant part: "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…."

[79] Article 25 of the American Convention indicates in part: "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."

[80] I/A Court HR. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 56. See also: IACHR. Report on Citizen Security and Human Rights. December 31, 2009, paras. 144-146.

[81] I/A Court HR. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 55. See also: IACHR. Report on Citizen Security and Human Rights. December 31, 2009, paras. 144-146.

[82] IACHR, Application before the I/A Court HR, Walter David Bulacio, Argentina, January 24, 2001, para. 61.

[83] IACHR, Application before the I/A Court HR, Walter David Bulacio, Argentina, January 24, 2001, para. 62.

security, which implies that the conditions that uphold the deprivation of liberty under domestic law should be clearly defined and that the application of the legislation itself should be foreseeable. According to the same Court, the standard of legality of the European Convention requires that the legislation be sufficiently precise so as to enable the person to foresee the consequences that a specific act may imply to a degree that is reasonable in the circumstances.[84]

50. As regards Article 7(3) of the American Convention, the Court has held that "no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality."[85] On referring to the arbitrary nature of the detention, the Court has established that "'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[86] Therefore, any arrest must be carried out not only in keeping with the provisions of domestic law, but moreover it is necessary that "domestic law, the applicable procedure, and the corresponding general explicit or tacit principles are, in themselves, compatible with the Convention."[87]

51. Specifically on the phrase "reasonable suspicion," which, in the case of the European Convention is expressly provided for in Article 5 related to the right to personal liberty, the European Court has stated that "reasonable suspicion" that a crime has been committed means "the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[88] In this context of arrest based on "reasonable suspicion," the European Court added that "the prosecutor's failure to make a genuine inquiry into the basic facts" in order to verify whether there was a violation of the right to personal liberty triggers their responsibility.[89] It added that the requirement that

> … the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient….
>
> When assessing the "reasonableness" of the suspicion, the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. Consequently, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.[90]

52. Specifically, in the case of *Gillan and Quinton v. United Kingdom,* the European Court ruled on the legal authority of state security forces to "stop and search." In that case, the Court indicated that these situations may be understood within the concept of deprivation of liberty established at Article 5 of the European Convention, even when in that case the procedure did not last more than 30 minutes. The determination was based on the persons in question being entirely deprived of their freedom of movement, were forced to stay where they were and undergo searches, which incorporates the element of coercion that is relevant for applying that provision.[91]

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[84] ECtHR. Case Del Río Prada v. Spain, Judgment of October 21, 2013, para. 125; Case Creangă v. Romania, Judgment of February 23, 2012, para. 120; and Case Medvedyev and Others v. France, Judgment of March 29, 2010, para. 80.

[85] I/A Court HR. Case of Gangaram Panday v. Suriname. Judgment of January 21, 1994. Series C No. 16, para. 47; and I/A Court HR. Case of López Álvarez v. Honduras. Judgment of February 1, 2006. Series C No. 141, para. 66.

[86] I/A Court HR. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 92.

[87] I/A Court HR, Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C, No. 251, para. 133.

[88] ECtHR. Case Ilgar Mammadov v. Azerbaijan, Judgment of October 13, 2014, para. 88; Case Erdagöz v. Turkey, Judgment of October 22, 1997, para. 51; and Case Fox, Campbell and Hartley v. the United Kingdom, Judgment of August 30, 1990, para. 32.

[89] ECtHR. Case Stepuleac v. Moldova, Judgment of February 6, 2008, para. 73.

[90] ECtHR. Case Ilgar Mammadov v. Azerbaijan, Judgment of October 13, 2014, paras. 88 y 89.

[91] ECtHR, Gillan and Quinton v. United Kingdom, Judgment of June 28, 2010, paras. 79-81.

53. In the same case the European Court considered it relevant to apply the right to privacy, indicating that "the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life," which is applicable even if the search takes place in public. It added that to the contrary, in certain cases "the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment." The European Court indicated that the legislation that gives this sort of authority should indicate, with "with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise."[92]

54. On applying these standards to the specific case, the European Court noted that expressions such as that the authority may be used when it is beneficial or useful for preventing acts of terrorism, in the absence of a requirement of "necessity," could require a determination of proportionality of the measure in each case. It noted that due to this breadth, it is difficult to show, before an oversight body, that the public servant acted beyond the authority granted or engaged in an abuse of authority. It emphasized the fact that the domestic regulation referred to the way in which the procedure should be carried out, but it did not establish "any restriction on the officer's decision to stop and search." In response to the State's argument that the authority is exercised based on "professional intuition," the European Court indicated as problematic that, under this regulation, it is not necessary for the officer to show the existence of a reasonable suspicion, regulating only the purpose, i.e. to prevent terrorism.[93]

55. The Court also indicated that there is a clear risk of arbitrariness and discrimination in the granting of such broad powers to a police officer, finding that there are differential impacts with respect to certain groups affected by their exercise.[94]

56. For his part, the Rapporteur on Torture, referring to the pursuit of terrorism, has underscored that "the exigencies of dealing with terrorist criminal activities cannot justify interpreting the notion of the 'reasonableness' of the suspicion on which an arrest and then a detention may be based, to the point of impairing its very meaning."[95]

57. Along the same lines, the current United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has considered that arrests based on racial and ethnic profiles are contrary to international standards due to their discriminatory nature.[96]

58. The United Nations Working Group on Arbitrary Detention has indicated that if there are reasonable indicia of a violation of the international requirements then the state bears the burden of proof.[97]

59. Finally, as per the repeated case-law of the Inter-American Court, Article 25(1) of the Convention

> … includes an obligation for States Party to guarantee all persons under its jurisdiction access to an effective judicial remedy against acts that violate their fundamental rights. This effectiveness supposes that in addition to the formal existence of the remedies, they get results or responses to the violations of the rights contemplated in the Convention, in the Constitution or in laws…. Thus the proceeding must tend toward the materialization of the protection of

[92] ECtHR, Gillan and Quinton v. United Kingdom, Judgment of June 28, 2010, paras. 62-65.
[93] ECtHR, Gillan and Quinton v. United Kingdom, Judgment of June 28, 2010, paras. 83-84.
[94] ECtHR, Gillan and Quinton v. United Kingdom, Judgment of June 28, 2010, para. 85.
[95] United Nations, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Provisional Report, A/57/173, published July 2, 2002, para. 21.
[96] United Nations, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere**,** Report on Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up to and implementation of the Durban Declaration and Programme of Action, A/HRC/29/46, April 20, 2015, para. 63.
[97] United Nations, Working Group on Arbitrary Detention, Opinion no. 58/2016 re: Paulo Jenaro Díez Gargari, Mexico, A/HRC/WGAD/2016/58, January 30, 2017, para. 19.

the right recognized in the judicial ruling through the suitable application of that ruling.[98]

60. Accordingly, for there to be an effective remedy it does not suffice that it is provided for in a provision, or that it is formally admissible, but rather it must be genuinely suitable for establishing whether there has been a human rights violation and provide as necessary to remedy it.[99]

61. The Constitution in force at the time of the facts establishes at Article 18 that "no one may be … arrested other than by written order of a competent authority." The IACHR recalls that said provision "does not set beforehand any cause or condition for detention."[100] On referring to the "competent authority" the Constitution does not expressly regulate in whom such competence vests.[101] Accordingly, the Commission must turn to other areas of the legal system, mindful of the specific circumstances in each case and the parties' arguments.

62. As indicated in the section on facts proven, the Code of Criminal Procedure, in 1992, allowed for the detention "of those against whom there are vehement indicia or *prima facie* conclusive evidence guilt." Law 23,950 of 1991 established that a person should be held "if there are duly founded circumstances that allow one to presume that someone has committed or may commit a criminal act." In addition, the reform to the Code of Criminal Procedure indicates that the police agents should detain someone, even without judicial order, if "there are vehement indicia of guilt and there is an imminent danger of flight or serious impairment" of the proceedings.

63. The IACHR notes that the analysis for determining the legality and non-arbitrary nature of the detention is focused on the moment when the police agents decided to hold, question, and search Messrs. Fernández and Tumbeiro, situations which, as indicated, the European Court has considered to be included in the right not to be unlawfully and arbitrarily deprived of liberty. The analysis of the state action at that first moment in light of the safeguards in Articles 7 and 11 of the Convention is independent of the fact that after the search and even throughout the criminal proceeding it was found that the alleged victims in effect had committed a crime, which is outside of the scope of this analysis.

64. In the instant case it is not disputed that Messrs. Fernández and Tumbeiro were stopped and searched by police agents without a court order. Nor was it possible to perceive any situation of flagrancy at the moment the police agents decided to stop and search them. Accordingly, it is clear that the reasons that led to the stops and searches, whose findings led, in turn, to the arrest, were not based on these criteria, but on the police power to stop a person for suspicion in the terms regulated in the legislation.

65. The Commission considers that the states may and should regulate, in their provisions, the reasons, circumstances, and procedures that justify a deprivation of liberty and conducting a search. Nonetheless, in keeping with the standards described, Article 7(2) of the Convention requires not only the existence of such a regulation, but that it be as clear and detailed as possible and in keeping with the foreseeability that underlies the principle of juridical security. More specifically, the Commission considers it acceptable, in principle, for the states to grant police officers powers for crime prevention. Nonetheless, these powers should be accompanied by safeguards both in the legislation and in the institution, through adequate trainings, as well as by establishing serious mechanisms to ensure the accountability of police action. The existence of these safeguards is aimed at preventing arbitrary detentions in the terms of Article 7(3) of the Convention, even in the legitimate context of preventing crime.

66. The Commission observes that the regulation that granted the authority applied in the case is extremely vague and does not include specific references to objective reasons or parameters that could potentially

[98] I/A Court HR. *Case of Abrill Alosilla et al. v. Peru.* Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of November 21, 2011. Series C No. 235, para. 75. The cites within the original text were omitted.

[99] I/A Court HR. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of June 17, 2005. Series C No. 125, para. 61; I/A Court HR. *Case of "Five Pensioners" v. Peru.* Judgment of February 28, 2003. Series C No. 98, para. 136, and I/A Court HR. *Case of the Awas Tingni Mayagna (Sumo) Community v. Nicaragua.* Judgment of August 31, 2001. Series C No. 79, para. 113.

[100] IACHR, Application before the I/A Court HR, Walter David Bulacio, Argentina, January 24, 2001, para. 79.

[101] IACHR, Application before the I/A Court HR, Walter David Bulacio, Argentina, January 24, 2001, para. 79.

justify the suspicion. In addition, the legislation does not include any requirement that the police authorities be accountable, in writing and to their superiors, for the detail of the reasons that led to the arrest and search. In addition, from the context described in the section of facts proven, it appears that the incidents in this case are not isolated but that these provisions and their application in practice have resulted in abusive actions by the police.

67. In the case of Mr. Fernández, the arrest report only indicates that he had a "suspicious attitude." The IACHR takes note that said report does not explain what "suspicious attitude" means when applied to the circumstances of time, manner, and place of Mr. Fernández, nor does it mention other reasons for searching him and the vehicle in which he was traveling.

68. In the case of Mr. Tumbeiro, from the information submitted by the parties it appears that the initial detention was based on (i) a supposed "state of nervousness"; (ii) that his attire "was not similar to what one sees in the zone"; and (iii) that he indicated that he was in the zone to purchase electronic products when such products are not sold there.

69. The State confirmed the foregoing on noting that the police action, before verifying the supposed possession of narcotics, was based on the "reasonable suspicion" identified by the respective agents.

70. Accordingly, the Commission observes that in neither of the two arrests were the objective elements that led to a degree of reasonable suspicion that a crime was being committed established in any detail, in the respective police documentation. In the case of Mr. Prieto, that lack of explanation was absolute. In the case of Mr. Tumbeiro, that the explanation related to "state of nervousness" and inconsistency between the attire and his reason for being in that place is not only insufficient to justify, in the eyes of a reasonable spectator, a suspicion of crime, but moreover may reveal a certain discrimination based on appearance and the prejudices about that appearance in relation to the respective zone. As indicated, powers of this nature that are not accompanied by additional safeguards create a risk of discriminatory actions based on profiles associated with stereotypes.

71. In that regard, it is possible to establish that the stops and searches in the instant case not only failed to meet the standard of lawful and non-arbitrary, but are in the context already indicated in the section on Facts Proven and identified domestically and internationally.

72. In the face of this situation of lack of objective justification for the police action in the specific cases, the judicial authorities who heard the respective appeals did not offer effective remedies, for not only did they continue with the State's failure to require objective reasons for the exercise of the legal power to stop persons based on suspicion, but they validated, as lawful, the reasons given by the police officers, which, as indicated, in the view of the Commission are entirely insufficient to justify a deprivation of liberty associated with the suspicion of criminal conduct. To the contrary, based on the respective motivations, it would appear that an effort is made to justify the suspicion at the moment of the stops and searches based on the subsequent corroboration that they had in fact engaged in criminal conduct.

73. The European Court addressed this situation of subsequent corroboration in the case of *Ilgar Mammadov v. Azerbaijan*, indicating: "The Court is mindful of the fact that the applicant's case has been taken to trial…. That, however, does not affect the Court's findings in connection with the present complaint, in which it is called upon to examine whether the deprivation of the applicant's liberty during the pre-trial period was justified on the basis of information or facts available at the relevant time."[102]

74. In this regard, the Commission is of the view that the subsequent corroboration that the persons affected may indeed have been engaged in criminal conduct is irrelevant for the purposes of establishing the violations stemming from the stop, search, and arrest. Moreover, the Commission considers that the inconsistency of those procedures with the requirements of the American Convention should have led the domestic authorities to exclude any evidence obtained from the use of procedures in violation of the alleged victims' rights. This exclusion should have operated as the result of serious police and judicial review of the actions by the police officers, which did not happen in this case. To the contrary, as explained, the reasons given

[102] ECtHR. Case Ilgar Mammadov v. Azerbaijan. Judgment of May 22, 2014, para. 100.

by the officers for the purported suspicion were validated judicially. The Commission reiterates that the evidence obtained in the context of these procedures should be excluded; on not having done so, the domestic authorities allowed both the pretrial detention and the criminal trial and conviction to become arbitrary as well. With respect to pretrial detentions, the Commission also observes that they extended for the unreasonable time of six years in the case of Mr. Fernández and four years in the case of Mr. Tumbeiro, from the deprivation of liberty to the convictions becoming final.

75. In view of the foregoing, the Commission concludes that the State of Argentina is responsible for violating the rights established at Articles 7(1), 7(2), 7(3), 7(5), 8(1), 11(2), and 25(1) of the American Convention in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro.

VI. CONCLUSIONS

76. Based on the considerations of fact and law set forth throughout this report on the merits, the Inter-American Commission concludes that the Argentine State is responsible for violating the rights to personal liberty, judicial guarantees, and judicial protection, established at Articles 7(1), 7(2), 7(3), 7(5), 8(1), 11(2), and 25(1) of the American Convention, in relation to the obligations established at Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro.

VII. RECOMMENDATIONS

77. In light of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF ARGENTINA,

1. That it make full reparation for the human rights violations found in this report in both the material and moral aspects to the detriment of Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro. This reparation should take into account both that the initial stop and search were not in keeping with the requirements of the American Convention, and the proceedings, pretrial detention, and criminal conviction that took place based on the findings of the initial stop and search, in the terms established in this report.

2. That it adopt legislative, administrative, or other measures to prevent the repetition of the human rights violations found in this report. In particular: (i) the State should ensure that the legislation that regulates the power to stop and search persons in public places on the basis of suspicion that they might be committing a crime is based on objective reasons and includes requirements to justify those reasons in each case; (ii) the State should adopt measures to properly train police personnel so as to avoid abuses in the exercise of that power, including trainings on the prohibition on exercising it in a discriminatory manner based on profiles associated with stereotypes; and (iii) the State should ensure the existence and implementation of judicial remedies to address reports of public abuses in the context of the exercise of that power.