**INTER-AMERICAN COURT OF HUMAN RIGHTS**

# CASE OF FORNERÓN AND DAUGHTER *v.* ARGENTINA

## JUDGMENT OF APRIL 27, 2012

***(Merits, Reparations, and Costs)***

In the case of *Fornerón and daughter*,

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

Diego García-Sayán, President
Manuel E. Ventura Robles, Judge
Margarette May Macaulay, Judge
Rhadys Abreu Blondet, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Vio Grossi, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

in accordance with Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and with Articles 31, 32, 65, and 67 of the Court Rules of Procedure (hereinafter also "the Rules of Procedure"), delivers this Judgment.

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[*] Judge Leonardo A. Franco, an Argentine national, did not take part in this case in accordance with Article 19(1) of the Court's Rules of Procedure approved at its eighty-fifth regular session, which entered into force on January 1, 2010, pursuant to Article 78 thereof.

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## I
## INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On November 29, 2010, pursuant to Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission" or "the Commission") submitted the case of Fornerón and daughter against the Republic of Argentina (hereinafter also "the State" or "Argentina") to the jurisdiction of the Inter-American Court. The case originated from a petition presented on October 14, 2004 by Leonardo Aníbal Javier Fornerón and by Margarita Rosa Nicoliche, legal representative of the *Centro de Estudios Sociales and Políticos para el Desarrollo Humano* (hereinafter "CESPPEDH"), with Susana Ana Maria Terenzi and Alberto Pedronccini as legal representatives. On October 26, 2006, the Inter-American Commission adopted Report on Admissibility No 117/06[1] and on July 13, 2010, it approved Report on Merits No. 83/10 under Article 50 of the Convention (hereinafter also "the Merits Report" or "Report No. 83/10"), in which it made a series of recommendations to the State. The report was notified to Argentina in a communication of July 29, 2010, granting it two months to report on compliance with the recommendations. Following the expiry of an extension requested by Argentina, the Commission submitted the case to the Court owing to the State's failure to comply with the recommendations, and the consequent need to obtain justice and effective protection of the rights to protection of the family and of the best interest of the child, as well as the need for the State to amend its law on the sale of children, and to provide integral reparation for the human rights violations in this case. The Inter-American Commission appointed Commissioner Luz Patricia Mejía and Executive Secretary Santiago A. Canton, as delegates, and Deputy Executive Secretary Elizabeth Abi-Mershed and María Claudia Pulido, Marisol Blanchard and Lilly Ching Soto, attorneys of the Executive Secretariat, as legal advisers.

2. According to the Inter-American Commission, this case relates to the alleged violation of the right to protection of the family of Mr. Fornerón and his biological daughter.[2] The infant was handed over by her mother for pre-adoptive care to a married couple without the consent of her biological father, who has no access to the child, and the State has not ordered or implemented a visiting regime despite numerous requests by Mr. Fornerón over the last 10 years. The Commission considered that the passage of time was particularly relevant in the determination of the legal status of the child and her father, because the judicial authorities granted the simple adoption of the girl in favor of the couple with guardianship on December 23, 2005, based on the relationship that had developed over time. The unjustified delay in the proceedings became the grounds for disregarding the father's rights. Consequently, the Commission asked the Court to conclude and declare the international responsibility of the State for violating the rights of Mr. Fornerón and his daughter to due process and to judicial guarantees, and their right to protection of the family established in Articles 8(1), 25(1) and 17 of the American Convention, respectively, in relation to Articles 19 and 1(1) of this instrument, and for failure to comply with Article 2 of the Convention in relation to Articles 1(1) and 19 thereof. The Commission asked the Court to order various measures of reparation.

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[1] In this Report, the Inter-American Commission declared the petition admissible with regard to the alleged violation of Articles 1(1), 8, 17, 19 and 25 of the American Convention.

[2] Hereafter, the Court will refer to the child as M, and to the adoptive couple as B-Z, in order to protect the former's identity.

## II
## PROCEEDINGS BEFORE THE COURT

3. The Inter-American Commission's submission of the case was notified to the State and to the representatives of the presumed victims (hereinafter "the representatives") on January 31 and February 3, 2011. On April 1, 2011, Susana Terenzi and Margarita Nicoliche forwarded their brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"), pursuant to Articles 25 and 40 of the Rules of Procedure. The representatives agreed, in general, with the violations alleged by the Inter-American Commission and also asked the Court to order different measures of reparation.

4. On July 11, 2011, the State presented its answer to the briefs submitting the case and with pleadings and motions (hereinafter "answering brief" or "answer"). Argentina emphasized its "willingness, political will, and the specific actions taken proactively in order to resolve the situation described." The State indicated that it had avoided confrontation by all available means, and had always given priority to dialogue, proposing as a work strategy the possibility of re-establishing the relationship between Mr. Fornerón and his biological daughter, as this was the only effective option in this case. In addition, it recalled the diverse measures taken by different authorities, including those taken by a Minister of Justice and Human Rights of the Nation in order to reach a friendly settlement. Furthermore, the State referred, among other matters, to the definition of the procedural purpose of the case, to the intervention of provincial authorities in various steps taken, and to some of the measures of reparation requested by the representative. The State appointed Eduardo Acevedo Díaz as Agent, and Juan José Arcuri, Alberto Javier Salgado, and Andrea Gualde as Deputy Agents.

5. Following the presentation of the main briefs (*supra* paras. 1 to 4), as well as other briefs forwarded by the parties, in an Order of September 13, 2011, the President of the Court ordered that the statements of five witnesses[3] and the opinion of one expert witness, proposed by the representatives, be received by sworn statements made before notary public (hereinafter also "affidavit"), regarding which the State was given the opportunity to formulate questions and observations. In addition, he convened the Inter-American Commission, the representatives and the State to a public hearing to receive the statement of Mr. Fornerón, proposed by the representatives, and the expert opinions of Emilio García Méndez, proposed by the Inter-American Commission, and Graciela Marisa Guilis and Carlos Ariana, proposed by the State, as well as the final oral arguments of the representatives and the State, and the final oral observations of the Commission on the merits, reparations, and costs.[4]

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[3] Finally, the representatives only forwarded three of the five statements offered.

[4] *Cf. Case of Fornerón and daughter v. Argentina. Invitation to a Public Hearing.* Order of the President of the Inter-American Court of Human Rights of September 13, 2011; available at: http://www.corteidh.or.cr/docs/asuntos/forneron.pdf. Following the said convocation, the State advised that for duly justified reasons of *force majeure*, expert witness Arianna was unable to take part in the public hearing. The Court authorized the said expert witness to provide his opinion by affidavit, granting the representatives the opportunity to formulate questions and observations on it. However, the Court did not admit the representatives' request for reconsideration in relation to the omission of an expert witness from their final list of deponents. *Cf. Case of Fornerón and daughter v. Argentina.* Order of the Inter-American Court of Human Rights of October 9, 2011 (merits file, tome II, folios 1180 and 1184).

6. The hearing took place on October 11, 2011, during the forty-fourth special session of the Court, held in Bridgetown, Barbados.[5] During the hearing, the Court asked the parties to provide specific additional information when submitting their written final arguments.

7. On November 14 and 16, 2011, the representatives, the State, and the Inter-American Commission sent their respective final written arguments and observations. With their briefs, the State and the representatives submitted documents that were forwarded to the other parties so that they could make any observations they deemed relevant. In addition, on November 29, 2011, under Article 58(b) of the Rules of Procedure, the State was requested to forward specific information and documentation as helpful evidence by December 14, at the latest.[6] On December 14, 2011, Argentina requested an extension and this was granted by the Court, establishing a new deadline for receiving the information of January 23, 2012. On January 24, 2012, Argentina presented some information, although not the information that had been specifically requested, and the State was advised of this situation. On February 28, 2012, Argentina forwarded another brief containing part of the information requested by the Court as helpful evidence. The Court informed the State that the admissibility of this documentation would be considered at the appropriate opportunity[7] (*infra* para. 12).

8. In addition, the Court received *amicus curiae* briefs from the following persons and institutions: (1) Laura Clérico and Liliana Ronconi, professors of the Law School of the Universidad de Buenos Aires; (2) Diana Mafia, Legislator of the Autonomous City of Buenos Aires; (3) the Committee against Torture of the *Comisión Provincial por la Memoria* [the Provincial Commission for Memory];[8] (4) the *Adoptar* Foundation,[9] and (5) Laura María Giosa, Simón Conforti, Renzo Adrián Sujodolski, Marisa Herrera and Lucas E. Barreiros, coordinators of the master's programs in family, children's and adolescents' law and international human rights law of the Law School of the Universidad de Buenos Aires.

## III
## JURISDICTION

9. The Inter-American Court has jurisdiction to hear this case in accordance with Article 62(3) of the American Convention on Human Rights, because Argentina has been a State Party to the American Convention since September 5, 1984, and accepted the binding jurisdiction of the Court on that same date.

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[5] There appeared at this hearing: (a) for the Inter-American Commission: Luz Patricia Mejía Guerrero, Delegate and Silvia Serrano Guzmán, legal adviser; (b) for the representatives: Susana Ana María Terenzi and Margarita R. Nicoliche, and (c) for the State: Alberto Javier Salgado, Julia Loreto, Andrea Gladys Gualde, María Eugenia Carbone, and Marisa Graham.

[6] *Cf.* Note of the Secretariat of the Court REF.: CDH-12.584/108 of November 29, 2011, requesting the State to forward: (a) a complete copy of the civil and criminal judgments referred to in the attachment to its final written arguments, in the case identified as "E.Z. ref/guardianship. March 2010. Civil Court No. 38"; (b) information on whether the act of surrendering a child in exchange for financial compensation or payment is a criminal offense under domestic law and, in this regard, it should provide any observations it deems pertinent, and (c) detailed information on the steps taken by the State in order to verify whether the actions of the officials who intervened in the different domestic proceedings concerning this case were in keeping with the law and, if appropriate, the results.

[7] *Cf.* Notes of the Secretariat of the Court REF.: CDH-12.584/111, 114 and 117 of December 20, 2011, and January 31 and March 6, 2012.

[8] The brief was filed by Adolfo Perez Esquivel, Aldo Etchegoyen, Alejandro Mosquera, Elisa Carca and Roberto F. Cipriano García, directors of the *Comisión Provincial por la Memoria.*

[9] The brief was filed by Julio Cesar Ruiz, President of the *Adoptar* Foundation.

## IV
## EVIDENCE

10. Based on the provisions of Articles 50, 57 and 58 of the Rules of Procedure, as well as on its case law concerning evidence and its assessment, the Court will examine and weigh the documentary evidence submitted by the parties at different procedural opportunities, the statements of the presumed victim, the testimony of the witnesses, and the opinions of the expert witnesses provided by affidavit and during the public hearing before the Court. To this end, the Court will follow the rules of sound judicial discretion within the corresponding legal framework.[10]

### *A. Documentary, testimonial and expert evidence*

11. The Court received diverse documents presented as evidence by the Inter-American Commission, the representatives, and the State, as well as the testimony and expert opinions provided by affidavit by the following persons: Olga Alicia Acevedo, Gustavo Fabián Baridón, Rosa Fornerón, José Arturo Galiñanes and Carlos Alberto Arianna. Regarding the evidence provided at the public hearing, the Court received the statement of the presumed victim Leonardo Aníbal Javier Fornerón, and the opinions of the expert witnesses Emilio Arturo García Méndez and Graciela Marisa Guilis.[11]

### *B. Admission of the evidence*

12. In this case, as in others, the Court admits those documents forwarded by the parties at the appropriate procedural opportunity that were not contested or opposed, and the authenticity of which was not questioned.[12] The information and documents requested as helpful evidence that were submitted by the State two and a half months after the original deadline and more than a month after the extension granted had expired (*supra* para. 7) are not admitted by the Court.

13. In addition, regarding the statement of the presumed victim, the testimony and the expert opinions provided during the public hearing and by affidavit, the Court considers them pertinent only to the extent that they are in keeping with the purpose defined by the President of the Court in the Order requiring them. They will be assessed in the corresponding chapter, together with the other elements of the body of evidence, and taking into account the observations formulated by the parties. Moreover, pursuant to this Court's case law, the statements provided by the presumed victims cannot be assessed alone, but must be evaluated together with all the other evidence in the proceedings, because they are useful insofar as they can provide more information on the alleged violations and their consequences.[13] Based on the foregoing, the Court admits the said statements and expert opinions and will assess them in accordance with the above-mentioned criteria.

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[10] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 76, and *Case of González Medina and family v. Dominican Republic*. *Preliminary objections, merits, reparations and costs*. Judgment of February 27, 2012. Series C No. 240, para. 64.

[11] The purpose of these statements can be consulted in the Order of September 13, 2011, convening the public hearing, *supra* note 4.

[12] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 1, para. 140, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 66.

[13] *Cf. Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of González Medina and family v. Dominican Republic*, supra note 10, paras. 79 and 80.

## VI
## PRELIMINARY CONSIDERATIONS

### *A. Determination of the presumed victims*

14. With regard to the persons who must be considered presumed victims in this case, the Inter-American Commission noted that when approving Report No. 83/10, it had referred to the child and to Mr. Fornerón, the only names that appeared in the case file at the time the decision was adopted. In addition, it observed that, following the approval of that report, the representatives added certain next of kin of Mr. Fornerón and his daughter as presumed victims. Thus, in their pleadings and motions brief, the representatives added as presumed victims: Argentina Rogantini (paternal great-grandmother of the child), and Araceli Nahir Terencio and Víctor Fornerón (paternal grandmother and grandfather of the child). The State indicated that the only beneficiaries of possible reparations are those determined by the Commission in its Merits Report; namely, Mr. Fornerón and the child, M.

15. The Court recalls that, in its case law in recent years, it has established that the presumed victims must be indicated in the Commission's report under Article 50 of the Convention and in the application filed before the Court. In addition, under Article 34(1) of the current Rules of Procedure, it is for the Commission and not this Court to identify the presumed victims in a case before the Court precisely and at the appropriate procedural opportunity.[14]

16. The instant case was filed under the Court's Rules of Procedure that came into force in 2010. Consequently, under Article 35 thereof, the Commission does not submit the case by means of an application, but rather by the presentation of the report referred to in Article 50 of the Convention. Thus, in accordance with the criteria indicated above, the Court considers it necessary to clarify that the next of kin added by the representatives will not be considered presumed victims in this case, because they were not indicated as such by the Inter-American Commission in Report on Merits No. 83/10.

### *B. Determination of the factual framework*

17. According to Article 35(3) of the Rules of Procedure, the Inter-American Commission must indicate which of the facts contained in the report referred to in Article 50 of the Convention are submitted to the Court's consideration. In its brief submitting the case, the Commission indicated that "it submitted to the jurisdiction of the Court all the facts [...] described in Report on Merits [No.] 83/10." Thus, the Merits Report constitutes the factual framework for the proceedings before the Court, so that, with the exception of events subsequent to the submission of the case, it is not admissible to allege in the pleadings and motions brief any facts other than those described in the Report, without prejudice to presenting those that explain, clarify, or reject facts that have been mentioned in the latter.[15]

18. The representatives indicated that in "Argentina child trafficking is systematic throughout the country, [and] that the State is aware of such situations." They also

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[14] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 42.

[15] *Cf. Case of "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, paras. 153 and 154, and *Case of the Barrios Family v. Venezuela. Merits,* reparations and costs. Judgment of November 24, 2011. Series C No. 237, paras. 32 and 33.

asserted that "child trafficking is a common practice Argentina" and that "in this specific case, it is evident that child trafficking has resulted in the violation of different human rights of [M and her father] recognized in the international instruments, which reveals the State's failure to comply with its obligations." They added that the facts of this case "confirm the complicity of the judicial agents with a child trafficking network that operated in Rosario del Tala and with those who appropriated [M]." The State considered that any statement tending to identify the facts of the case as situations related to the trafficking or the "sale" of children was inappropriate. Argentina denied the representatives allegations concerning a supposed "general situation […] tolerated by the State apparatus" or the existence of a "massive and systematic practice of child-trafficking […], or that the case was in any way similar to the illegal appropriation and substitution of identify of children that took place under the criminal plans of the last military dictatorship in Argentina."

19. When determining the facts in the Merits Report, the Commission did not indicate the existence of a habitual or systematic practice of the sale or "trafficking of children" in Argentina; these facts were only described by the representatives. In addition, the representatives did not argue that these facts were designed to "explain, clarify or reject" the facts that had been mentioned in Report No. 83/10. According to the above-mentioned criteria, the Court will not consider the facts alleged by the representatives that are not part of the Commission's Merits Report, or that do not explain, clarify or reject the facts presented by the Commission. Consequently, the alleged existence of a general situation or systematic practice of the trafficking or sale of children in Argentina does not form part of the factual framework of this case and, therefore, the Court will not consider the arguments related to those aspects.

## VI
## RIGHTS TO JUDICIAL GUARANTEES, TO JUDICIAL PROTECTION, TO PROTECTION OF THE FAMILY AND OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS, IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS, AND TO THE RIGHTS OF THE CHILD

### *A. Facts*

20. Before establishing the proven facts, the Court recalls that, according to Article 41(3) of the Rules of Procedure, it may consider accepted the facts that have not been expressly denied and the claims that have not been expressly contested. In this case, the State has not contested the facts that are considered proven in the following paragraphs.

21. On June 16, 2000, M, the daughter of Diana Elizabeth Enríquez and Mr. Fornerón was born in the Victoria Polyclinic Hospital. The two adults had a relationship that ended before the child was born. Mr. Fornerón was unaware of the existence of the pregnancy of Ms. Enríquez until approximately the fifth month, when a mutual friend told him about it. After he knew about the pregnancy, Mr. Fornerón asked Ms. Enríquez several times if he was the father and each time she denied this. The birth of M was registered by the mother on June 20, 2000. At the time of the facts, both Mr. Fornerón and the mother of the child lived in Rosario del Tala, a city about 100 milometers from Victoria.[16]

22. The day after the birth, Ms. Enríquez surrendered her daughter to the couple B-Z,

[16] *Cf.* Testimony of Olga Acevedo rendered before notary public on October 4, 2011 (merits file, tome II, folios 1140 and 1141); birth certificate of M dated June 20, 2000 (file of attachments to the Merits Report, attachment 5, folio 47), and statement by Mr. Fornerón during the public hearing on October 11, 2011.

residents of the Autonomous City of Buenos Aires, with the intervention of the Deputy Ombudsman for Children and the Poor of Victoria, who formally recorded the surrender. The record of the surrender prepared by the said official states that the mother "expressly affirms her willingness to surrender her daughter under provisional guardianship for the purpose of future adoption" to the said couple, and "expresse[d her] wish not to be summoned to any judicial procedure on guardianship and/or full adoption that may be conducted for that purpose."[17] Subsequently, Ms. Enríquez returned to Rosario del Tala, and there Mr. Fornerón, who had learned of the birth of the child through the said mutual friend, again consulted the mother about whether he was the father of the child and told her that, if this was so, they could both go and fetch her and he would take care of her. Ms. Enríquez confirmed that he was the father, but indicated that she did not want him to go and fetch the child.[18]

23. Owing to the foregoing, on July 3, 2000, 17 days after the birth of M, Mr. Fornerón and Ms. Enríquez appeared before the Ombudsman for Children and the Poor of Rosario del Tala. There Mr. Fornerón expressed his interest in acknowledging the paternity of M and indicated that, even though he was not certain he was the father, if appropriate, he wished to take responsibility for the child. Before the Ombudsman for Children and the Poor, Ms. Enríquez stated that Mr. Fornerón was not the father of the child and advised that the child was in Baradero, in an aunt's house. On July 4, 2000, Mr. Fornerón informed the Children's Ombudsman that he was concerned about the whereabouts of the child, as well as about her health, and expressed his doubts with regard to the version given by Ms. Enríquez. The following day, Ms. Enríquez appeared again before the same Ombudsman and told him that she had surrendered the child in guardianship for future adoption to a couple she knew, owing to her limited resources and, once again, assured that Mr. Fornerón was not the child's father.[19]

24. On July 18, 2000, one month and two days after the birth of M and 15 days after having appeared before the Children's Ombudsman, Mr. Fornerón went to the Civil Registry and legally acknowledged his daughter.[20]

25. The said facts were analyzed, *inter alia,* during several judicial proceedings to which the Court will refer below, corresponding to: (a) the criminal case on the possible elimination of civil status; (b) the civil case on judicial guardianship; (c) the civil case on visiting rights, and (d) the civil case on full adoption.[21]

*Case entitled "Prosecutor requests precautionary measures – possible perpetration of elimination of civil status," file No. 537*

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[17] *Cf.* Record of the surrender of M dated June 17, 2000 (file of attachments to the answer, tome III, folio 3075).

[18] *Cf.* Statement by Mr. Fornerón during the public hearing of October 11, 2011, and testimony of Olga Acevedo, *supra* note 16, folios 1141 and 1142.

[19] *Cf.* Briefs of the Ombudsman for Children and the Poor of the jurisdiction of Rosario del Tala of July 3 and 5, 2000 (file of attachments to the answer, tome II, folios 2685 to 2687), and brief of the prosecution requesting precautionary measures of July 11, 2000 (file of attachments to the Merits Report, attachment 4, folios 38 al 40).

[20] *Cf.* Birth certificate of M, *supra* note 16, folio 47.

[21] In addition to the judicial proceedings examined in this judgment, the Commission and the representatives included references to two domestic proceedings regarding which they did not allege specific violations of the rights contained in the Convention; consequently, they will not be included in this chapter. These are the cases entitled "Fornerón Aníbal Leonardo, regarding precautionary measures," file No. 33.707 before National Civil Justice Court No. 86 of the City of Buenos Aires and "Enríquez, Diana Elizabeth ref. her complaint," before the Trial Court of Victoria.

26. On July 11, 2000, 25 days after the birth, the prosecutor, having been informed of the facts by Mr. Fornerón, asked the investigating judge to adopt precautionary measures, owing to the uncertainty about the fate of the child and to the contradictions in the statements made by the mother. In his brief, the prosecutor indicated that it could not be ignored "that one of the offenses established in Title 4, Chapter 2 of the Criminal Code had been committed," corresponding to elimination and substitution of civil status and identify.[22]

27. On July 28, 2000, the investigating judge determined "the irrelevance" of some of the measures requested by the prosecutor, because "it [was] clear that, in the instant case, none of the unlawful conducts established and sanctioned [in the Criminal Code] had been committed; […] notwithstanding the particular characteristics of the birth and subsequent surrender of the [child], in a place located more than 100 kilometers from the domicile of the [mother]." On August 2, 2000, the prosecutor formulated a "request for a preliminary investigation" into the presumed perpetration of offenses established in articles 138 and 139(2) of the Criminal Code.[23]

28. On August 4, 2000, the investigating judge decided to file the proceedings because the facts "do not correspond to the definition of any offense." In addition, he considered, among other grounds, that "since [Mr. Fornerón] had not acknowledged the [child] as his child born out of wedlock, and irrespective of the reasons why this was not done, he has not yet been summoned as the father of the child,"[24] so that the conduct of Ms. Enríquez "is not designed to violate [Mr.] Fornerón's civil status as a father, simply because he lacks this status until he acknowledges his presumed daughter"; thus her conduct was not punishable under article 138 of the Criminal Code. In addition, in the said articles 138 and 139, the passive subjects of the crime are minors, and "the alteration [they establish] refers to the civil status of another individual, because if it referred to that of the author, no offense would have been committed."[25]

29. On August 10, 2000, the prosecutor filed an appeal against the decision to archive the case.[26] On September 12, 2000, the Gualeguay Criminal Chamber revoked the decision appealed and ordered the acting judge to continue investigating the case.[27] On January 31, 2001, the Investigating indicated that, having analyzed numerous pieces of evidence, he had "arrived at the same conclusion as [previously]," and therefore ordered that the case be archived.[28] On February 5, 2001, the prosecutor filed an appeal against this decision in which he underscored that Mr. Fornerón had acknowledged his daughter and had submitted to DNA testing that confirmed his paternity, despite which the investigating judge archived the case, this time without using the argument that there was no violation of the civil status

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[22] *Cf.* Brief of the prosecutor of July 11, 2000, *supra* note 19, folios 41 and 42.

[23] *Cf.* Ruling of the investigating judge of Rosario del Tala of July 28, 2000, and the prosecutor's request for a preliminary investigation of August 2, 2000 (file of attachments to the Merits Report, attachments 6 and 7, folios 50 to 60).

[24] The evidence in the case file before this Court shows that the information on Mr. Fornerón's acknowledgement of his daughter was incorporated into the case file in September 2000; that is, after the ruling of the investigating judge (file of attachments to the answer, tome II, folios 2765 to 2769).

[25] *Cf.* Ruling of the investigating judge of Rosario del Tala of August 4, 2000 (file of attachments to the Merits Report, attachment 8, folios 63 to 69).

[26] *Cf.* Appeal filed by the prosecutor on August 10, 2000 (file of attachments to the Merits Report, attachment 9, folios 71 to 80).

[27] *Cf.* Ruling of the Gualeguay Criminal Chamber of September 12, 2000 (file of attachments to the Merits Report, attachment 10, folios 82 and 83).

[28] *Cf.* Ruling of the investigating judge of January 31, 2001 (file of attachments to the Merits Report, attachment 11, folios 85 to 97).

of father, because Mr. Fornerón had not appeared in that capacity, but rather using new arguments, ignoring the said status of father.[29]

30. On April 26, 2001, the Gualeguay Criminal Chamber rejected the appeal, confirming the decision to archive the case. The said Chamber stated, *inter alia*, that, from the evidence gathered, "the existence of acts executing the offenses sanctioned in article 11 of Title IV of the second volume of the Criminal Code [could not be] suspected," and that "the purpose [of the reform of Law No. 24,410] was not to eliminate the activities of those who profit from the sale of, or act as intermediaries in, the surrender of children for benevolent or humanitarian purposes."[30]

*Case entitled "[M.] Re/Judicial Guardianship," file No. 994*

31. On August 1, 2000, a month and a half after the child's birth, the couple B-Z requested the judicial guardianship of M. On August 29, 2000, the Ombudsman for Children and the Poor (hereinafter also "the Children's Ombudsman") informed the investigating judge that Mr. Fornerón had acknowledged the child. On September 27, 2000, the said judge ordered that Mr. Fornerón be summoned to appear, and on October 3, 2000, this official received a note from the first instance judge of the criminal case "Prosecutor requests precautionary measures - possible perpetration of elimination of civil status," advising him of the case filed in the latter's jurisdiction. On October 18, 2000, Mr. Fornerón, as "biological father of the [child]," asked the first instance judge to suspend the legal guardianship and that the child be transferred to him granting him provisional guardianship. In view of the biological mother's denial of Mr. Fornerón's paternity DNA testing was ordered on November 13, 2000, and the results were received by the first instance judge on December 11, 2000. The test confirmed Mr. Fornerón's paternity. On February 14, 2001, Mr. Fornerón reiterated his request for suspension of the guardianship and return of the child, "who I not only love as my daughter, but also I have the legal and biological certainty that I am her father."[31]

32. In March 2001, the first instance judge ordered that a psychological report be prepared based on the Children's Ombudsman's request for an expert appraisal on the "possible harm that [the child] could suffer if [her] surrender […] to her biological father was ordered." The said report, submitted to the judge on May 9, 2001, concluded that "the transfer from a family she know […] to one that she does not know would be extremely harmful for the child psychologically, [and that] taking the child away from the people she loves and from her environment would be exceedingly traumatic and could cause serious and irreversible emotional harm, especially [if] she has already suffered from an initial situation of abandonment." On May 7, 2001, Mr. Fornerón reiterated his previous request, indicating to the judge that the guardianship should be suspended "owing to the situation of the child who receives affection from those who currently have her, shares their home and

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[29] *Cf.* Appeal filed by the Prosecutor on February 5, 2001 (file of attachments to the Merits Report, attachment 12, folios 99 to 106).

[30] *Cf.* Ruling of the Gualeguay Criminal Chamber of April 26, 2001 (file of attachments to the Merits Report, attachment 13, folios 109 to 114).

[31] *Cf.* Ruling of the first instance judge of May 17, 2001 (file of attachments to the Merits Report, attachment 2, folio 14); brief requesting granting of legal guardianship of August 1, 2000; brief of the Ombudsman for Children and the Poor of August 28, 2000; record of summons to a hearing of Mr. Fornerón of September 27, 2000; note of the investigating judge of September 28, 2000; request to suspend the legal guardianship and return the minor filed by Mr. Fornerón on October 18, 2000; note of the First instance Judge of November 9, 2000; results of the DNA tests performed on Mr. Fornerón received by the court on December 11, 2000, and brief of Mr. Fornerón concerning the return of his daughter of February 14, 2001 (file of attachments to the answer, tome III, folios 3111, 3112, 3121, 3127, 3128, 3157 to 3160, 3163, 3173 to 3180 and 3182).

their possessions, and is becoming used to a precarious relationship and situation from which she will be taken […] to experience a new situation. But this reality will be increasingly painful, difficult and traumatic for [M] the longer it takes to return her."[32]

33. On May 17, 2001, the first instance judge granted legal guardianship of the child to the couple B-Z for one year. In the judgment, he considered that: (a) the inexistence of a "formal relationship of more than 12 months" between Mr. Fornerón and Ms. Enríquez, the fact that the child "was not the result of love" or "the desire to form a family," and the existence of the strong opposition of the biological mother to the possible surrender of the child to her father, are circumstances that "reveal[ed] a real conflict" between the child's parents and "the absence of a biological family"; (b) Mr. Fornerón had not shown any type of interest or collaboration with the mother before the child's birth, or filed any legal motion to safeguard his relationship with the child; (c) the length of time between the birth of the child or her acknowledgement and his appearance in the case to claim the surrender of M was excessive; (d) if the child were to be surrendered to her biological father, she would not have a biological family, or the presence of a mother, and (e) although he took into account the rights of the father, the best interest of the child was the most important factor and, in the expert's opinion, she would suffer irreparable harm if she was transferred to Mr. Fornerón. He concluded that "if the biological father agrees to it, in the future […] a visiting regime could be established so that he maintains contact with the child."[33]

34. On June 4, 2001, Mr. Fornerón and his lawyer filed an appeal against this judgment,[34] indicating, *inter alia*, that: (a) Ms. Enríquez had never provided evidence to the case file about the identity of the father; consequently, if it were not for his "determination to know the truth […] and the decision to acknowledge his daughter […] extrajudicially, he would never have found out about his paternity"; (b) the first instance judge did not order the necessary evidence and did not summon Mr. Fornerón; (c) the search, the acknowledgement, and the filing of a case before the court demanding the suspension of the guardianship are indicative of his concern to have, to take care of, to educate and to live with his daughter, so that the judge cannot affirm the father's lack of interest; (d) the judge supposes that it will be more beneficial for M to grow up with the couple than with the presence of her father, thus prejudging and underestimating the position of Mr. Fornerón, who unmarried, but with the full support of his family, claims his daughter; (e) considering that the absence of a family is an impediment to taking care of a child, or invoking the difference between "constituted family" and biological father is contrary, among other norms, to the national law on adoption and guardianship, as well as to the American Convention and the Convention on the Rights of the Child, and (f) in addition, the judge has not complied with the legal principle that require the father's consent to an adoption, because Mr. Fornerón "unequivocally expressed his decision not to grant guardianship of his daughter."

35. On June 10, 2003, the First Court of the Second Chamber of Paraná (hereinafter also "the Chamber"), having taken various measures,[35] revoked the first instance judgment,

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[32] *Cf.* Judgment of the first instance judge of May 17, 2001, *supra* note 31, folios 15 and 16; brief of Mr. Fornerón of May 7, 2001, and psychological report of May 9, 2001 (file of attachments to the answer, tome III, folios 3192 and 3198).

[33] *Cf.* Judgment of the first instance judge of May 17, 2001, *supra* note 31, folios 16 to 20.

[34] *Cf.* Appeal filed by Mr. Fornerón on June 4, 2001 (file of attachments to the answer, tome III, folios 3220 to 3234).

[35] The following measures were taken, among other: (a) on August 14 and 15, 2002, the inter-disciplinary team interviewed the couple B-Z, Mr. Fornerón and Ms. Enríquez, and on August 16, 2002, the report of the inter-disciplinary team that had been appointed was sent to the court; (b) a socio-environmental report was prepared on Mr. Fornerón, which was submitted to the Court on September 8, 2002; (c) on February 14, 2003, a hearing was

annulling the legal guardianship that had been established, which "was not legal." In the judgment, adopted by two votes in favor and one against, the majority votes stated, *inter alia*, that: (a) the presence of the Children's Ombudsman when the child was surrendered did not comply strictly with the legal requirements, because "only [guardianship] granted by the courts is admissible"; (b) the first instance judge should have warned that the criminal proceedings existed in relation to the facts, a circumstances that required "scrupulousness" in the procedural actions of the civil judge; (c) the psychological report considered by the first instance judge did not examine the ties between the child and the couple B-Z; there is no record that either the biological father or the said couple were interviewed, and it did not take into account the child's right to identity, and neither did the first instance judge; (d) Mr. Fornerón cannot be attributed with inertia in his actions and, in addition, the acknowledgement of the child in the civil registry office "juridically and legally, and while his paternity was not contested, granted him the status invoked, with all the corresponding rights and obligations," and (e) the consent that Mr. Fornerón, as the father, was bound to give for the guardianship with a view to adoption, did not exist in the case.[36]

36. On June 27, 2003, the couple B-Z filed an appeal based on the non-applicability of the law against the Chamber's judgment revoking the legal guardianship."[37] On November 20, 2003, the Superior Court of Justice of Entre Ríos declared the appeal admissible, revoked the Chamber's decision and, consequently, confirmed the first instance judgment.[38] The ruling considered, above all, the time that had elapsed. Among other matters, it indicated that the delay in the processing of the legal guardianship proceedings had influenced the decision to confirm the first instance judgment, based on the best interest of M, who had lived for more than three years, since her birth, with the couple B-Z. The ruling also indicated that the Chamber had not "indicated any inconsistency in the opinions of the experts" that it had taken into consideration in its judgment, which, in the opinion of one of the judges of the Superior Court of Justice should be interpreted as "arbitrary and capricious conduct by the judges" of the Chamber.

37. In addition, in its decision, the Superior Court of Justice indicated that, although Article 9 of the Convention on the Rights of the Child establishes the State's obligation not to separate a child from its parents against their wishes, it also establishes an "exception based on review by the courts" that can establish this separation based on the best interest of the child, particularly in cases such as this one in which "the biological ties are not

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held with the parties involved, during which it was agreed to suspend the hearing "in order to initiate […] a process of mutual understanding and dialogue assisted by the inter-disciplinary team"; on March 17, 2003, another hearing was held at which it was agreed "to terminate the [mediation]," and (d) following the first hearing, the inter-disciplinary team, the Children's Ombudsman, and the Chamber Prosecutor produced their respective reports; the last two ruled in favor of confirming the first instance judgment. The inter-disciplinary team stated that the "return was desirable […] either within the framework of a process of gradual communication with the help of professionals, supervised by the courts," which "could start now," and recommended that, if return was decided, this should be when the child was between 5 and 6 years of age; in other words, when she was at a stage of mental age and development that enabled her to better understand the situation. *Cf.* Reports of the inter-disciplinary team of August 16, 2002, and April 1, 2003; socio-environmental report on Mr. Fornerón of September 9, 2002; record of the hearing held before the First Court of the Second Chamber of Paraná on February 14, 2002; record of the mediation hearing before the Judiciary of the province of Entre Ríos of March 17, 2003; report of the Children's Ombudsman of April 22, 2003, and report of the Chamber Prosecutor of April 25, 2003 (file of attachments to the answer, tome III, folios 3336 to 3340, 3354, 3404, 3431, 3435 to 3437, 3441 to 3443, 3447 to 3450 and 3454).

[36] *Cf.* Judgment of the First Court of the Second Chamber of Paraná of June 10, 2003 (file of attachments to the Merits Report, attachment 15, folios 127 to 169).

[37] *Cf.* Appeal based on the non-applicability of the law filed on June 27, 2003 (file of attachments to the Merits Report, attachment 17, folios 173 to 194).

[38] *Cf.* Judgment of the Civil and Commercial Chamber of the Superior Court of Justice of Entre Ríos, *supra* note 38, folios 214 to 244.

significant." In addition, it indicated that the crux of the matter is the conflict between the biological father's subjective right to have his daughter, which is resolved taking into consideration the time elapsed from the day after her birth to the date of the judgment, "which makes it totally undesirable to change the child's situation, owing to the pernicious effects this would have on her psyche and the development of her personality." The determination of the best interest of the child "is full of subjectivities and depends on the scale of values of the judge, of his ideological formation, of his life experience, and also of those who take part in the decision, which, in addition, is arbitrary, because when the results become evident, time will have consumed many years of the life of [M]."[39]

38. On December 4, 2003, Mr. Fornerón filed a special federal appeal, which was denied on April 2, 2003, because it did not comply with the formal requirements of admissibility.[40]

*Case entitled "Fornerón Leonardo Aníbal Javier Ref/Visiting rights," file No. 3768*

39. On November 15, 2001, Mr. Fornerón filed proceedings for visiting rights. On March 13, 2002, the Civil and Commercial Court of Rosario del Tala declared itself incompetent "because the pre-adoption guardianship of the [child] was being processed […] before the Civil Court of Victoria," a decision that Mr. Fornerón appealed on March 18, 2002. On April 18, 2002, Mr. Fornerón's lawyer, "[b]ased on the status of the case file and the time that had elapsed without the appeal having been admitted, ask[ed] that the case file be forwarded to the court of Victoria, [province] of Entre Rios." On April 22, 2002, orders were given for the case file to be forwarded to the Civil and Commercial Court of Victoria. On November 25, 2003, Mr. Fornerón reiterated his request that a visiting regime be established. The first instance judge of Victoria declared himself competent to hear the case on April 7, 2004. On April 8, 2005, Mr. Fornerón appeared "spontaneously" and "without his lawyer" requesting "that a hearing be convened to establish a visiting regime."[41] The hearing was held on April 29, 2005, with the presence of Mr. Fornerón and the couple B-Z.[42]

40. On May 19, 2005, Mr. Fornerón's lawyer submitted his proposal for a visiting regime, indicating that the expert witness he offered had recommended, *inter alia*, that the meetings should take place close to where M lived; hence, Mr. Fornerón's representative proposed "the Permanent Human Rights Assembly as the appropriate environment for the meetings between the [child] and her father." That same day, he requested the joinder of

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[39] *Cf.* Judgment of the Civil and Commercial Chamber of the Superior Court of Justice of Entre Ríos, *supra* note 38, folios 234, 235, 240 and 241.

[40] *Cf.* Special federal appeal of December 4, 2003 and judgment of the Civil and Commercial Chamber of the Superior Court of Justice of Entre Ríos of April 2, 2004 (file of attachments to the Merits Report, attachments 19 and 20, folios 246 to 266). In its judgment, the Superior Court of Justice of Entre Ríos denied the appeal, *inter alia*, because "the appellant had not complied with the formal requirement that the appeal brief must be sufficient in itself, avoiding any consideration about the background or facts of the case […], entering directly into the grounds for the appeal, all of which would prevent its formal admissibility. Despite this […], it should also be specified that the attempted appeal is not admissible either because the federal aspect was not introduced appropriately and opportunely on the first occasion that the jurisdictional proceeding offered the appellant."

[41] *Cf.* Brief filing proceedings on visiting rights of November 15, 2001; decision of the Civil Judge of Rosario del Tala of March 13, 2002; brief of Mr. Fornerón's lawyer requesting that the case file be forwarded of April 18, 2002; order to forward the case file of the Civil Judge of Rosario del Tala of April 22, 2002; brief requesting a visiting regime of November 25, 2003; brief of the first instance judge of Victoria of November 25, 2003; brief answering the request of the first instance judge of Victoria of November 25, 2003; Declaration of competence of the first instance judge of Victoria of April 7, 2004; record of the appearance of Mr. Fornerón before the first instance judge of Victoria of April 8, 2005, and record of hearing held on April 29, 2005 (file of attachments to the Merits Report, attachments 21, 23, 24 and 25, folios 268 to 271, 303 to 305, 307, 308, 314, 316, 317, 321, 329 and 331).

[42] In the summons to the hearing, the judge convened Mr. Fornerón and the couple B-Z with the child.

the cases on legal guardianship, adoption and visiting regime, to avoid "the duplication of evidence and the prolonging of time frames, especially because it was a question of ensuring the best interest of [M]." The judge determined "that the requested joinder was not admissible," because judgment had already been delivered in the guardianship proceedings, and the visiting regime was being decided by a different process. On October 21, 2005, Mr. Fornerón and his daughter, who was then five years and four months old had their first and only meeting to that date in a hotel, for 45 minutes, in the presence of the psychologist designated by the couple B-Z and an observer from the First Instance Court. The site of this first and only meeting was proposed by the representative of the couple B-Z, because it was a "place that the child already knows and is familiar, and has appropriate rooms for the interview." This request was accepted by the first instance judge.[43]

41. Following this meeting, on several occasions, Mr. Fornerón asked the judge to deliver a ruling on the visiting regime.[44] In addition, during this proceeding, among other measures: (a) the parties, including the child, were convened several time to appear at a hearing;[45] (b) psychological reports were forwarded by the experts of the two parties; (c) the request of the Secretariat of Human Rights of the Nations to be present in the interviews with Mr. Fornerón "in order to find a solution to this problem, that respected the best interest of the child" was refused; (d) Mr. Fornerón requested, "so as not to delay the proceedings further, […] that the re-establishment of ties with his daughter begin immediately"; (e) on May 27, 2009, a member of the Judiciary's inter-disciplinary team interviewed Mr. Fornerón, and indicated that "he is in an appropriate state of mind to carry out a visiting regime, with the purpose of achieving the return of his daughter to her family, respecting all the time and steps required to this end"; (f) on June 17, 2010, the judge delivered judgment, denying the requested visiting regime; (g) on June 23, 2010, Mr. Fornerón filed an appeal which was rejected by the First Court of the Second Chamber of the Judiciary of Entre Ríos on November 9, 2010; (h) Mr. Fornerón filed an appeal of non-applicability of the law on December 2, 2010, and (i) on February 28, 2011, the Second Chamber referred the case file to the Civil and Commercial Chamber of the Superior Court of Justice.[46]

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[43] *Cf.* Brief requesting a measure and brief of Mr. Fornerón's lawyer requesting a joinder of cases presented on May 19, 2005 (file of attachments to the Merits Report, attachments 26 and 27, folios 334 to 337); ruling of the first instance judge of Victoria denying the request for a joinder of cases of June 14, 2005; record of the hearing of September 14, 2005, of the first instance judge of Victoria; decision appointing an observer of the First Instance Court of October 20, 2005; record of meeting between Mr. Fornerón and his daughter of October 21, 2005; brief requesting a visiting regime presented by Mr. Fornerón on November 17, 2005 (file of attachments to the answer, tome IV, folios 3896, 3917, 3920 a 3922, 3928 and 3929).

[44] *Cf.* Briefs presented by Mr. Fornerón on November 17, 2005, April 18, 2006, May 24, 2007, November 19, 2009 and December 1, 2009 (file of attachments to the answer, tome IV, folios 3933, 3934, 3951, 3954 to 3956, 4224 and 4229).

[45] At a hearing held in November 2008, M stated that, in 2005, "she was introduced to the person she calls Leonardo, her biological father, and she was pleased to meet him […]; that she would not like to see him now, but when she is older; at the moment, she wants to live peacefully, carry on her life […]; that her parents not be bothered." In another hearing held the same day, Mr. Fornerón stated that he "would like a visiting regime every two weeks and in holiday times for a longer period; [he indicated] his intention of seeing her, telling her about her biological reality […]; that, during the visiting regime, [he considered] that, at first, both he and the child should be accompanied by their respective psychologists; [he clarified] that it was not his intention to [remove M] from her family surroundings and from her adoptive parents; [he wanted] what is best for [M] and that the visits take place in Buenos Aires where she lives."

[46] *Cf.* Summons to a hearing dated November 27, 2007; decision establishing a new hearing on October 20, 2008; records of hearings before the substitute first instance judge of November 11, 2008, and June 12, 2009; psychological report of November 28, 2008; notes of the National Director of Legal Affairs in the area of Human Rights of the Human Rights Secretariat of the Ministry of Justice, Security and Human Rights of the Nation and March 5 and 9, 2009; brief of Mr. Fornerón's lawyer on suspension of time frames and hearing of March 9, 2009; decision of the substitute first instance judge of March 27, 2009; brief of Mr. Fornerón requesting the measure of April 21, 2009; reports of the inter-disciplinary team of the Judiciary of June 1 and 25, 2009; Judgment of the

42. On May 4, 2011, a hearing was held before the Civil and Commercial Chamber of the Superior Court of Justice of Entre Ríos, at which the child was heard, and also Mr. Fornerón and the couple B-Z. The child stated that she did not know Mr. Fornerón and, although at times during her statement she indicated that she did not want to see her biological father, she also stated that it might be possible to take some kind of measure to gradually get to know him, such as Mr. Fornerón visiting her at her home in the presence of her adoptive mother. Mr. Fornerón indicated that he wanted "to get to know her and know what she thinks"; he explained that "his intention was not to appropriate her, but to have a visiting regime, get to know her; if she is older and wants to come and live with him," and explained that "today the reality is not the same, she is able to reason, she can ask for things, and whether she wants a visiting regime or not; today the reality is that she is 10 years old and can take decisions […]; [he] cannot oblige her to live with [him]." The parties agreed (a) to establish a visiting regime by mutual agreement and progressively; (b) that Mr. Fornerón should desist from his remedy of non-applicability of the law; (c) a confidentiality agreement, halting any type of publicity, interviews or declarations about the case, and (d) Mr. Fornerón would not file any new civil or criminal complaints that upset the family life of the child and her adoptive parents.[47]

*Case entitled "Fornerón M[.] Ref/Full adoption," file No. 4707*

43. On July 6, 2004, the couple B-Z filed a request for full adoption. Following a series of internal procedures, Mr. Fornerón was summoned to appear before the Civil and Commercial First Instance Court of Victoria on April 8, 2005. Mr. Fornerón indicated his opposition to the adoption on several occasions, including on April 6, 2005, when he also advised the judge that he had filed a petition before the Inter-American Commission on Human Rights and asked that "the request for any form of adoption be denied, because paternal consent is an essential requirement to be taken into consideration when making any decision in this regard." On April 8, 2005, the couple B-Z asked the judge to deliver judgment, stating that Mr. "Fornerón's opposition to the adoption was not binding […] as regards granting [it]." In their appearance before the judge, the biological mother granted her consent to the adoption and Mr. Fornerón opposed it. On December 23, 2005, the Civil and Commercial first instance judge of Victoria granted simple adoption to the couple B-Z.[48]

### *B. General considerations of the Court*

44. In this case, the Court considers that the alleged violations of the rights to judicial guarantees, judicial protection, protection of the family, and the rights of the child must be interpreted in light of the international *corpus juris* for the protection of children. As this

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substitute first instance judge of June 17, 2010; appeal of July 30, 2010; Judgment of the First Court of the Second Chamber of the Judiciary of Entre Ríos of November 9, 2010; appeal on non-applicability of the law of December 2, 2010; note No. 12 of the Second Chamber of Paraná of February 28, 2011 (file of attachments to the answer, tome IV, folios 3965, 3967, 3969 to 3975, 3976, 3977, 4006 to 4008, 4036 to 4038, 4053, 4054, 4057, 4078, 4079, 4097 to 4099, 4123 to 4129, 4244 to 4259, 4277, 4295 to 4308, 4377 to 4432, 4440 to 4454 and 4464).

47 *Cf.* Record of the hearing held before the Civil and Commercial Chamber of the Superior Court of Justice of Entre Ríos (file of attachments to the answer, tome IV, folios 4479 and 4480).

48 *Cf.* Brief with application for full adoption filed by the couple B-Z on July 6, 2004; summons of the Civil and Commercial First Instance Court of Victoria of March 7, 2005, addressed to Mr. Fornerón; brief of Mr. Fornerón of April 6, 2005, addressed to the Civil and Commercial First Instance Court of Victoria; request of the couple B-Z for the delivery of judgment of April 8, 2005; record of appearance of Mr. Fornerón before the Civil and Commercial First Instance Court of Victoria of April 8, 2005, and judgment of the Civil and Commercial First Instance Court of Victoria of December 23, 2005 (file of attachments to the Merits Report, attachments 29, 31, 32 and 33, folios 345 to 349, 367, 369, 371, 372, 374, 375, 371, 372, 374, 375 and 389 to 396); Mr. Fornerón's brief of March 18, 2005, contesting the adoption, and record of appearance of Ms. Enríquez before the Civil and Commercial First Instance Court of Victoria of October 28, 2004 (file of attachments to the answer, tome V, folios 4700 and 4666).

Court has stated on other occasions, this *corpus juris* should define the content and the scope of the obligations that the State has assumed when the rights of children are analyzed.[49]

45. Children are holders of the rights established in the American Convention, in addition to having the special measures of protection established in Article 19 of the Convention, which must be interpreted in keeping with the particular circumstances of each specific case.[50] The adoption of special measures for the protection of the child corresponds to the State, and also to the family, the community and the society to which the child belongs.[51]

46. This Court has already referred extensively to the rights of the child and the protection of the family in its Advisory Opinion No. 17, and has established that children have the right to live with their family, which is called on to satisfy their material, affective and psychological needs.[52]

47. In addition, this Court has indicated that the mutual enjoyment of coexistence between parents and children is a fundamental element of family life. In this regard, the child should remain within its family unit, unless there are specific reasons, based on the child's best interests, to choose to separate the child from his or her family. In any case, the separation should be exceptional and, preferably, temporary.[53]

48. Any State, social or family decision that involves a restriction of the exercise of any right of the child must take into account the best interests of the child, and be strictly adapted to the provisions that regulate this matter.[54]

49. Regarding the best interests of the child, the Court reiterates that this regulating principle of the law on the rights of the child is based on the dignity of the human being, on the inherent characteristics of children, and on the need to promote their development so that they can realize their full potential. In this regard, it should be noted that, in order to ensure the prevalence of the best interests of the child to the fullest possible extent, the preamble to the Convention on the Rights of the Child stipulates that childhood is entitled to "special care," and Article 19 of the American Convention indicates that every child has the right to special "measures of protection."[55]

50. Recently, the Court has indicated that, in cases concerning the care and custody of minors, the determination of the best interests of the child must be made based on an evaluation of the specific conduct of the parents and its negative impact on the well-being and development of the child, if applicable, or on the real and proved, not speculative or imaginary, harm or risk to the well-being of the child. Thus, speculations, presumptions,

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[49] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 194, and *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 121.

[50] *Cf. Case of Gelman v. Uruguay, supra* note 49, para. 121, and *Case of Atala Riffo and daughters v. Chile*. *Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 196.

[51] *Cf. Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 62, and *Case of Gelman v. Uruguay, supra* note 49, para. 121.

[52] *Cf.* Advisory Opinion OC-17/02, *supra* note 51, paras. 67 and 71.

[53] *Cf.* Advisory Opinion OC-17/02, *supra* note 51, paras. 72, 75 and 77.

[54] *Cf.* Advisory Opinion OC-17/02, *supra* note 51, para. 65.

[55] *Cf.* Advisory Opinion OC-17/02, *supra* note 51, paras. 56 and 60, and *Case of Atala Riffo and daughters v. Chile, supra* note 50, para. 108.

stereotypes, generalized considerations on the personal characteristics of the parents, or cultural preferences regarding traditional concepts of the family are inadmissible.[56]

51. Moreover, the Court has also maintained that, owing to the importance of the interests in question, the administrative and judicial proceedings that concern the protection of the human rights of children, particularly those judicial proceedings concerning the adoption, guardianship and custody of children in early infancy, must be dealt with by the authorities with exceptional diligence and speed.[57]

52. The Court has also established that, in cases of the custody of children, the simple passage of time may constitute a factor that encourages the creation of ties with the foster family or the family that has the child. Consequently, the greater the delay in the proceedings, irrespective of any decision on the determination of the child's rights, could determine the irreversible or irreparable nature of the *de facto* situation and make any decision in this regard null and prejudicial for the interests of the child and, if applicable, of the biological parents, whatever the corresponding decision taken.[58]

53. Based on these general considerations, and in order to examine the violations in this case, the Court will now rule on: (a) reasonable time and due diligence in the domestic judicial proceedings; (b) protection of the family, and (c) obligation to adopt domestic legal measures. In this regard, the Court considers it opportune to clarify that the purpose of this case is to determine whether the said judicial proceedings complied with the State's international obligations under the American Convention.

54. Before making the said analysis, the Inter-American Court will assess the measures taken by the State to reach a friendly settlement in this case, and those designed to achieve the establishment of ties between Mr. Fornerón and his daughter, which included among other domestic authorities, two Ministers of Justice and Human Rights of the Nation.

55. In addition, the Court takes note that, in its answering brief,[59] Argentina recalled that the Secretariat for Children and the Family had indicated that:

> It was the courts that […]systematically severed Mr. Fornerón's guardianship of his daughter and, consequently, their possibility of forming their own family.

56. Furthermore, the Minister of Justice, Security and Human Rights of the Nation at the time, stated that:

> This is a paradigmatically serious case, involving reproachable conduct by judicial officials who instead of protecting and repairing the violation of the rights of the child and her father, chose to delay the proceedings and manufacture an irreversible factual context that was then used as grounds for their decision.

57. Lastly, the current Minister of Justice and Human Rights endorsed his predecessor's position and indicated that:

> The judicial proceedings conducted by the province of Entre Ríos did not guarantee the constitutional norms and the international treaties with constitutional rank that grant rights and

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[56] *Cf. Case of Atala Riffo and daughters v. Chile, supra* note 50, para. 109.

[57] *Cf. Matter of L.M.* Provisional measures with regard to Paraguay. Order of the Inter-American Court of Human Rights of July 1, 2011, considering paragraph 16.

[58] *Matter of L.M., supra* note 57, considering paragraph 18.

[59] The State's answering brief (merits file, tome I, folios 574 and 575).

guarantees to both father and child.

### *C. Judicial guarantees and judicial protection*

*i) Considerations of the Commission*

58. Regarding the presumed violation of Articles 8(1)[60] and 25(1)[61] of the Convention, in relation to Articles 1(1)[62] and 19[63] thereof, the Commission indicated that the domestic proceedings on the legal guardianship and on the visiting rights did not comply with the guarantee of a reasonable time. It affirmed that the judicial authorities "incurred in a series of delays that ended up constituting the grounds for the decisions." Argentina "has not contested that the domestic authorities who heard the case during the judicial proceedings acted in non-compliance with their obligation of exceptional diligence, with extremely serious effects on the exercise of several rights of [M and Mr. Fornerón], including the right to a family and the right to identity. It stated that Mr. Fornerón "never had the possibility […] to be heard apart from during the approval of the adoption procedure that had been initiated illegitimately, illegally [and] with clear indications that rather than adoption, […] it was a process of appropriation that was occurring." The State "never implemented any of the judicial guarantees established for the protection of children, even for the defense of adoption as a protective institution that protects and safeguards infants and children and the concept […] of family." The legal situation of M was determined by the passage of time in the judicial proceedings.

59. In particular, regarding the reasonable time in the legal guardianship proceedings the Commission stated that: (a) "this involved a proceeding that was, by its nature, delicate, requiring expert opinions; the participation of a biological father who opposed the guardianship, and a detailed analysis of the rights of the child"; (b) Mr. Fornerón, among other actions, resorted to the courts on numerous occasions, requested the return of his daughter three times during the proceedings, submitted voluntarily to DNA testing, and appealed the judgment opportunely, even though he lived 100 kilometers away from the place where the proceedings were being held; (c) the proceedings lasted three years and eight months, during which there was significant lack of activity and the competent first instance authority omitted to order basic measures, and (d) the duration of the proceedings had a particularly serious effect on the rights of Mr. Fornerón and his daughter, because

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60 El Article 8(1) of the American Convention establishes:

> 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.

61 Article 25(1) of the American Convention establishes:

> 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.

62 Article 1(1) of the American Convention establishes:

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

63 Article 19 of the American Convention establishes:

> Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

with the passage of time the child created stronger ties with the guardians, a factor that was subsequently used to maintain the adoption and deny the requests of the biological father. The courts failed to comply with their obligation of diligence and there was an unjustified delay in deciding the proceedings that gravely affected the rights of M and Mr. Fornerón. Consequently, the Commission concluded that the State had violated the right "to a hearing within a reasonable time" as established in Article 8(1) of the Convention.

60. Moreover, regarding the reasonable time in the proceedings on visiting rights, the Commission indicated that: (a) the determination of a visiting regime was a delicate matter that required expert opinions and monitoring; (b) Mr. Fornerón requested the right to have contact with his daughter and recognition of their right to be together before various authorities and took various measures, despite which, although a judgment was delivered that recognized the possibility of establishing a visiting regime in May 2001, at the date on which the case was submitted, this had not been implemented; (c) it did not agree with the State that Mr. Fornerón, but had been inactive; rather the latter had filed all the appropriate requests and collaborated to the extent necessary in the judicial proceedings; his only period of inactivity coincided with the processing of the appeal against the judgment that awarded the guardianship, between April 22, 2002, and November 25, 2003, the date on which Mr. Fornerón reiterated his request for a visiting regime on several occasions in view of the inactivity of the courts. In addition, Mr. Fornerón proposed a meeting and requested the joinder of the cases on the visiting rights, legal guardianship and adoption, which was denied. On November 18, 2005, he requested that judgment be delivered and there is no record that any judicial activity has taken place since then; (d) the court's inactivity fails to meet the requirement of basic diligence. The court in charge of the case was the same one that had initially determined the viability of establishing a visiting regime, so that it had the obligation to act with special diligence in the proceedings, knowing that the passage of time would have negative effects. However, the court did not take any measures until it "delivered a ruling" in March 2004. From April 2004 to April 2005, there was no movement in the case file, and (e) the foregoing was relevant in the determination of the legal situation of M and of her father, because that same court established the simple adoption of the child in favor of the couple B-Z in December 2005, based on the relationship developed over the course of time. Even though that decision reiterated the pertinence of commencing contacts between father and daughter, the competent authorities have not made any progress in this regard. The Commission concluded that a delay of almost nine years in establishing a visiting regime, the possibility of which was indicated in two judgments, constituted a violation of the right of Mr. Fornerón and of his daughter M to proceedings conducted within a reasonable time, as established in Article 8(1) of the Convention, and also violated Mr. Fornerón's right to an effective remedy, because he has not been provided with an effective mechanism for implementing the said visiting regime, in violation of Article 25(1) of the Convention.[64]

*ii) Arguments of the representatives and of the State*

61. The representatives agreed substantially with the Inter-American Commission. They indicated that Mr. Fornerón and M had the right to the State complying with the obligation to "provide them with effective judicial remedies because their human rights were violated"; and that those remedies be substantiated in accordance with the rules of due process of

[64] In its final arguments briefs, the Commission indicated that "from the information in the case file, it does not appear that, in the course of the three proceedings, the competent authorities adopted appropriate measures to ensure that [M] was heard so that her opinion, free of all errors of understanding could be assessed by the respective judicial authorities." This affirmation corresponds to a new argument which was not mentioned when the case was submitted to the Court, so it will not be considered by the Court.

law, and that the State "should have provided [M] with special measures of protection" owing to her condition as a child. They added that the legal guardianship proceedings exceeded a reasonable time and stated that the judge in charge of the case acted "with wrongful intent," systematically obstructing the actions of Mr. Fornerón and his mother. They added that the proceeding on visiting rights "repeated the arbitrariness and inaction of the courts of Entre Ríos," affirming that "[t]he claim has lasted more than 10 years and again it is the passage of time, according to the agents of justice, that has prevent[ed] the meeting between [M] and her father." Mr. Fornerón's claim "was never heard, which has prevented him from having real access to justice." In all the judicial proceedings in which the rights of M and Mr. Fornerón should have been protected, "the judges failed to respect due process and, thus, delayed in an arbitrary and unjustified manner, their decisions in order to let time pass, which caused and continues to cause their separation, violating Articles 8, 25 and 19 of [the Convention]."[65]

62. The State indicated that both the Secretariat for Children and the Family, and two Ministers of Justice and Human Rights of the Nations had ruled on the failure of the judicial authorities to observe the provisions of the Constitution and international human rights treaties with constitutional rank (*supra* paras. 55 to 57). Despite this, regarding the proceedings on the visiting regime, Argentina indicated that the case file "revealed sporadic presentations by the representatives of [Mr.] Fornerón and several briefs confuse the purpose of the [*litis*], because they refer to 'return' when, in reality, what was being processed was a visiting regime." It added that to protect the rights of Mr. Fornerón, the Minister of Justice had asked the National Director for Legal Affairs in the area of Human Rights to appear formally in the case, so that he could be present in the interview between the child's psychologist, proposed by the couple B-Z, and the biological father. The judge in charge of the case denied this request, "because the applicant lacked legal standing, but fundamentally owing to the inflexibility of the position assumed by Mr. Fornerón," which the State emphasized because "the brief [… of Mr.] Fornerón's representatives questioned why the State had not appealed this refusal, as if, should the State have done so, which was not viable procedurally, the answer would have been different."

63. In addition, the State referred to the "gradual re-connection" process initiated at the request of the Minister of Justice and Human Rights in 2008, whose intervention led to several measures at the domestic level. The provincial prosecutor considered that it was not feasible for the Provincial Executive to file judicial proceedings to revoke the adoption because the respective procedural time frames had expired. Argentina stressed that "Mr. Fornerón's lawyer […] declined […] to file the respective complaint, which could have avoided reaching this level." It added that the complexity of the case stems from the fact that "the biological father is claiming the return of his daughter at the international level, [but] at the domestic level, when the judicial proceedings on guardianship for the purpose of adoption were processed, the decision that was finally adopted by the court concerned was not contested at all domestic levels."

64. Lastly, the State indicated that, in the context of the Executive's attempts to achieve a rapprochement, there were several stages. During the said process, "the Ministry of Justice made available technical, psychological and legal teams to monitor [this, up until the last] stage that began in 2010 when, owing to the absence of effective communication, the Executive insisted in its efforts with the province of Entre Ríos and, within that framework, the province intervened to achieve or to try and achieve a rapprochement between father

[65] In their brief with final arguments, the representatives referred to specific irregularities in which the judge of the case incurred concerning the precautionary measures requested by the prosecutor. This affirmation corresponds to a new argument that was not mentioned previously during the proceedings before the Court.

and daughter." Subsequently, a hearing was held in May 2011 in the context of the proceedings on the visiting regime, during which specific agreements were reached. It added that the rapprochement process agreed on "was virtually suspended, because during the first court hearing that was convened following [it], no agreement was reached and [Mr.] Fornerón's legal representative failed to attend a second hearing convened for September 27, [2011]."

*iii) Considerations of the Court on a reasonable time*

65. Based on the arguments of the Inter-American Commission and the representatives, the Court will analyze whether the proceedings on legal guardianship and the visiting regime complied with the requirement of reasonable time in keeping with Article 8(1) of the Convention. The violation of a reasonable time was not argued before this Court with regard to the other proceedings.

66. The right of access to justice must ensure that the rights of the individual are determined within a reasonable time. In principle, the absence of reasonableness in the time frame constitutes, in itself, a violation of judicial guarantees.[66] In this regard, the Court has considered the following elements to determine the reasonableness of the time:[67] (a) the complexity of the matter; (b) the procedural activities of the interested party; (c) the conduct of the judicial authorities, and (d) the effects on the legal situation of the individual involved in the proceedings.

67. Regarding the first element, the proceedings analyzed involve the guardianship of a child who is being claimed by her biological father, and the establishment of a visiting regime that permits the creation of ties between them. These issues, even though they are of enormous relevance and require special care, are being heard in specific proceedings that are not particularly complex and that are not unusual for States.

68. With regard to the procedural activity of the interested party in both proceedings, the Court underscores that, among other measures, Mr. Fornerón: (a) informed the authorities from the outset of his opposition to the request for legal guardianship filed by the couple B-Z and, from the moment he became aware that he could be the child's father, asked to assume responsibility for her; (b) submitted to several tests, including DNA testing; (c) filed different briefs and petitions, including appeals against several decisions; (d) filed an action for visiting rights; (e) presented proposals for a visiting regime; (f) requested measures to expedite the proceedings, and (g) submitted various petitions to the judge in charge of the visiting regime proceedings including, on several occasions, a request that he finally issue a decision (*supra* paras. 23, 31, 32, 34, 38 and 39 to 42). In conclusion, there is nothing to indicate that, in this case, Mr. Fornerón has obstructed the domestic proceedings; but rather, to the contrary, he has played an active role, doing everything possible to make progress towards finalizing them.

69. Even though Mr. Fornerón took all the measures that could reasonably be required during the proceedings, the Court notes that, in a case such as this one, the responsibility for accelerating the proceedings falls on the judicial authorities, because of their obligation

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[66] *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 257.

[67] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, para. 77, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 255.

to provide special protection to the child owing to her condition as a minor, and not on the procedural activity of the father. Furthermore, since Mr. Fornerón made it clear to several authorities from the outset that he wished to exercise his rights and to fulfill his obligations as a father, this should have been ensured immediately.[68] The Court stresses that the main purpose of the proceedings was to determine a child's rights to a family and those of her biological father, and to establish the ties between them.

70. Regarding the conduct of the authorities, the proceedings on the legal guardianship lasted more than three years. During that time, the first instance judge took three months from the moment he became aware of Mr. Fornerón's acknowledgement of paternity to request a DNA test, and seven months to request an expert psychological opinion on the child, which he received more than two months later. The Chamber that revoked the first instance judgment found it necessary, *inter alia*, to collect evidence that had been omitted in first instance, which delayed the judicial ruling on Mr. Fornerón's right to obtain possession of his daughter. In this regard, on August 7 and 13, 2001, the Children's Ombudsman and the Chamber's prosecutor, respectively, requested the collection of the evidence omitted in first instance, which the Chamber had ordered, "with the urgency required by this case."[69] Subsequently, five more months passed before the Superior Court of Entre Ríos confirmed the first instance ruling. This case had the specific particularity that the time that was passing could lead to irreparable effects on the juridical situation of Mr. Fornerón and his daughter, as some judicial authorities and domestic expert opinions acknowledged.[70] However, the said authorities did not accelerate the proceedings for which they were responsible and did not take into account the effects that time would have on the rights of Mr. Fornerón and his daughter, based on the best interests of the child.

71. Regarding the proceedings that were supposed to determine a visiting regime between father and daughter, the Court emphasizes that the first instance judge of Victoria took more than three years to declare himself competent. In addition, there is no record that any procedural activity occurred for a year and a month after the said judge's declaration of competence and, after this, a hearing was ordered at Mr. Fornerón's request. Despite the subsequent measures taken in the proceedings on the visiting regime, over more than 10 years no visiting regime was established by the provincial courts, with the exception of the May 2011 agreement reached between the parties (*supra* para. 42), and there is no record that it has been implemented.

72. The domestic authorities specifically referred to the flaws in the judicial proceedings. The Court recalls that the State referred to the considerations of the Secretariat for Children and the Family and those of two Ministers of Justice, Security and Human Rights of the Nation who, among other irregularities, mentioned the delay incurred by the judicial authorities (*supra* paras. 55 to 57),

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[68] The Chamber's prosecutor indicated: [the father] has opposed [the guardianship] since his first appearance in this hearing, which occurred four months after the birth […]. The time passed between both dates cannot be attributed to the appellant as negligence or lack of interest. If he did not appear before, this was purely and simply because he was unaware of the existence of these proceedings. The lower court opted to maintain the pre-existing tie with the *de facto* guardians, without taking any account whatsoever of the legitimate rights of the father who, I insist, had nothing to do with the surrender of the newborn and who should not be prejudiced by the circumstance of not having formed a family with [the mother]" (file of attachments to the answer, tome III, folios 3259 and 3260).

[69] The Chamber ordered that some of these tests be carried out seven and eight months later; and an interdisciplinary team was requested to interview the guardians and the parents on July 1, 2002 (file of attachments to the answer, tome III, folios 3288, 3296, 3321 and 3382).

[70] For example: brief of the Children's Ombudsman of August 7, 2001 (file of attachments to the answer, tome III, folio 3257), and Judgment of the Second Chamber of Paraná of June 10, 2003, *supra* note 36, folio 3463.

73. Furthermore, two judges of the Superior Court of Entre Ríos who ruled, in a majority vote, on the non-applicability of the law with regard to the Chamber's judgment on the legal guardianship, referred to the delay in the guardianship proceedings. One of them attributed the delay to the backlog of cases before the domestic courts, indicating that "all the paperwork that has mounted up […] explains the slowness of the court system" and that "[t]he delay in the proceeding […] had an impact on the decision" of that court. Also, another judge of the Superior Court stated, *inter alia*, that "[t]he duration of this proceeding has not been reasonable; in other words, [international] standards have not been complied with" (*infra* paras. 102 and 103).

74. In this regard, this Court has established that it is not possible to argue domestic obstacles, such as the lack of infrastructure or personnel to conduct judicial proceedings, in order to be relieved of an international obligation.[71] Similarly, the European Court of Human Rights has determined that a chronic backlog of cases is not a valid explanation for excessive delay.[72]

75. Lastly, this Court has indicated that, to determine the reasonableness of the time, the impact of the duration of the proceedings on the legal situation of the person involved in them must be taken into account, considering, among other elements, the matter in dispute. Thus, the Court has established that, if the passage of time has a relevant impact on the legal situation of the individual, the proceedings must advance more rapidly so that the case is decided as soon as possible.[73]

76. Both the first instance judge and the Superior Court of Entre Ríos granted the legal guardianship of the child to the married couple B-Z based, principally, on the ties that M had formed with her guardians over time. This means that, even though Mr. Fornerón is the child's biological father – and acknowledged this before the authorities shortly after her birth – he has been unable to exercise his rights or comply with his obligations as a father, and M has been unable to enjoy the rights that correspond to her as a child in relation to her biological family. In addition, the absence of a decision and the failure to establish a visiting regime has prevented father and daughter from getting to know each other and establishing a relationship; all this, in the first 12 years of the child's life, a fundamental stage in her development. Consequently, taking into account the rights and interests in play, the delay in the judicial decisions led to significant, irreversible and irremediable harm to the rights of Mr. Fornerón and of his daughter

77. Based on the above, in this case, the total duration of the proceedings on the legal guardianship and on the visiting regime of more than three and ten years, respectively, is categorically in excess of a time frame that could be considered reasonable in proceedings relating to the guardianship of a child and the visiting regime with her father, so that it constitutes a violation of Article 8(1) of the Convention, in relation to Articles 17(1) and 1(1) of this instrument, to the detriment of Mr. Fornerón and of his daughter M, as well as in relation to Article 19 of the Convention to the detriment of the latter.

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[71] *Cf. Case of Garibaldi v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of September 23, 2009. Series C No. 203, para. 137.

[72] *Cf. ECHR*. *Case of Probstmeier v. Germany* (No. 20950/92), Judgment of July 1, 1997, para. 64, and *Case of Samardžić and AD Plastika v. Serbia* (No. 2844/05), Judgment of July 17, 2007, para. 41.

[73] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C. No. 192, para. 155, and *Case of Kawas Fernández v. Honduras*. Merits, reparations and costs. Judgment of April 3, 2009, Series C No. 196, para. 115.

*iv) Considerations of the Court on the due diligence of the judicial authorities in the guardianship proceedings*

78. The Court will examine whether, in the guardianship proceedings which preceded the decision to grant the adoption of the child M, the domestic judicial authorities acted with the due diligence required in this case, taking into account its specific circumstances, together with the enhanced obligation to proceed with special diligence and promptness in proceedings involving children (*supra* paras. 51 and 52). To this end, the Court will examine the following aspects in relation to the guardianship proceedings: (a) failure to observe the legal requirements; (b) omission of evidence; (c) use of stereotypes, and (d) delay as grounds for the decision.

*a) Failure to observe the legal requirements*

79. The day after the birth of M, Ms. Enríquez surrendered the child to the married couple B-Z, an act in which the Victoria Ombudsman for Children and the Poor intervened, drawing up a deed that recorded this act (*supra* para. 22). Article 318 of the Civil Code in force at the time of the facts established that "t]he surrender of a minor to guardianship by means of a public instrument or an administrative procedure is expressly prohibited."

80. Several authorities indicated that the surrender of M had not complied with this and other legal provisions. For example, the Children's Ombudsman who took part in the guardianship proceedings before the Chamber stated that "the procedure for the surrender of the child did not observe the provisions […] of Provincial Law 8,490; because, once the act had been constituted, […] the acting Ombudsman should have asked for the institutional protection of the child, since she had been abandoned by her mother, placing her in an irregular situation without investigating her social and family background." For its part, the Civil Chamber involved, which revoked the first instance decision on guardianship, observed that:

> Under article 318 and similar articles of the Civil Code [the surrender of the child by her mother] would not be in strict compliance with the requirements and purpose of the law, because the latter expressly prohibits surrender by means of a public instrument or an administrative procedure, […] and [only] the surrender granted by the courts is admissible.

81. However, these were not the only observations by the judicial authorities indicating that the surrender and the "*de facto* guardianship" did not meet the legal requirements. In fact, even the Chamber judge who, emitted a minority vote in favor of confirming the first instance decision, stated that the law was not respected "strictly"; indicating: "I am aware that, at the time of the decision granting legal guardianship, which is contested by the biological father, the plaintiffs had exercised *de facto* guardianship for almost a year, which is not strictly in accordance with the provisions of substantive law." The third paragraph of Article 316 of the Civil Code, which it is indicated has not been observed establishes that [t]he guardianship must be granted by the judge or court of the child's domicile or of the place where his or her abandonment has been verified judicially.

82. Moreover, regarding the legal requirements that should have been observed in the judicial proceedings on guardianship, Article 317 of the Argentine Civil Code established:

> The requirements for awarding guardianship are:
>
> a) The parents of the child must be summoned so that they can give their consent to the award of guardianship for the purpose of adoption. The judge shall determine the date of this summons within 60 days of the birth.
> Consent shall not be necessary if the minor is in a welfare institution and the parents have totally disassociated themselves from the child for one year, or when the lack of moral or material

> protection is evident, definite and continuous, and this situation has been verified by the judicial authority. In addition, it shall not be necessary when the parents have been deprived of parental authority, or when they have legally stated their express intention of surrendering the child for adoption.
> […]
> The judge shall observe the rules contained in paragraphs (a) (b) and (c) or the decision is null.

83. In this regard, the first instance judge, in application of the provisions of article 317 of the Civil Code, summoned the child's mother who gave her consent to the guardianship. Subsequently, when he became aware of the acknowledgement of paternity, the judge summoned the biological father who expressed his opposition to the guardianship. In Argentina, the acknowledgement of paternity in the civil registry grants the father all his rights and obligations as progenitor.[74] Despite Mr. Fornerón's acknowledgement of paternity and biological confirmation by DNA testing, the first instance judge failed to order the surrender of the child to her father[75] but requested an expert opinion "on the possible harm that the minor could suffer if he ordered her surrender to the biological father." Based on this report, requested when M was nine months old, the judge justified his decision to keep the child with the guardians, considering that it was in her best interests. The legal guardianship granted to the said couple was awarded without observing the provisions of the Convention on the Rights of the Child (*infra* para. 120) and of Argentine law,[76] without the father's consent and without the court having verified whether any of the exceptions to the requirement of prior consent established in article 317 of the Civil Code had been met (*supra* para. 82).

84. The decision of the Chamber that revoked the first instance ruling indicated that, in accordance with "article 317(a) of the Civil Code […], in the absence of consent and of the other negative circumstances established therein, at the present time, the request made [by Mr. Fornerón to discontinue the guardianship] would appear to be clearly admissible," emphasizing that "the consent that Mr. Fornerón as the father must *necessarily* give to the guardianship for the purposes of adoption did not exist in the proceedings" (italics added).

85. The need to follow the legal procedures strictly was underlined by the Civil Chamber in one of the majority votes, which indicated that, in view of the purpose that adoption should pursue, "it must be accompanied by or consistent with the legal restrictions that this mechanism includes." However, it indicated that the "despite the importance of the case, scrupulousness […] in the procedural aspects has not been observed," and agreed with the Children's Ombudsman involved in the proceedings that the provisions of provincial Law No. 8,490 had not been complied with.

86. Taking into account these considerations, among others, the Chamber revoked the first instance judge's decision to award the legal guardianship of M to the couple B-Z. This decision was appealed by the *de facto* guardians and by the Children's Ombudsman, and the Civil Chamber of the Superior Court of Justice of the province of Entre Ríos focused on the supposed best interests of the child, omitting any analysis of the failure to meet the legal

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[74] The judgment of the Chamber of Appeal established that "juridically and legally and while his paternity is not contested, this acknowledgement, of itself, granted him the status cited and all the rights and obligations that it implies and those that, until now, were not […] accorded any merit" (file of attachments to the answer, tome III, folio 3463).

[75] One of the judges of the Chamber who heard the appeal filed by Mr. Fornerón stated in the judgment that the latter accepted to submit to a DNA test, "[h]owever, even though the test confirmed fully the alleged paternity […], his request was not answered favorably and, thus, the interested party could ask himself what purpose the test served" (file of attachments to the answer, tome III, folio 3463).

[76] *Cf.* rulings of different domestic authorities (file of attachments to the answer, tome III, folios 3260, 3464, 3468, 3635 and 3636).

requirements in the *de facto* surrender of M and the legal guardianship proceedings, which included the fact that the child had been surrendered by means of an administrative act, without the intervention of the competent judge (*supra* paras. 80 and 81), that the father had not consented to the surrender to guardianship, and that the conditions that allow such consent to be disregarded were not verified (*supra* paras. 82 to 84).[77]

*b) Omission of evidence*

87. Various officials indicated that when the judicial decision was issued awarding guardianship, the necessary probative measures had not been taken. In this regard, the Chamber's judgment indicated that, when it received the case file, the measures it adopted were designed, among other objectives, "to remedy the production of evidence that had not been obtained at the appropriate time (and the evidence that, *of necessity*, must be obtained in this type of litigation)" (italics added).

88. Furthermore, that judgment also noted the flaws in the psychological report on which the first instance judge had based his guardianship decision, indicating, *inter alia*, that: "it does not appear that ties between the baby and the adopting mother had been observed, or between the baby and the adopting father, or that interviews were conducted with the adopting parents or the biological father."

89. For his part, the Children's Ombudsman who intervened before the Chamber also verified the omission of evidence in first instance and, citing articles 73 and 74 of provincial Law No. 8,490, indicated that it was necessary to rectify this omission. Accordingly, among other measures, he proposed "a social and environmental study of the father, [and] interview[s] by professionals of the Juvenile Court's technical team […], together and separately, with the parents of the child and [with the] guardians." Similarly, the Public Prosecution Service also noted that, in first instance, no study of any kind, whether psychological, social, environmental or any other, had been conducted concerning Mr. Fornerón. Even the minority vote of the Chamber noted that the possibility of delivering judgment "was delayed because the Chamber had to take essential measures to incorporate important probative material."

90. In conclusion, the first instance decision granting the legal guardianship of M, not to her biological father, but to a couple who had "*de facto* guardianship," was issued without the necessary evidence, as indicated by various officials, who all agreed that probative measures had been omitted in first instance.

*c) Stereotypes used as grounds for the guardianship decision*

91. The first instance judge stated that "the biological parents of the child […] had not had a formal relationship for more than 12 months, […] but had merely had occasional meetings, and the child's mother had been having at least one other relationship; I am stating this, not to judge the mother's conduct, but to underscore that the fruit of this relationship […] was not the result of love or the desire to form a family." In addition, he emphasized the existence of a dispute between the parents of M and "the absence of a biological family." He stressed that Mr. Fornerón was aware of the pregnancy, at least during the two months before the birth and, nevertheless, "did not show any kind of interest

[77] Only one member of the Superior Court of Justice "underline[d]" and endorsed the assertion of the Chamber judge in relation to the irregularity that, at the time of the court's decision, a guardianship that was not in keeping with the provisions of the law had been exercised "*de facto*" for almost a year. However, this finding had no legal consequences (file of attachments to the answer, tome III, folio 3652).

or collaboration with the mother before the [birth] and had not filed any type of legal action to safeguard his relationship with the child." He added that the child "would not have a biological family, understanding this to mean a father and a mother; hence, she would not have […] the presence of a mother," reiterating in his arguments that the biological father "does not know the child and is not married," so that the child would not have a mother, which "would add an element prejudicial to her mental health." For his part, one of the judges of the Superior Court of Justice of Entre Ríos stated that "up until the acknowledgement [of his daughter], the father had manifested an indifference comparable to abandonment." Another judge of that court stated that "initially the mother fulfilled her role, which is not a small one, conserving the pregnancy and she certainly took care of the child in her womb, and did so until the birth. The father was aware of this pregnancy; to the extent that, following the surrender of the child to her guardians, he acknowledged her in the Victoria civil registry office. Thus, I mean that the father, indirectly, was involved in the surrender of the child, because, previously, his attitude had been passive, which undoubtedly contributed to the decision taken by the mother who repeatedly stated that she was unable to assume the obligations and responsibilities of another maternity."

92. The Court notes that these considerations refer, first, to conduct of both the mother and the father prior to the birth of the child; that is to the characteristics of the relationship between Mr. Fornerón and Ms. Enríquez, to the circumstances in which the pregnancy occurred, and to the supposed absence of collaboration and alleged indifference and passivity of the father which, in the court's opinion, led the mother to surrender the child; and, second, to circumstances following the birth, relating to the unmarried biological father's claim to his daughter surrendered by the mother to another family.

93. Regarding the circumstances prior to the birth, the judge did not indicate what implications the supposed absence of love between the child's parents in the past or the absence of "a formal relationship of more than 12 months" between them, would have on the relationship of a father and daughter, and did not justify how these elements would prejudice the well-being and development of M, or why this prevented a father from exercising his parental role. In addition, he did not analyze the reasons why the biological mother opposed the surrender of the child to her father, or why the latter could not take care of or collaborate with the pregnant mother, especially when the initial surrender of the newborn to the married couple B-Z occurred irregularly and has even resulted in the filing of criminal actions based on the possible surrender of the child in exchange for money. In addition, the said judges referred to Mr. Fornerón's supposed indifference or passivity towards the pregnant woman, one of them praising the conduct of a mother who, ignoring the claims of the biological father, decided to surrender her newborn daughter to another family, presumably in exchange for money. In addition, he suggested that the mother's decision arose from the conduct of the biological father when, as has been indicated Mr. Fornerón advised the mother that he would take care of the child (*supra* para. 22). The Court considers that, in the instant case, the unilateral decision of a woman that she is not in conditions to assume her role of mother, cannot constitute grounds for the judicial authority in question to deny paternity.

94. To the contrary, the Court observes that these assertions correspond to preconceived ideas about the roles of a man and a woman with regard to certain reproductive processes or functions in relation to a future maternity and paternity. These notions are based on stereotypes indicating the need for eventual ties of affection or a supposed mutual desire to form a family, the presumed importance of the "formality" of the relationship, and the role of the father during pregnancy, who should provide care and attention to the pregnant woman, because if these assumptions do not exist, a lack of capacity or aptness of the

father will be presumed as regards his role in relation to the child, or even that the father was not interested in providing care and well-being to the child.[78]

95. Regarding the alleged circumstances of the situation after the birth, the first instance judge referred to the absence of a mother, that the father did not know his daughter, and also that he was not married. In this regard, the judge did not indicate what real and proven risk arises from raising a child in a single-parent or extended family, or determine why the absence of the mother in the specific case would, as he stated, "harm [the] mental and undoubtedly the physical health" of the child.[79] Furthermore, the first instance judge who granted the legal guardianship considered Mr. Fornerón to be the only relative of M, even though Mr. Fornerón's mother, the child's grandmother, appeared before the judge to offer to take care of the child.

96. The considerations of the first instance judge also reveal a preconceived idea of what it is to be a single parent, because Mr. Fornerón's capacity and possibility of fulfilling the role of father was questioned and conditioned to the existence of a wife. The single status of Mr. Fornerón, compared by one of the judges to "the absence of biological family," used as grounds for legally depriving him of performing his role as a father, constitutes the denial of a basic right based on stereotypes about the capacity, qualities or attributes required to exercise single parenthood, without considering the specific characteristics and circumstances of the father who wishes, alone, to fulfill his role as a father.

97. In this regard, expert witness García Méndez stated before the Court:

> The first instance decision indicating that this child could not be restored to her father because […] he does not constitute a family, [did not consider] the Convention on the Rights of the Child, or [… domestic] case law, which [reflects the fact that] Argentina is a progressive country in this regard. Domestic law contains no indication that this family must […] be composed of the [father] and the [mother], […] this is not in international law or in the laws of Argentina. To the contrary, […] Argentina has been a leader in recognizing different types of family organization; […] it is also one of the States that has the best record in this regard.

98. The Court has stated previously that the American Convention does not establish a closed concept of family and, in particular, it does not protect only a "traditional" model of the family.[80] In addition, the Inter-American Court has established that the term "family members or next of kin" should be understood in its broadest sense, including all those persons connected by a close relationship.[81] There is nothing to indicate that single-parent families cannot provide children with care, support and affection. Every day, the reality

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[78] In this regard, one of the Chamber judges indicated: "[M] was born of the relationship between [Mr.] Fornerón and her mother […] and I consider that it is not for us […] to assess whether they were in love. The father's claim is legitimate and, if the contested criteria were shared, numerous paternity suits, for example, would be unsuccessful. [… Mr. Fornerón] had nothing to do with the surrender of the newborn [and] cannot be prejudiced […] because he has not formed a family with [Ms.] Enríquez, and […] the mother's lack of love for her daughter does not mean that the same applies to the father[. H]e consider[s] that the denial, as it is conceived, is not only excessive, but also a kind of punishment for an inexistent omissive conduct." Judgment of the First Court of the Second Chamber of Paraná of June 10, 2003, *supra* note 36, folio 137.

[79] In this regard, the said Chamber judge indicated: "The excuse that, if the child were to be surrendered to the father, the mother would be absent, is also unacceptable, [particularly, when Argentine adoption laws] establish that no one can be simultaneously adopted by more than one person, unless the adoptive parents are married. Judgment of the First Court of the Second Chamber of Paraná of June 10, 2003, *supra* note 36, folios 137 and 140.

[80] *Cf.* Advisory Opinion OC-17/02, *supra* note 51, para. 69 and, similarly, *Case of Atala Riffo and daughters v. Chile, supra* note 50, para. 142.

[81] *Cf.* Advisory Opinion OC-17/02, *supra* note 51, para. 70, and *Case of Loayza Tamayo v. Peru. Reparations and costs*. Judgment of November 27, 1998. Series C No. 42, para. 92.

shows that not every family has a maternal or paternal figure, and this does not prevent the family from providing the necessary well-being for a child's development.

99. In addition, this Court has established that a decision based on presumptions and stereotypes about parental capacity and aptness to be able to guarantee and promote the well-being and development of the child is not sufficient to ensure the best interests of the child.[82] In addition, the Court considers that the best interests of the child cannot be used to deny the right of his or her father owing to his civil status, in favor of those who have a civil status adjusted to traditional concepts of the family.

100. The judicial decisions did not ensure the best interests of the child and the rights of the father, and were based on assertions that reveal a predetermined idea about the circumstances in which her paternity occurred, and that a single parent cannot assume responsibility for a child.

*d) Judicial delay as grounds for the decision*

101. The Superior Court of Justice of Entre Ríos, which decided to confirm the decision of the first instance judge on the legal guardianship, made various observations on the determinant influence that, in its opinion, time had had on the decision concerning the child's guardianship.

102. In this regard, in one of the votes, one of its members indicated:

> The reason for these prolonged proceedings arises from reading all the paperwork that has mounted up […], which explains the slowness of the court system, delaying their obligation to decide disputes promptly so as to try and cause as little harm as possible to those seeking justice. The delay in the proceeding […] is not a minor issue; evidently, it will have an impact on the decision that must be delivered in this proceeding.[83]

103. Furthermore, another judge asserted that "the issue is decided taking into consideration the time that has elapsed from the day following her birth up until today, which makes it utterly undesirable to change the child's situation, owing to the very damaging effects this would have on her psyche and on the development of her personality. He added that, "[e]vidently, […] if the final ruling had been made at the time of the first instance proceeding, the result would probably have been different." The same judge indicated that "[t]he duration of this process has not been reasonable; in other words, it has not complied with [international] standards." He added that they "were deciding a very special case on a problem that is clearly complex and with delayed contributions from the parties, officials, judges, technical personnel, experts, etc., all of this in the context of a Judiciary collapsed by the economic and political vicissitudes that affect Argentines in general and those that affect the people of Entre Ríos in particular. Despite all this, the particularities of the case should have been noted from the outset in order to abbreviate the procedures to complete it."[84]

104. This Court has already determined that the guardianship proceedings violated the right of Mr. Fornerón and of his daughter to be heard within a reasonable time, established in Article 8(1) of the American Convention (*supra* para. 77). Over and above this, the Court observes that the delay in the proceedings and the passage of time constituted a

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[82] *Cf. Case of Atala Riffo and daughters v. Chile, supra* note 50, para. 111.

[83] Judgment of the Civil and Commercial Chamber of the Superior Court of Justice, *supra* note 38, folio 223.

[84] Judgment of the Civil and Commercial Chamber of the Superior Court of Justice, *supra* note 38, folios 242 and 243.

determinant factor for the Superior Court of Justice of the province of Entre Ríos to rule, arguing the best interests of the child, that the legal guardianship of M should be awarded to the couple B-Z. With this decision, the provincial Superior Court of Justice revoked the Chamber's ruling and confirmed the decision of the first instance judge, even though, in the said proceedings, the legal requirements had not been strictly observed (*supra* paras. 79 to 86) and the ruling had been made without having probative elements, including some that the judge was bound to obtain, and which had to be sought at a subsequent stage (*supra* paras. 87 to 90).

105. This Court considers that the observance of legal provisions and diligence in judicial proceedings are fundamental elements to protect the best interests of the child. Moreover, the best interests of the child cannot be cited to legalize the failure to observe legal requirements, or delay or errors in judicial proceedings.

106. Based on all the above, the Inter-American Court concludes that the judicial authorities in charge of the guardianship proceedings did not act with due diligence and, therefore, the State violated the right to judicial guarantees established in Article 8(1) of the American Convention, in relation to Articles 17(1) and 1(1) of this instrument, to the detriment of Mr. Fornerón and of his daughter M, as well as in relation to Article 19 of the Convention to the detriment of the latter.

*v) Considerations of the Court on the right to an effective remedy*

107. The Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure to all persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental rights. This effectiveness supposes that, in addition to the formal existence of remedies, these obtain results or responses to the violations of the rights established in the Convention, the Constitution, or by law. In this regard, those remedies that, owing to the general situation of the country or even to the specific circumstances of a given case, are illusory cannot be considered effective. This can occur, for example, when their ineffectiveness has been revealed in practice, because the means to execute their decisions are absent, or for any other situation that constitutes a denial of justice. Thus, the proceedings must endeavor to ensure the real protection of the right recognized in the judicial ruling by the appropriate implementation of this ruling.[85]

108. Moreover, as it has indicated previously when assessing the effectiveness of remedies, the Court must observe whether the decisions in the judicial proceedings have made a real contribution to ending a situation that violated rights, ensuring the non-repetition of harmful acts, and guaranteeing the free and full exercise of the rights protected by the Convention.[86]

109. As shown above, the time that passed exceeded the reasonable time for the State to deliver judgments in the proceedings on guardianship and visiting rights. This delay gave rise to other consequences in addition to the violation of reasonable time, such as an evident denial of justice, the violation of the right to the protection of the family of Mr.

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[85] *Cf. Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 69, and *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 127.

[86] *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005, Series C No. 134, para. 210, and *Case of Chocrón Chocrón v. Venezuela, supra* note 85, para. 128.

Fornerón and of his daughter, as well as the protection of the rights of the child of the latter (*supra* paras. 66 and 106).

110. The denial of access to justice relates to the effectiveness of the remedies, because it cannot be considered that a remedy that exists in a State's laws but that does not decide the litigation filed for an unjustified delay in the proceedings is an effective remedy.[87]

111. The judicial remedies filed by Mr. Fornerón did not provide an effective and appropriate response to protect his right and that of his daughter to the protection of the family and to the rights of the child of M. Consequently, the State violated the right to judicial protection recognized in Article 25(1) of the Convention, in relation to Articles 17(1), 8(1) and 1(1) of this instrument, to the detriment of Mr. Fornerón and of his daughter M, as well as in relation to Article 19 thereof to the detriment of the latter.

### *D. Protection of the family*

*i) Considerations of the Commission*

112. Regarding the presumed violation of Article 17 de la Convention,[88] in relation to Articles 1(1) and 19 thereof, the Inter-American Commission indicated, *inter alia*, that children have the right to live with their biological family; the right of a father or mother to live with his or her child is a fundamental element of family life, and the domestic measures that prevent this, constitute an interference with a right protected by Article 17 of the Convention. The decision to separate a child from its family must be made in keeping with the law, a requirement that was not met in this case, because Mr. Fornerón had indicated his opposition to the guardianship, and there is no record that a declaration of incapacity had been made that would have avoided this requirement or compliance with the other requirements of article 317 of the Argentine Civil Code. Consequently, the State's decision to grant judicial guardianship and, subsequently, adoption, contrary to the wish of the biological father and without respecting the other legal requirements, constituted "an unlawful restriction of the right to a family" of Mr. Fornerón and his daughter. This decision, taken without ensuring due "access of the father to the child," not only interfered in the exercise that the Convention guaranteed them of their family rights, but also entailed the risk that affective ties would be established over time that would be difficult to reverse without causing harm to the child.

113. In addition, the Commission affirmed that the State had not taken the necessary measures to implement an appropriate visiting regime, so that the child has been deprived of her right to have access to various aspects of her identity, to have information that was important for her development, and to establish ties with her biological family. The family relationships and the biological aspects of the history of an individual, particularly a child, constitute a fundamental element of his or her identity, so that any act or omission of the State that has an effect on the said components can constitute a violation of the right to identity. In this regard, the conduct of the domestic authorities who granted the guardianship and the adoption engaged the State's international responsibility for the violation of the rights to a family and to identity. It concluded that the State's decision to

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87 *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits*. Judgment of May 6, 2008. Series C No. 179, para. 88. *Cf.* also *Case of Las Palmeras v. Colombia. Merits.* Judgment of December 6, 2001. Series C No. 90, para. 58.

88 The pertinent part of Article 17 of the American Convention establishes:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

separate M from her biological father, without providing a visiting regime, violated the rights to a family of the child and of Mr. Fornerón, established in Article 17 of the Convention, in relation to the rights established in Articles 19 and 1(1) of this instrument.

*ii) Arguments of the representatives and of the State*

114. The representatives stated that M had been "subjected to one of the most serious interferences […], that which results in the separation of a family divesting her of the mutual enjoyment of coexistence between parents and children […] and to be raised and educated by her father. She continues to be denied her origin, severing family ties." They indicated that the separation of a child from his or her biological family is only admissible under exceptional circumstances. In addition, the child "was separated from her father without any reason," and without Mr. Fornerón having consented during the more than 10 years that the proceedings have lasted. The said judicial decisions prevented "access to and respect for […] family coexistence, and [the child] was deprived of her right to have access to her identity and to have significant information for her insertion into her family of origin." In addition, the decisions had "place Mr. Fornerón to date […] in a situation of disadvantage" in relation to the couple who obtained the guardianship. They indicated that "Argentine law has no requirement [other than] acknowledgement to confirm paternity and possession of the rights and obligations of paternal authority," so that the Judiciary should have returned the child to him once the father acknowledged her in July 2000. They stated that "the child is obliged to live with a family that is not her family, with a different name than her father; she is the child of another person's life project" and that "the right of the child is above all the right to acquire and develop an identity and, consequently, to be accepted and integrated into the family into which he or she is born, which is the genetic inheritance of the cultural experiences accumulated by preceding generations." They concluded that the State's decision to separate the child from her father, without granting a visiting regime, violated the rights of the family of M and of Mr. Fornerón, recognized in Articles 17, 19 and 1(1) of the Convention.

115. The State indicated that its openness to dialogue was revealed in declarations made by the senior political level of the Executive, which included, in addition to two Ministers of Justice, the Secretariat for Children, Adolescents and the Family, stating that the actions of the courts made it impossible for the two of them to form a family. It added that "Mr. Fornerón's acknowledgement gave rise to rights and obligations as the father of the child" and that the father opposed the pre-adoptive guardianship and the adoption procedure. It considered that Argentina had done everything possible to reach a friendly agreement between the parties, focused on bringing the biological father and the child together, always considering the latter's best interest.

*iii) Considerations of the Court*

116. The Court has already indicated that the right to protection of the family, recognized in Article 17 of the American Convention involves, among other obligations, promoting the strengthening and development of the family insofar as possible.[89] Also, as previously indicated in Advisory Opinion OC-17, one of the most serious forms of State interference is the one resulting in the separation of a family. In this regard, the separation of a child from his or her family may constitute, under certain circumstances, a violation of the said right to

[89] *Cf.* Advisory Opinion OC-17*, supra* note 51, para. 66, and *Case of Atala Riffo and daughters v. Chile, supra* note 50, para. 169.

protection of the family,[90] because even legal separations of a child from his or her biological family are only admissible when they are duly justified by the best interests of the child, exceptional and, insofar as possible, provisional[91] (*supra* para. 47).

117. According to the Court's consistent case law, for the restriction of a right to be compatible with the American Convention, it must fulfill several requirements, among others and above all, it must be based on law. In this case, the guardianship procedure and subsequent adoption of the child M were regulated by, among other norms, the Civil Code, a law in the formal and pertinent sense.

118. Despite the foregoing, this Court has determined that the legal guardianship, which culminated in the adoption of M, was awarded without observing certain legal requirements, such as the consent of the biological father, and the absence of verification of the other conditions established in article 317(a) of the Civil Code, among others provided for under domestic law (*supra* paras. 79 to 86). Consequently, the interference in the right to protection of the family of Mr. Fornerón and of his daughter M did not meet the requirement of the legality of the restriction.

119. Furthermore, the Court considers, as indicated by expert witness García Méndez during the public hearing in this case, that the right of the child to grow up with his or her family of origin is of fundamental importance and is one of the most relevant legal criteria derived from Articles 17 and 19 of the American Convention, as well as from Articles 8, 9, 18 and 21 of the Convention on the Rights of the Child. Hence, the family to which every child has a right is, first and foremost, the biological family,[92] which includes the closest family members, who should provide protection to the child and, in turn, should be the principal subject of measures of protection by the State. Consequently, in the absence of one of the parents, the judicial authorities are obliged to seek the father or mother or other members of the biological family.

120. In particular, Article 9 of the Convention on the Rights of the Child establishes that:

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
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> [...]
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> 2. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

121. In this case, the requirement of the exceptional nature of the separation was not met. The judge who awarded the legal guardianship and subsequent adoption, did not take into account Mr. Fornerón's wish to take care of his daughter and not to continue separated from her. He did this despite the fact that the biological father expressed this wish explicitly and repeatedly to different authorities and, particularly, to the said official during the

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90 *Cf.* Advisory Opinion OC-17, *supra* note 51, paras. 71 and 72, and *Case of Atala Riffo and daughters v. Chile, supra* note 50, para. 169.

91 *Cf.* Advisory Opinion OC-17, *supra* note 51, para. 77, and *Case of Gelman v. Uruguay*, *supra* note 49, para. 125.

92 *Cf.* Opinion of expert witness García Méndez provided during the public hearing.

guardianship and adoption proceedings. Furthermore, the said official did not determine the existence of any of the circumstances established in the Convention on the Rights of the Child, such as a case "involving abuse or neglect of the child by the parents," which would have permitted, exceptionally, the separation of the father from his daughter.

122. Moreover, in addition to the separation of father and daughter, made official with the judgment in which the legal guardianship was awarded to the couple B-Z for one year and, subsequently, in the adoption proceedings, no measures were taken to establish ties between Mr. Fornerón and his daughter, despite the fact that the judicial decisions on guardianship and adoption determined this possibility.[93] In November 2001, the biological father filed a lawsuit to establish a visiting regime. However, and with the exception of an agreement between the parties before the Superior Court of Justice of Entre Ríos in May 2011 (*supra* para. 42), there is no record that, in more than 11 years, a visiting regime had been established by the courts that would have established ties between father and daughter.

123. Lastly, the Court recalls that Article 8(1) of the Convention on the Rights of the Child indicates that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." The Court has recognized the right to identity, which can be conceptualized, in general, as a series of attribute and characteristics that allow the individualization of the person in society and, in this regard, include several other rights according to the subject of law in question and the circumstances of the case.[94] Personal identity is closely related to the person in his or her specific individuality and private life, both supported by a historical and biological experience, and also by the way in which the said individual relates to others, by developing social and family ties. This is why, although identity is not a right that is exclusive to children, it has special importance during childhood.[95] The circumstances of this case signified that M grew up from birth with the B-Z family. This fact meant that the personal, family and social development of M occurred within a family other than her biological family. In addition, the fact that, in all these years, M has not had any contact or ties with her family of origin has not allowed her to create the family relationships that correspond to her by law. Consequently, the impossibility of M to grow up with her biological family and the absence of measures aimed at establishing a relationship between father and daughter affected the right to identity of the child M, in addition to her right to the protection of the family.

124. Based on the above, this Court concludes that the State violated the right to protection of the family recognized in Article 17(1) of the American Convention, in relation to Articles 1(1), 8(1) and 25(1) of this instrument, to the detriment of Mr. Fornerón and of his daughter M, as well as in relation to Article 19 of this treaty with regard to the latter.

### *E. Domestic legal effects*

*i) Considerations of the Commission*

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93 *Cf.* Judgment of the first instance judge of May 17, 2001, *supra* note 31, folio 19; Judgment of the Civil and Commercial Chamber of the Superior Court of Justice, *supra* note 38, folio 243, and Judgment of the first instance judge of December 23, 2005, *supra* note 48, folio 4761.

94 *Case of Gelman v. Uruguay, supra* note 49, para. 122, and *Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011 Series C No. 232, para. 113.

95 *Cf. Case of Contreras et al. v. El Salvador, supra* note 94, para. 113.

125. Regarding the obligation to adopt domestic legal provisions established in Article 2 of the American Convention,[96] in its Report No. 83/10, the Inter-American Commission indicated that, "[a]lthough the petitioners did not advance a claim under the said article [before this organ], based on the arguments as to fact and law offered by the parties in the adversarial proceedings, [it found] it necessary to analyze its application under the *iura novit curia* principle." It noted that there were significant indications that there had been a transaction involved in the birth of the child M and that "the State […] should have investigated this in light of its international obligations." However, the Commission considered it proved that, "in Argentina, there are no criminal laws that punish the sale of children." It indicated that Article 35 of the Convention on the Rights of the Child, which forms part of the *corpus juris* incorporated into Article 19 of the American Convention, establishes that the States Parties shall take all appropriate domestic measures to prevent, *inter alia*, "the sale of or traffic in children for any purpose or in any form." Furthermore, Article 2 of the Optional Protocol to this Convention on the sale of children, child prostitution and child pornography defines the sale of children. The Commission indicated that, in light of Article 2, in relation to Articles 1(1) and 19 of the American Convention, the State had the obligation to adopt legislative measures to prevent the sale of children on its territory and did not do so. This meant that it did not investigate with due diligence the allegation, first of Mr. Fornerón and then of the Public Prosecution Service, that the child M "could have been the victim of child-trafficking." Based on the foregoing, the Commission concluded that the State had violated Article 2, in relation to Articles 1(1) and 19 of the American Convention, to the detriment of Mr. Fornerón and his daughter.

*ii) Arguments of the representatives and of the State*

126. The representatives argued that the State "had not complied with the obligation to adopt the legislative, judicial or any other measures to prevent the sale of children on its territory; because it did not investigate or punish the participants in the act of trafficking [of which] the child and her father were victims." They stated that "this violation began before the birth of [M], because all the conditions of impunity for this to occur were in place in Argentina." The State "had and has the responsibility to protect the children on its territory, to prevent, investigate and punish child-trafficking" and not having done so "continues to create a risk, promoting impunity, and aggravating its responsibility."

127. Among other arguments, the State underlined the different legislative measures that had resulted in "an important change, not only in the country's legal standards, but also in […] its case law." Among these measures it mentioned: (a) the adoption of Law No. 25,854 creating the Single Register of applicants for guardianship for the purposes of adoption and the decrees regulating the law, in particular the one creating the electronic network interconnecting the 24 provincial registers, and (b) the adoption of Law No. 26,061 on the integral protection of the rights of children and adolescents. In addition, it emphasized that this legislative framework was established following the approval of the Convention on the Rights of the Child, which took place with the adoption of Law No. 23,849. This Convention "formed the basis for all the legislation concerning children following the 1994 reform of the Constitution, which granted it constitutional rank, by explicitly incorporating it into [paragraph] 22 of Article 75." In addition, the State advised that a working group had been established within the Supreme Court of Justice of the Nation, with the participation of

[96] Article 2 of the American Convention establishes:

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

judges from the Judiciary, and officials from the Public Defenders Service (*Ministerio Publico de la Defensa*) and the National Secretariat for Children, Adolescents and the Family, which had decided to draft a bill that would specifically prohibit the direct award of guardianship for the purpose of adoption.

128. In addition, the Stated indicated that it considered inadmissible any declaration suggesting that the facts of the case related to situations of the trafficking or sale of children, owing to the inexistence of evidence to prove this in the case. Nevertheless, it affirmed that the State was "directly aligned with the international trend that criminalizes such acts [by promoting] legislative measures to combat them." Furthermore, it observed that there was some confusion concerning the sale, appropriation and trafficking of children. Thus, it mentioned that, under Argentine law, the illegal trafficking of persons is a migratory crime, while some governmental and non-governmental organizations "use the concept of child-trafficking when referring to the sale of children, as in the case of the events that gave rise to the representatives' claim, and that, in no way, had the State […] acknowledged that this occurs systematically in [Argentina]."

*ii) Considerations of the Court*

129. The Inter-American Court considered it desirable to clarify that although there are diverse and important indications, even pointed out by the domestic authorities (*infra* paras. 132 to 134), that support the possibility that M was surrendered by her mother in exchange for money, they are not sufficient for this Court to reach a conclusion in this regard. The absence of a criminal investigation played a fundamental role in the failure to determine what happened with the child.

130. This Court has stated on other occasions that "[u]nder international customary law, a customary norm stipulates that a State that has acceded to an international convention must introduce into its domestic law the necessary modifications to ensure the execution of the obligations it has assumed." In the American Convention, this principle is contained in its Article 2, which establishes the general obligation of each State Party to adapt its internal law to the provisions of the Convention in order to guarantee the rights that it recognizes.[97]

131. The Inter-American Court has interpreted that the adaptation of domestic law to the parameters of the Convention entails the adoption of two types of measures, namely: (a) the elimination of the norms and practices of any nature that entail a violation of the guarantees established in the Convention or that disregard the rights recognized therein or impede their exercise, and (b) the enactment of laws and the implementation of practices leading to the effective observance of the said guarantees. The former is satisfied with the reform, repeal or annulment of the laws or practices that have those effects, as appropriate. The latter obliges the State to prevent the recurrence of human rights violations and, to this end, it must adopt all the necessary legal, administrative and other measure to avoid similar facts occurring in the future.[98] At times the obligation to adopt provisions of domestic law has entailed the obligation of the State to criminalize certain conducts.[99]

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[97] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 28, 1998. Series C No. 39, para. 68, and *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 179.

[98] *Cf. Case of Salvador Chiriboga v. Ecuador, supra* note 87, para. 122, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 85.

[99] *Cf.*, for example, in relation to the forced disappearance of persons, *Case of Heliodoro Portugal v. Panama supra* note 97, para. 185, and *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, paras. 66 and 165.

132. In this case, the prosecutor and the judge in charge of the investigation established the existence of indications that M had been surrendered by her mother in exchange for money. The prosecutor indicated that "there had presumably been a scheme to sell the baby," described the facts to be investigated and indicated that, behind the child's mother, "there are other individuals with more influence, with more economic power, individuals who perhaps are organized to entrap young girls who are pregnant, single and from a disadvantaged background, and put them in contact with couples with the financial means, who pay to appropriate the children of the said girls."[100]

133. Moreover, the investigating judge stated that he:[101]

> [A]greed with the assertions of the prosecutor that, behind all the proceedings, there were a series of interests, fundamentally of a financial nature, among which, the most powerful make arrangements to entrap young, single pregnant women (in other words, the weakest and neediest) so that, in exchange money (which is never as much as those who profit from this intermediation receive), they surrender their child to couples with affective needs willing to adopt the newborns and to pay for this.
>
> The situation described in the case file falls within this reality, which is heartbreaking for those who still believe we have some compassion in the face of what we can only be classified as human exploitation, in which legal and health professionals are also involved[.]

134. Despite this, the criminal investigation was archived on two occasions without determining whether, a "sale" had really taken place (*supra* paras. 28 to 30), given that, in the opinion of the investigating judge and the Criminal Chamber involved, the facts relating to the alleged "sale" of the child did not conform to any criminal offense. In his second decision to file the case, the investigating judge indicated, among other considerations,[102] that:

> Trafficking in babies has not been criminalized in our Criminal Code and can only be punished as an attack on the civil status or identity of the person (the latter since the enactment of Law [No.] 24.410), provided that the buyers register them in the Civil Registry as "their own children," changing one identity for another (equivalent to eliminating).
>
> The fact that has not been proved, although always presumed, of money changing hands for the surrender of newborns is not a crime under the Criminal Code; irrespective of the moral or ethical harm that could be caused by this kind of action, which is fairly common at present, it does not represent criminal conduct, to the extent that the surrender of the newborn is carried out with all the legal formalities, as occurred in the instant case.
>
> [I]t is true, and I have indicated this in the judgment that was revoked […] that, shielded on the one hand by the financial needs (of the mother who is usually single) and on the other by the affective needs (of those who wish to adopt the child by any means, including paying for it), are the unlawful interests of individuals who are [well] known in small communities such as these and who, aware of the difficulties involved, take advantage of the situation, in order to profit from it, to contact both parties; while taking the largest share, convinced perhaps that they have done a good deed for the parties and, consequently, have a clear conscience. But that was a far cry from affirming that such conduct is criminal.
>
> [T]he fact denounced does not conform to any crime, a conclusion that definitively and irrevocably closes the case, by archiving it. It is concluded that, beyond the reservations of another nature that I have indicated above, there is no criminal conduct to investigate[.]

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[100] Prosecutor's request for a preliminary investigation of August 2, 2000 (file of attachments to the Merits Report, attachment 7, folios 55 and 57).

[101] Ruling of the investigating judge of August 4, 2000 (file of attachments to the Merits Report, attachment 8, folios 63 to 65).

[102] Ruling of the investigating judge of January 31, 2001 (file of attachments to the Merits Report, attachment 11, folios 89, 92 and 96).

135. The Criminal Chamber confirmed that the case should be archived and, among other considerations,[103] indicated that:

> The reform [of the Criminal Code introduced by Law No. 24,410 modifying articles discussed in the judicial investigation,] was not intended to eliminate the activities of those who profit from the sale of children or intermediation in their surrender for benevolent or humanitarian reasons.

136. This Court, based on Article 58(b) of its Rules of Procedure, asked the State to provide information on whether the act of surrendering a child in exchange for financial compensation or remuneration constituted a criminal offense under domestic law. After requesting an extension of the time frame that was granted, Argentina failed to forward the information requested as helpful evidence. Two and a half months after the original time frame had expired, and more than a month after the extension had expired, the State submitted information related to the Court's request; this was not admitted because it was time-barred (*supra* paras. 7 and 12).

137. As this Court has indicated, the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of children, which this Court must use to establish the content and the scope of the general provision defined in Article 19 of the American Convention.[104]

138. Article 19 of the Convention establishes the right of every child, and the consequent obligation, *inter alia*, of the State to provide the measures of protection required by his or her condition as a minor. Meanwhile, Article 35 of the Convention on the Rights of the Child, ratified by Argentina on December 4, 1990, establishes that:

> States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

139. The combined analysis of the two articles reveals that the latter clarifies and determines the content of some of the "measures of protection" mentioned in Article 19 of the American Convention, establishing, *inter alia*, the obligation to adopt all appropriate national measures to prevent the "sale" of children for any purpose or in any form. The text is clear in stating that the State is obliged to adopt all appropriate measures to prevent the sale of children; in other words, the State is not permitted to choose between different measures, but must prevent the "sale" in all possible ways, without exceptions or limitations, and this includes, among other legislative, administrative and any other type of measure, the obligation to criminalize the "sale" of children, whatever the purpose or form.

140. The Court considers that criminalization is an appropriate way to protect certain rights.[105] The surrender of a child in exchange for remuneration or any other compensation clearly affects fundamental rights such as the child's liberty, personal integrity and dignity, and results in one of the most serious injuries to a child, whose condition of vulnerability is being taken advantage of by adults. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has indicated that the sale of children must be

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[103] Ruling of the Gualeguay Criminal Chamber of April 26, 2001 (file of attachments to the Merits Report, attachment 13, folio 112).

[104] *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra* note 49, para. 194 and, similarly, *Case of Contreras et al. v. El Salvador, supra* note 94, para. 107.

[105] *Cf., mutatis mutandi, Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 76, and Case *of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs*. Judgment of January 27, 2009. Series C No. 193, para. 118.

"condemned regardless of the motivation or the purpose for which it is done, as it reduces the child to an article of trade and grants the parents or any 'seller' the power to dispose of him as if they were a chattel."[106]

141. As the domestic courts have indicated, at the time of the facts of this case, the State did not criminalize the surrender of a child in exchange for money. The "sale" of a child was not prevented or prohibited by criminal law, even though other factual presumptions were punished such as the concealment or elimination of identity (*supra* para. 134). This prohibition does not satisfy the provision of Article 35 of the Convention on the Rights of the Child that measures must be adopted to prevent the "sale" of children for any purpose and in any form. The obligation to adopt all measures to prevent any "sale," including prohibition under criminal law, was in force from the moment Argentina ratified the Convention on the Rights of the Child in 1990.

142. In addition, the obligation to prohibit any sale of children under criminal law was affirmed by the State when ratifying the Optional Protocol of the Convention on the Rights of the Child on the Sale of Children, Child Prosecution and Child Pornography on September 25, 2003. On that occasion, Argentina made, *inter alia*, an interpretative declaration indicating its preference for a more comprehensive definition of sale than that established in Article 2 of the Protocol,[107] also indicating that "the sale of children should be penalized in all cases and not only in those listed in Article 3, paragraph 1(a) [of the said Protocol]."[108]

143. The Court observes that several States in the region have criminalized the sale of children and adolescents.[109] Moreover, considering the sale of a person as a crime is even in

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106 *Cf.* Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography of 17 January 1996, E/CN.4/1996/100, para. 12. Also, *cf., inter alia,* United Nations, General Assembly, Resolution on the rights of the child, A/RES/66/141, 4 April 2012, para. 20, and A/RES/65/197, 30 March 2011, para. 18 ("The General Assembly […] calls upon all States to prevent, criminalize, prosecute and punish all forms of the sale of children") and Human Rights Council, Resolution on the rights of the child, A/HRC/RES/19/37, 19 April 2012, para. 42(a) ("The Council of Human Rights […] *Calls upon* all States: (a) To take all measures necessary to eliminate, criminalize and penalize effectively […] the sale of children") and A/HRC/RES/7/29, 28 March 2008, para. 36(a) ("The Council of Human Rights […] *Calls upon* all States: (a) To take all measures necessary to eliminate, criminalize and penalize effectively […] the sale of children").

107 Article 2 of the said Protocol defines the sale of children as follows:

For the purposes of the present Protocol: (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration[.]

108 In this declaration, Argentina indicated: "[w]ith reference to Article 2, the Argentine Republic would prefer a broader definition of sale of children[.] [T]he Argentine Republic believes that the sale of children should be criminalized in all cases and not only in those enumerated in Article 3, paragraph 1(a)." United Nations Treaty Collection; Status of treaties, Optional Protocol of the Convention on the Rights of the Child on the Sale of Children, Child Prosecution and Child Pornography, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

The pertinent part of Article 3 of the said Protocol, establishes that:

> 1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:
>
> (a) In the context of sale of children as defined in article 2:
> (i) Offering, delivering or accepting, by whatever means, a child for the purpose of:
> a. Sexual exploitation of the child;
> b. Transfer of organs of the child for profit;
> c. Engagement of the child in forced labour[.]

109 *Cf.* Brazil, Law No. 8,069, regulating the Law on Children and Adolescents and other measures; published on July 16, 1990, and amended on September 27, 1990, Article 238 (Promise or surrender a child or ward to a third party, by means of payment or compensation. Punishment: one to four years' imprisonment. Single paragraph. The person offering or making the payment or compensation shall incur the same punishment); Costa

accordance with Argentina's domestic law. Indeed, article 15 of the Argentine Constitution, among other provisions, establishes that:

> Any contract for the sale of a person is a crime, and those who sign the contract and the notary or official who authorizes it shall be held responsible.

144. The State failed to investigate the alleged "sale" of M to the couple B-Z, because, as stated by the investigating judge and by the Appeals Chamber, among other authorities that intervened in the case, this fact did not constitute a criminal offense; e at that time, the State's obligation existed to adopt all measures, including penal measures, to prevent the sale of children for any purpose and in any form. Based on the foregoing, the Court concludes that the State failed to comply with its obligation to adopt the provisions under domestic law established in Article 2 of the American Convention on Human Rights, in relation to Articles 19, 8(1), 25(1) and 1(1) of this instrument to the detriment of the child M and of Mr. Fornerón.

## VII
## REPARATIONS
## *(Application of Article 63(1) of the American Convention)*

145. Based on the provisions of Article 63(1) of the American Convention,[110] the Court has indicated that any violation of an international obligation that has caused harm entails the duty to provide adequate reparation,[111] and that this provision reflects a customary norm that is one of the fundamental principles of contemporary international law on State responsibility.[112]

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Rica, Penal Code, Article 376 (Punishment for child trafficking. One to four years' imprisonment shall be imposed on whosoever sells, promotes or facilitates the sale of a child and perceives for this any type of payment or financial or any other type of gratification or recompense. The same punishment shall be imposed on anyone who offers payment, reward or compensation in order to receive the child. The term of imprisonment shall be four to six years when the author is a forebear or relative to the third degree, the person responsible for guardianship or custody, or any person who exercises the representation of the child. The same punishment shall be imposed on the professional or public official who sells, promotes, facilitates or legitimates by means of any act the sale of the child. The professional and the public official shall also be disqualified from exercising the profession or trade in which the act occurred for from two to six years), and Venezuela, Organic law for the protection of children and adolescents, published in *Gaceta Oficial Extraordinaria* No. 5,859 of December 10, 2007, Article 267 (Profit based on the transfer of children or adolescents. Anyone who promises or surrenders a son, daughter, ward or a child or adolescent they are responsible for raising to a third party, based on payment or remuneration, shall be punished with two to six years' imprisonment. Anyone who offers or makes the payment or remuneration shall incur the same punishment). Similar provisions may be found in other countries, including El Salvador (Penal Code, Article 367) and the Dominican Republic (Law 136-03, Code for the protection of the rights of children and adolescents, published in *Gaceta Oficial* No. 10234, of August 7, 2003, Article 404). In addition, the sale of children in relation to adoption processes is criminalized in, among other countries, Guatemala (Decree 9-2009. Law against sexual violence, and people trafficking and exploitation, March 20, 2009; published in *Diario Oficial,* Tome CCLXXXVI No. 49, arts. 47 and 53, adding Articles 241bis and 202(3) to the Penal Code); Panama (Law 79 of 2011 on people trafficking and related activities, November 15, 2011, *Gaceta* 26912, Articles 4 and 64, adding Article 457-A to the Penal Code) and Paraguay (Law No. 1(1)60/97, October 16, 1997, Article 223).

[110] Article 63(1) of the American Convention stipulates:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

[111] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 276.

[112] *Cf. Case of Castillo Páez v. Peru*. *Reparations and costs*. Judgment of November 27, 1998. Series C No. 43, para. 50, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 276.

146. This Court has established that the reparations must have a causal connection with the facts of the case, the violations declared, the harm proved, and the measures requested to repair the damage. Therefore, the Court must observe this concurrence in order to rule appropriately and in keeping with the law.[113]

147. Taking into account the violations of the American Convention declared in this Judgment, the Court will proceed to analyze the claims presented by the Commission and by the representatives, as well as the arguments of the State, in light of the criteria established in the Court's case law concerning the nature and scope of the obligation to make reparation, in order to establish the measures aimed at repairing the harm caused to the victims.

### *A. Injured Party*

148. In the terms of Article 63(1) of the American Convention, The Court considers the injured party to be the person declared a victim of the violation of any right established therein.[114] The injured parties in this case are Mr. Fornerón and his daughter who, as victims of the violations declared in this Judgment, will be considered beneficiaries of the reparations that the Court orders.

### *B. Measures of integral reparation: restitution, satisfaction and guarantees of non-repetition*

149. International case law and, in particular, that of the Court, has established repeatedly that the judgment can constitute *per se* a form of reparation.[115] Nevertheless, considering the circumstances of the case and the adverse effects on the victims as a result of the violations of the American Convention declared against them, the Court finds it pertinent to determine the following measures of reparation.

#### *1. Measure of restitution*

##### *1.1 Restitution of ties between Mr. Fornerón and his daughter*

150. The Inter-American Commission asked the Court to order the State to adopt, in the short term, all necessary measures to make integral reparation for the human rights violations suffered by Mr. Fornerón and his daughter, with the appropriate assistance and taking into consideration the best interests of the child. In particular, it requested that, among other measures, Argentina take urgently the necessary steps to create the conditions to establish the relationship between Mr. Fornerón and his daughter. It indicated that the most important measure of reparation was that the State guarantee the child and Mr. Fornerón a relationship in accordance with their actual needs and the best interests of the child, and that the visiting regime was a first step.

151. Additionally, the Commission indicated that the State must follow various guidelines

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[113] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 278.

[114] *Cf. Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 281.

[115] *Cf. Case of El Amparo v. Venezuela. Reparations and costs*. Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of González Medina and family v. Dominican Republic, supra* note 16, para. 315.

in order to determine what, in this case, is the best interest of the child and, therefore, the most appropriate visiting regime in keeping with the current needs of the girl and her biological father. First, the State must base its actions on an analysis of the case history, which means that the actual needs and interests of the child must be determined by a competent analysis by specialists who consider different pre-identified factors, such as maturity or experiences to date. Second, the State must guarantee the right of the child to be heard in the corresponding proceedings, having previously determined the most appropriate methodology and medium for her to express her opinion in keeping with her age and maturity. Third, the State must guarantee various conditions and guarantees of due process when conducting the procedure to determine the most appropriate visiting regime for Mr. Fornerón and the child.

152. Lastly, the Commission emphasized other aspects that it considered important in the context of any future proceedings to determine the situation of Mr. Fornerón and his daughter. In this regard, it indicated that the State must guarantee: (a) that the child has prior access to all the relevant information she requires to be able to form her own opinion; (b) an appropriate environment for expressing her opinions, that "the hearing be held in an environment appropriate to the child's capacity, in keeping with her age and maturity, so that she can express herself freely," and (c) that the courts have access to all relevant information to determine the best interests of the child.

153. The representatives indicated that, in this case, reparation meant the return of the child to her family of origin so that she can know the truth about her life and that of her father; that she was never up for adoption, because she was never abandoned; that no one replaced Mr. Fornerón's desire to be her father, and that she is part of the generational continuity of her biological family. Thus, this return, which will give her back her identity, her origin and her culture, is an act of integral reparation, in her best interests, and the only way to repair the human rights violations suffered by the child and her father.

154. In addition, the representatives affirmed that her return is possible taking into consideration the judicial and the psychological aspects. Regarding the judicial factor, they indicated that the adoption judgment must be annulled, using mechanisms of domestic law, because it legalized an unlawful act: the sale of the child. The annulment of the adoption is possible because: (a) it resulted from an unlawful act; (b) the child was never abandoned and was never legally declared abandoned and her father opportunely and appropriately acknowledged her, acquiring parental authority and, in exercise of his paternity, he did not consent to his child being adopted, and (c) the decision granting the pre-adoption guardianship was discriminatory based on the personal and financial situation of the father. Also, from a psychological perspective, they indicated that the psychological-therapeutic restitution process used in the case of children appropriated during the military dictatorship should be followed. In addition, they indicated that the act of restitution did not involve a traumatic situation; the idea of a second trauma being inflicted on the child due to its return cannot be accepted; "there is no 'rupture,' or silence, it is a new and reparatory situation." The representatives concluded that to restitute is to repair; it is returning to the child her liberty, her identity, her honor, her family and her history.

155. The State rejected categorically "the immediate return of the child to her family of origin" which "does not appear to be a realistic, opportune or viable alternative. Rather, it would only result in an even more harmful event for all those involved." As an action strategy, Argentina proposed the possibility of reuniting Mr. Fornerón with his biological daughter and indicated its willingness to provide the material resources to facilitate bringing father and daughter together; even though the two of them must develop the visiting regime, and decide when and how frequently they will meet, under a "therapeutic structure"

that will facilitate the process. The State agreed with the Commission that a visiting regime cannot be proposed as an end in itself, and the biological father must have a real influence in the child's life. Argentine also expressed its commitment, insofar as possible, to remove the obstacles that exist to establishing ties between father and daughter. In addition, it recalled that it had taken specific measures designed to ensure material conditions to contribute to the bonding process and insisted on the efforts it had made with the province of Entre Rios to achieve or attempt to bring the father and daughter together.

156. In this case, the Court determined that the domestic proceedings culminating in the decision to hand over M for guardianship and subsequent adoption violated the rights to judicial guarantees, judicial protection, protection of the family, and the rights of the child recognized by the American Convention (*supra* paras. 77, 106, 111 and 124). Consequently, in principle, this Court should annul the domestic decisions taken in the said proceedings. However, the Court cannot overlook the exceptional aspect of this case, which is the circumstance that a bond has been established between the child and her adoptive parents and the social environment in which she has been immersed for almost 12 years.

157. This Court has indicated that reparation of the harm caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), whenever possible; this consists in re-establishment of the previous situation. If this is not feasible, as in numerous cases of human rights violations, the Court will determine measures to safeguard the violated rights and to repair the consequences of the violations.[116] The Court considers that, in this case, it is not possible to create immediately a relationship between father and daughter that has not been established in almost 12 years.

158. In this regard, the Court observes that the Inter-American Commission and the State did not propose the immediate return of the child to her biological father, but rather that a process of bonding be initiated with certain characteristics. In particular, Argentina indicated its willingness to provide material resources and therapeutic assistance, indicated that the biological father should have a real influence in the child's life, and undertook to remove the obstacles that existed to the relationship between father and daughter

159. In addition, the Court took note of the opinion provided during the public hearing in this case by expert witness Guilis, proposed by the State, who indicated, on the one hand, that the child had developed affective ties with her actual social and family environment from which she could not be separated suddenly and, on the other hand, that the ties between the child and the biological father and his environment could not be established immediately. The Court recalls that the expert witness offered by Argentina "advised against returning the child after 11 years" and stated "that [in this case] for the child's good, […] it is necessary to restore […] the role of the father, who never renounced that role." In this regard, the expert indicated that she "endorse[d] the State's proposal […] for establishing a bond by means of a visiting regime between [M] and her biological father, considering that this is the most prudent way of reducing the harm that has already been caused in this prolonged litigation process."[117] Lastly, the Court observes that expert witnesses Guilis and García Méndez, the latter proposed by the Commission, underscored the importance of informing M of the truth about her origin,[118] which, in this Court's opinion, should include what happened during the guardianship and adoption proceedings, and the efforts made by

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116 *Cf. Case of Velásquez Rodríguez v. Honduras,* supra note 111, para. 26, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 277.

117 *Cf.* Opinion of expert witness Guilis provided during the public hearing

118 *Cf.* Opinions of expert witnesses García Méndez and Guilis provided during the public hearing.

her biological father to be recognized as such and to recover her for himself and for his family.

160. Based on the above, the Court finds it necessary that, as a measure of reparation, the State must establish immediately a procedure designed to establish a bond between Mr. Fornerón and his daughter. This involves a process of bringing them together gradually in order to start building a relationship between the father and daughter who, in almost 12 years, have only met once for about 45 minutes. This process should be a mechanism for M and her father to establish a bond by means of periodic meetings and should be designed so that, in the future, they can develop and exercise their family rights, such as the right to live together, without this implying a conflict with the adoptive family of M. This process should observe the following guidelines.

*Appointment of one or more experts*

161. First, the bonding process should be guided and implemented by one or more professional with expertise in this area. The State must appoint the said expert or set up a team immediately and, if it creates a team, appoint one person to be in charge of it who, without delay, should develop and implement a plan of action. In addition, the State must ensure the impartiality and aptness of the expert or experts who take part in the bonding process, and they must be made aware of this Judgment as well as all other relevant circumstances regarding what happened to Mr. Fornerón and his daughter.

*Therapeutic support*

162. Second, the State must provide permanent therapeutic support to Mr. Fornerón and the child M, if they so wish. In addition, this assistance should be made available, obligatorily, at the times immediately before and after any meetings between father and daughter and, if necessary, at their request, during such meetings.

*Provision of material resources and conditions*

163. Third, the State must guarantee and provide all the material resources and conditions determined by the experts in order to create the bonding process and to facilitate the visits or meetings between father and daughter including, among other aspects, time off work, travel expenses, board and lodging for Mr. Fornerón and, eventually, for the child; appropriate physical spaces if required, and any other resource that may be necessary.

*Adoption of other measures*

164. Fourth, the State must adopt all judicial, legal and administrative measures to allow the bonding process to take place, and also remove any obstacle that prevent it. In particular, the State must adopt the necessary measures to ensure that, for the well-being of the child and the appropriate development of the bonding process, the adoptive family of the child M facilitate, collaborate and participate in the process.

*Consideration of the wishes and opinion of M*

165. Fifth, considering the essential role of children in any decision that affects their life, the experts in charge of the bonding process must ensure that M is aware of her rights and take into account her wishes and opinion, based on her level of development and personal autonomy at all times, regardless of third party interests or interference.

*Involvement of Mr. Fornerón in his daughter's life*

166. Sixth, the bonding process should include appropriate mechanisms for Mr. Fornerón to become involved in the life of M, based on his condition as her biological father. Furthermore, Mr. Fornerón should receive periodic information on different aspects of her life and about her development.

*Submission of reports*

167. Lastly, given the particularity of this case, the State must present a report within three months of notification of this Judgment on the characteristics, implementation, and progress in the bonding process. Subsequently, Argentina must submit an updated report on the said aspects every four months for the following two years. After this, the Court will determine the frequency with which the State must submit subsequent reports in the context of monitoring compliance with the Judgment,

*2. Guarantees of non-repetition*

*2.1. Investigation and eventual sanction of officials*

168. The Commission asked the Court to order the State to investigate and to apply the relevant measures or punishments to all the public officials found responsible for the violations perpetrated against the victims in this case.

169. The representatives requested this measure of reparation in similar terms to the Inter-American Commission. They also advised that, on July 5, 2010, they had filed complaints before the Review Panel of the Judicial Council of Entre Ríos against four officials involved in this case: (a) the Civil and Commercial first instance judge, Raúl A. Del Valle; (b) the deputy Ombudsman for Children and the Poor, Julio R. F. Guaita; (c) the investigating judge, Daniel Olarte, and (d) the Ombudsman for Children and the Poor, Marcelo Santiago Balbi. The representatives also indicated that the State had not played a proactive role in the proceedings concerning the responsibility of the judicial officials involved. Regarding the results of their complaints, they advised that former judge Olarte had retired and, therefore, could not be subjected to this type of proceeding, while "the other three officials were acquitted due to absence of merits." They concluded that the State had not provided a satisfactory response and, even today, it has not provided any measure to punish the judicial agents responsible for the violations analyzed in this case."

170. Argentina advised that the governor of the province of Entre Ríos had requested the province's state prosecutor to evaluate possible irregularities in the conduct of the officials involved in the adoption proceedings and, if appropriate, to take the corresponding measures to determine the responsibilities of the said officials. In addition, in response to this Court's request for information, Argentina indicated that the "Ministry of Governance and Justice of the province of Entre Ríos [had] responded […] that the province had taken several measures, including an evaluation of the conduct of the provincial officials, which verified that [the representatives] had access to justice." In addition, it indicated that "several officials involved no longer belong to the Judiciary, because they have retired" and, also, "over the years, significant progress has been made as regards the legislative aspect."

171. During the public hearing and, subsequently, as a helpful measure, the Court asked the State to provide detailed information on the measures taken to verify whether the conduct of the officials who intervened in the different proceedings relating to this case was in conformity with the law and the results (*supra* para. 7). Argentina failed to provide a

specific response to the Court's request for information, or to the information provided by the representatives concerning the four proceedings they had filed, but merely forwarded the very general information provided by the provincial authorities. Indeed, in its response, Argentina stated that "diverse measures have been taken by the province," without describing the supposed measures. It added that "the conduct of the provincial officials was evaluated," without indicating the form of the supposed "evaluation," the authority that had conducted it, the procedure used, or which official or officials had been "evaluated." Similarly, it continued its response indicating that "several of the officials involved no longer belong to the Judiciary," without informing the Court who those officials were. Lastly, the State referred to the supposed access to justice of the victims, which bears no relationship to the Court's request for information; also, it did not explain the "significant progress" made in the legislative aspect related to the Court's request for information.

172. In previous cases, faced with specific violations, the Court has established that the State must file, as appropriate, disciplinary, administrative or criminal actions in accordance with domestic law, against those responsible for the different procedural and investigative irregularities.[119] In view of the absence of information and exactitude in Argentina's response, the Court orders that, as of notification of this Judgment and within a reasonable time, the State must verify, in accordance with the pertinent disciplinary norms, whether the conduct of the public officials indicated by the representatives (*supra* para. 169), who intervened in the different domestic proceedings, was in conformity with the law and, as appropriate, establish the corresponding responsibilities under the law, forwarding the Court detailed and individualized information on the results of the investigations conducted, together with supporting documentation.

*2.2 Adaptation of domestic law*

173. The Commission asked the Court to order the State to adopt the necessary legislative or other measures to prevent and punish the sale of children, in order to fulfill its obligations under the American Convention.

174. The representatives requested this measure of reparation in similar terms to those of the Inter-American Commission.

175. The State did not refer specifically to this claim for reparation. However, it forwarded the information on the adaptation of its domestic criminal law that had been requested by the Court when this was time-barred (*supra* paras. 7 and 12).

176. In this case, the Court has concluded that the State failed to comply with its obligation to adopt provisions of domestic law by not using all means, including the criminal jurisdiction, to prevent the "sale" of a child, for any purpose or in any form, in accordance with the obligation established in Article 2 of the American Convention, in relation to Articles 19, 8(1) and 25(1) and 1(1) of this instrument to the detriment of Mr. Fornerón and his daughter M (supra para. 144).

177 Consequently, based on the obligation derived from Article 2 of the American Convention, in relation to Article 19 of this instrument, the State must adopt the necessary measures to criminalize the "sale" of children, so that the act of surrendering a child in exchange for remuneration or any other compensation, for any purpose or in any form, is a

[119] *Cf. Case of the Dos Erres Massacre, v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 233(d), and *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, para. 214.

criminal offense in accordance with international standards and the provisions of this Judgment (*supra* paras. 129 to 144). This obligation is binding on all the powers and organs of the State as a whole.

*2.3 Training for public officials*

178. The Inter-American Commission asked the Court to order the State to ensure the training of judges and other relevant officials on the comprehensive rights of children relating to the best interests of the child. It indicated that, in this case, the State's responsibility arose, to a great extent, from the lack of training of its public officials. The Commission asked that, using a specific approach, the State conduct continuous training programs for public officials, above all, judicial officials, concerning adoption and determination of guardianship, custody or visiting regimes when children have been legally or illegally separated from their families, in accordance with the *corpus juris* on children and adolescents and the principle of the best interests of the child, as well as the principle of non-discrimination contained in the American Convention.

179. The representative requested this measure of reparation in similar terms to the Inter-American Commission.

180. The State did not refer to this measure of reparation.

181. In the past, this Court has referred to the importance of training public officials in this regard, indicating that it is not enough to establish judicial guarantees and protection if those who intervene in the proceedings lack sufficient training on what the best interests of the child involve and, consequently, on the effective protection of their rights.[120]

182. In this case, the Court has concluded that the violations of the rights of Mr. Fornerón and his daughter occurred basically due to the actions of the justice system of the province of Entre Ríos. Consequently, the Court establishes that the State must implement, within a reasonable time calculated as of notification of this Judgment and with the respective budgetary provisions, an compulsory program or course for judicial agents, including judges, defense counsel, prosecutors, legal advisers and other officials of the province of Entre Ríos who intervene in the administration of juvenile justice, that includes among others aspects, international human rights standards, particularly with regard to the rights of the child, and their best interests, and the principle of non-discrimination.

*2.4. Publication of the Judgment*

183. Neither the Commission nor the representatives asked the Court to order the State to publish this Judgment. Nevertheless, the Court considers it appropriate to establish that the State must publish once, within six months of notification of this Judgment, the official summary of the Judgment prepared by the Court in the State's Official Gazette, as well as in the official gazette of the province of Entre Ríos.

*3. Other measures requested*

*3.1. Education on the best interests of the child and right to an identity*

184. The representatives asked the Court to order the State to incorporate the best interests of the child and the right to an identity into the educational curricula at all

[120] *Cf.* Advisory Opinion OC-17/02, *supra* note 51, para. 79.

municipal, provincial and national levels. The Court recalls that reparations must have a causal connection with the facts of the case and the violations declared (*supra* para. 146). The measure requested bears no causal relationship to the facts of the case or to the violations declared in this Judgment; hence it is not appropriate to admit it or to include any additional considerations in this regard.

*3.2. Single register of applicants for guardianship for purposes of adoption*

185. The representatives asked the Court to order the State to adopt explicit measures to ensure that the provinces joined the "Single Register of Adoptive Parents." Among other aspects, the State provided information on the initiative to create the provincial register of adoptive parents and the implementation of the Single Register of Applicants for Guardianship for the purpose of Adoption established by Law 25,854. Argentina indicated that "both requirements have been met and are in force." In addition, it indicated that 10 provinces, including Entre Rios, had joined the register. The Court observes that Argentina has advised that it has created a Single Register of Applicants for Guardianship for Purposes of Adoption, and that the province where the facts of this case took place has joined it. The information available reveals that the measure requested is being implemented by the State. Although Argentina must continue taking steps to ensure that all the provinces join the Register, the Court does not consider it necessary to order an additional measure of reparation in this regard.

*3.3. Gene bank*

186. In their brief with final arguments, the representatives added as a measure of reparation, the establishment of a DNA gene bank of all children at birth to guarantee their identity scientifically. In this regard, Article 40(2)(d) of the Court's Rules of Procedure states clearly that the claims of the representatives, including those relating to reparations, must be included in the initial pleadings and motions brief. Consequently, this request is time-barred and it is not appropriate to admit it or include any additional considerations in this regard.

***C. Compensation***

*1. Pecuniary damage*

187. In its case law, the Court has developed the concept of pecuniary damage and the situations in which it must be compensated. The Court has established that pecuniary damage involves loss or detriment to the income of the victims, the expenses incurred as a result of the facts, and the pecuniary consequences that have a causal relationship with the facts of the case.[121]

188. The representatives asked the Court to order the State to pay Mr. Fornerón the sum of US$147,000.00 (one hundred and forty-seven United States dollars[122]) for pecuniary damage, based on the following concepts and amounts:

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[121] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 310.

[122] All the amounts refer to United States dollars.

a) "Jobs that he lost, and the business that closed," over 10 years with a monthly income of one thousand dollars, for a total of US$120,000.00 (one hundred and twenty thousand dollars);

b) "Moving, transportation, communication, and accommodation expenses, and the measures he had to take to recover his daughter," which have required time, money, and effort, for a total of US$15,000.00 (fifteen thousand dollars), and

c) Psychological treatment, at one hundred pesos a month for 10 years, for a total of US$12,000.00 (twelve thousand dollars).

189. In addition, the representatives asked that the Court order payment of the sum of US$446,000.00 (four hundred and forty-six thousand dollars) for "expenses to be incurred" in favor of M for the following reasons and amounts:

a) Housing, for a total of US$80,000.00 (eighty thousand dollars), and

b) Expenditure on "physical and mental health, food, education and recreation of US$1,200.00 (one thousand and two hundred dollars) a month, until the end of her university studies, estimated to be when she is 25 years of age, for a total of US$336,000.00 (three hundred thirty-six thousand dollars).

190. The State indicated, *inter alia*, that "the amounts claimed […] are significantly higher than the international standards that [the] Court has established for pecuniary reparation"; that the representatives "have not used any of the parameters of reasonableness, prudence and moderation available to them to formulate a claim for compensation that would be legally viable and morally just, in accordance with the applicable international and domestic standards." In addition, the State indicated that it was not attempting to ignore the fact that Mr. Fornerón had incurred expenses for, *inter alia*, moving and transportation, and the need for psychological treatment. Despite this, it underlined that it had not seen any vouchers to authenticate the said expenses. Similarly, there was no supporting documentation on the close of his business, or on the monthly income he received. Furthermore, it recalled that the State had provided material assistance to Mr. Fornerón to support the rapprochement process, ensuring him a stable job (incorporation into the permanent personnel of the Provincial Police) that guaranteed him more periods of leave and financial resources to travel to the Autonomous City of Buenos Aires to see his daughter. Regarding the observations on future expenditure in favor of M for items such as housing, and health, food and education, the State indicated that, although the main purpose of the reparations was the relationship between father and daughter, it was premature to determine the expenses that this could require, and therefore considered that, at the appropriate time, these should be established by the Court based on the equity principle.

191. Regarding the alleged loss of income claimed, the Court finds that the statements made by Gustavo Fabián Baridon, Rosa Fornerón, and Olga Acevedo authenticate that Mr. Fornerón was in charge of a business and that, owing to the facts of this case, he had to close it.[123] However, his representatives did not submit any vouchers that would prove definitively the amount requested and the loss of income claimed. Consequently, the Court decides to establish, in equity, the amount of US $45,000.00 (forty-five thousand dollars).

192. Regarding the reimbursement of expenses for psychological treatment, the Court

[123] *Cf.* Statements of Rosa Argentina Fornerón of September 26, 2011, Olga Alicia Acevedo of October 4, 2011, and Gustavo Fabián Baridón of October 5, 2011 (merits file, tome II, folios 1046, 1140, 1134 and 1137).

observes that the representatives have not submitted any evidence to prove that the treatment was provided, or the amount that would have been paid for this treatment. Despite this, the case file and the Mr. Fornerón's statement before the Court reveal that, at certain times, he received psychological treatment.[124] Consequently, the Court decides to establish, in equity, the sum of US$5,000 (five thousand dollars). In addition, regarding the expenses related to the judicial measures and the steps taken to recover his daughter, these will be analyzed in the section of this Judgment on costs and expenses (*infra* para. 204).

193. Lastly, regarding the representatives' request for various amounts for future expenditure on, *inter alia*, housing, food and health care, in favor of Mr. Fornerón's daughter (*supra* para. 189(b)), the Court considers that these are normal expenses that correspond to the relationship between father and daughter and are unrelated to the violations declared in this Judgment. Based on the foregoing, the Court considers that it is not appropriate to order payments for pecuniary damage in this regard.

2. *Non-pecuniary damage*

194. In its case law, the Court has developed the concept of non-pecuniary damage and the assumptions under which it must be compensated. In this regard, it has established that non-pecuniary damage includes the suffering and anguish caused to the direct victims and their next of kin, the harm to values of great significance to the individual, as well as the changes of a non-pecuniary nature in the living conditions of the victims or their family.[125]

195. The representatives asked the Court to order the State to pay the sum of US$1,250,000.00 (one million, two hundred fifty thousand dollars) for non-pecuniary damage to Mr. Fornerón and his daughter. They indicated that Mr. Fornerón had suffered due to the "appropriation" of his daughter, because her return was denied, and he had been deprived of the enjoyment of watching her grow and of participating daily in her life. In addition, he suffered owing to the State's refusal to implement measures of reparation, delaying and denying justice, which caused great uncertainty, helplessness and anguish, preventing him from carrying on with his life in a normal manner. The separation from his daughter resulted in an unjust and arbitrary change in his life, violating the laws in force, and the trust he could place in the public bodies designed to protect him and to provide him with certainty in the exercise of his rights and the satisfaction of his legitimate interests. His representatives stated that Mr. Fornerón was unable to form another relationship, has not had other children, has not had stable employment, could not choose where to live, or what employment to take up, or undertake training, and his dreams were put on hold, because he has been obliged to live the last 10 years awaiting judicial decisions, which were always adverse, and exercising his paternity from the only place the State has permitted. In addition, in their reports, judgments, decisions, acts and omissions, the public officials have discriminated against him continuously. Based on the foregoing, they requested the sum of US$500,000.00 (five hundred thousand dollars) for non-pecuniary damage. Regarding M, the representatives requested the sum of US$750,000.00 (seven hundred and fifty thousand dollars) for non-pecuniary damage, owing, *inter alia,* to the "suffering because she had been appropriated from the time of her birth and been disposed of without respecting her rights, and because the Argentine justice system denied her right to identity, her origin,

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[124] Statement by Mr. Fornerón during the public hearing and report of the Judiciary's inter-disciplinary team of June 1, 2009, *supra* note 46, folio 4079.

[125] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of González Medina and family v. Dominican Republic,* supra note 10, para. 315.

her father, her paternal family, her siblings and her culture, and prevented her from constructing a personality based on the truth."

196. The State observed that the sum requested by the representatives was exorbitant, and bore no relationship to the amounts awarded by the Court in its case law. This was without beginning to consider the bases on which such a claim for reparation was founded, some of which were unrelated to the facts of the case and concerned Mr. Fornerón's private sphere.

197. Based on its case law, and considering the circumstances of this case, the violations committed, the suffering caused, the time that has elapsed, the denial of justice, the alteration in the living conditions, and the other non-pecuniary consequences, the Court establishes, in equity, the sum of US$60,000 (sixty thousand dollars) for Mr. Fornerón and the sum of US$40,000.00 (forty thousand dollars) for M, for non-pecuniary damage.

### *D. Costs and expenses*

198. As the Court has indicated on previous occasions, costs and expenses are included in the concept of reparation established in Article 63(1) of the American Convention.[126]

199. In their pleadings and motions brief, the representatives had requested the sum of US$500,000.00 (five hundred thousand dollars) for costs and expenses, distributed as follows:

> a) For costs and expenses related to the domestic claim for justice, they requested US$150,000.00 (one hundred fifty thousand dollars), which included: (i) expenses for court fees, bonds, *ius,* continuous travel to Victoria, Gualeguay and Paraná, correspondence, telephone calls, computer services, facsimiles, etc.; (ii) preparation and drafting of different briefs before the local justice system, and follow-up on the proceedings to date, and (iii) legal representation involving a considerable number of hours spent on collecting information, and preparing, editing and reading material, and repeated interviews with Mr. Fornerón and his family over the past 10 years.
>
> b) For expenses incurred by CESPPEDH owing to the international petition, they requested the sum of US$350,000.00 (three hundred and fifty thousand dollars), which included: (i) the constant advocacy of the case before the Inter-American Commission, meetings with lawyers, victims, next of kin of the victims, and experts to discuss different aspects of the case, creation of disciplinary teams and their respective fees; (ii) preparation of diverse briefs, follow-up on the process at the international level; (iii) legal representation involving a considerable number of hours spent on collecting information, and preparing, editing and reading material, and the discussion of the different briefs filed during the international proceedings over the last six years, and (iv) office expenses, telephone calls, computer service, facsimiles and e-mails.

200. In their final written arguments, the representatives added the following amounts for costs and expenses:

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[126] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 321.

a) US$3,500.00 (three thousand five hundred dollars) for the participation of one of the representatives at the public hearing, with some supporting documentation;

b) US$ 49,358.10 (forty-nine thousand three hundred and fifty-eight dollars and ten cents), in addition to the sum already requested, for correspondence, printing, copying, per diems, internet services, stationery, national and international telephone calls, meetings with experts, working meetings with the institutional interdisciplinary team assigned to the case, and with the victims. They indicated that this amount was calculated based on the number of days and hours worked during 11 months, using the same calculation method as in the pleadings and motions brief, and

c) Lastly, for future expenses that Mr. Fornerón and the CESPPEDH would incur during the remainder of the processing of the case before the Court, which would include those required for the dissemination, publication and satisfactory advancement of compliance with the Judgment, they requested that the Court permit them to submit these opportunely.

201. The State underscored "the scandalous figure that the representatives […] were seeking for costs and expenses" and that "the figure to which they aspire for the domestic and international proceedings [more than five hundred thousand dollars] exceeds the total pecuniary reparation that [the] Court has established for violation of the right to life, to personal integrity, to liberty and to judicial protection, in many cases." Obviously, all this has been requested without any effort at justification or authentication with vouchers, invoices, receipts or other supporting documentation. The State stressed that "the figure that [the] representatives are claiming is particularly obscene," and reiterated that the latter had not provided any reliable evidence to justify the excessive pecuniary reparations claimed. The State therefore asked that the Court decide the costs and expenses based on the principle of equity, in accordance with international standards, taking into account its observations.

202. The Court has indicated that "the claims of the victims or their representatives concerning costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural opportunity granted them, namely in the pleadings and motions brief, even though these claims may be updated subsequently, in line with the new costs and expenses that may have been incurred as a result of the proceedings before this Court."[127] Regarding reimbursement of costs and expenses, the Court must prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those arising from the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided the *quantum* is reasonable.[128]

203. The Court notes that the amounts requested by the representatives for costs and expenses are not in keeping with the said criterion of reasonableness and, consequently, will not be considered. In addition, evidently, the representatives did not authenticate the

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[127] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 275, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 326.

[128] *Cf. Case of Garrido and Baigorria v. Argentina, supra* note 97, para. 82, and *Case of González Medina and family v. Dominican Republic, supra* note 10, para. 325.

sum of more than half a million dollars requested. Furthermore, they did not forward evidence to support any of the expenses allegedly incurred during the domestic proceedings or before the inter-American system, with the exception of a few vouchers relating to the participation of one of the lawyers in the public hearing before this Court for approximately US$2,800.00 (two thousand eight hundred dollars).

204. Consequently, in view of the absence of probative elements, the Court must determine the costs and expenses in this case, based on equity. First, the Court considers that there can be no doubt whatsoever that Mr. Fornerón incurred expenses related to his search to obtain justice and the return of his daughter. In this regard, the Court decides to establish, in equity, the sum of US$10,000.00 (ten thousand dollars).

205. In addition, the Court considers that it must determine, also in equity, the sum of US$15,000.00 (fifteen thousand dollars) in favor of Mr. Baridón, the lawyer who assisted Mr. Fornerón in the domestic processing of this case.

206. Moreover, regarding the request for reimbursement of expenses in the proceedings before the inter-American human rights system, the Court establishes, in equity, that the State must pay the sum of US$15,000.00 (fifteen thousand dollars) to the representatives for costs and expenses.

207. The State must pay the amounts indicated in the preceding paragraphs to Mr. Fornerón (*supra* para. 204) and to his representatives in the domestic and international proceedings (*supra* paras. 205 and 206). During the proceedings on monitoring compliance with this judgment, the Court may order the State to reimburse the victim or his representatives the reasonable and proven expenses incurred at that procedural stage.

### *E. Reimbursement of expenses to the Victims' Legal Assistance Fund*

208. In 2008, the General Assembly of the Organization of American States created the Legal Assistance Fund of the Inter-American Human Rights System in order "to facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring their cases before the system."[129] In the instant case, financial assistance was granted from the Fund for Mr. Fornerón to appear with one of his legal representatives at the public hearing held in Barbados, and for the expenses of preparing and forwarding a statement made by affidavit.[130]

209. In accordance with Article 5 of the Rules of Procedure of the said Legal Assistance Fund, the State was given the opportunity to submit it observations on the expenditure made in the instant case, which amounted to US$9,046.35 (nine thousand and forty-six dollars and thirty-five cents). Argentina advised that, having examined the report on the application of the Victims' Fund, it had "no observations to make."

210. Based on the violations declared in this Judgment, the Court orders the State to reimburse the said Fund the sum of $9,046.35 (nine thousand and forty-six dollars and

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[129] AG/RES. 2426 (XXXVIII-O/08), Resolution adopted by the thirty-eighth General Assembly of the OAS at its fourth plenary session held on June 3, 2008, "*Creation of the Legal Assistance Fund of the Inter-American Human Rights System*," Operative paragraph 2(a), and CP/RES. 963 (1728/09), Resolution adopted on November 11, 2009, by the OAS Permanent Council, "*Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System,*" Article 1(1).

[130] *Cf. Case of Fornerón and daughter v. Argentina. Summons to a public hearing*. Order of the President of the Inter-American Court of Human Rights, *supra* note 4.

thirty-five cents) for the said expenses. This amount must be reimbursed to the Court within ninety days of notification of this Judgment.

### *F. Means of complying with the payments ordered*

211. The State must pay the compensation for pecuniary and non-pecuniary damage and reimbursement of costs and expenses directly to Mr. Fornerón and the other persons mentioned in this Judgment, within one year of notification of the Judgment, in the terms of the following paragraphs.

212. Regarding the compensation ordered in favor of the child M, the State must deposit this in a solvent Argentine institution. The investment must be made within one year, in the most favorable financial conditions allowed by banking practice and law, while the beneficiary is a minor. This sum may be withdrawn by her when she attains her majority or, before this, if this is in the best interests of the child determined by the decision of a competent judicial authority. If the corresponding compensation has not been claimed when 10 years have passed after she attains her majority, the sum shall revert to the State with the interest accrued.

213. If any of the beneficiaries die before they have received the respective amounts, these shall be delivered directly to their heirs, in accordance with the applicable domestic law.

214. The State must comply with its pecuniary obligations by payment in United States dollars or the equivalent in Argentine currency, using the exchange rate in force on the New York currency exchange market the day before the payment to make the respective calculation.

215. If, for reasons that can be attributed to the beneficiaries, it is not possible to pay the amounts established within the indicated time frame, the State shall deposit the said amounts in their favor in an account or a deposit certificate in a solvent Argentine financial institution in United States dollars and in the most favorable financial conditions permitted by banking practice and law. If, after ten years, the said sums have not been claimed, they shall revert to the State with the accrued interest.

216. The amounts allocated in this Judgment must be delivered to the persons indicated integrally, as established in this Judgment, without any deduction arising from possible taxes or charges.

217. If the State should fall into arrears, it shall pay interest on the amount owed, corresponding to the banking interest on arrears in Argentina.

## VIII
## OPERATIVE PARAGRAPHS

218. Therefore,

**THE COURT**

**DECLARES,**

unanimously, that:

1. The State is responsible for violating the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention in relation to Articles 1(1) and 17(1) thereof, to the detriment of Mr. Fornerón and of his daughter M, as well as in relation to Article 19 of this instrument to the detriment of the latter, as established in paragraphs 44 to 57 and 65 to 111 of this Judgment.

2. The State is responsible for violating the right to the protection of the family established in Article 17(1) of the American Convention in relation to Articles 1(1), 8(1) and 25(1) thereof, to the detriment of Mr. Fornerón and of his daughter M, as well as in relation to Article 19 of this instrument to the detriment of the latter, as established in paragraphs 44 to 57 and 116 to 124 of this Judgment.

3. The State failed to comply with its obligation to adopt domestic legal provisions established in Article 2 of the American Convention in relation to Articles 19, 8(1), 25(1) and 1(1) thereof, to the detriment of the child M and of Mr. Fornerón, as established in paragraphs 129 to 144 of this Judgment.

**AND DECIDES,**

unanimously, that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State must establish immediately a procedure designed to develop a real relationship between Mr. Fornerón and his daughter M, as established in paragraphs 156 to 166 of this Judgment. In addition, Argentina must present a report within three months of notification of this Judgment on the characteristics, implementation and progress of the bonding process. Subsequently, Argentina must forward an updated report on the said aspects every four months during the next two years, in accordance with paragraph 167 of this Judgment.

3. The State must verify, as of notification of this Judgment and within a reasonable time, in accordance with the pertinent disciplinary norms, whether the conduct of the public officials who intervened in the different domestic proceedings related to this case was in conformity with the law and, as appropriate, establish the corresponding responsibilities, as established in paragraph 172 of this Judgment.

4. The State must adopt all necessary measures to criminalize the sale of children, so that the act of surrendering a child in exchange for remuneration or any other type of compensation, for any purpose or in any form, constitutes a criminal offense, in accordance with international standards and the provisions of paragraphs 176 and 177 of this Judgment.

5. The State must implement, within one year and with the respective budgetary provision, a compulsory program or course for judicial agents, including judges, defense counsel, prosecutors, legal advisers and other officials of the province of Entre Ríos who intervene in the administration of juvenile justice, that includes among others aspects, international human rights standards, particularly with regard to the rights of the child, and their best interests, and the principle of non-discrimination, as established in paragraph 182 of this Judgment.

6. The State must publish once, within six months of notification of this Judgment, the official summary of the Judgment prepared by the Court in the State's Official Gazette, and in the official gazette of the province of Entre Ríos, as established in paragraph 183 of this Judgment.

7. The State must pay the amounts established in paragraphs 191, 192, 197 and 204 to 206 of this Judgment, as compensation for pecuniary and non-pecuniary damage and for reimbursement of costs and expenses, as appropriate, in the terms of paragraphs 207 and 211 to 217 hereof, and also reimburse the Victims' Legal Assistance Fund the amount established in paragraph 210 of this Judgment.

8. The State must, notwithstanding the provisions of the second operative paragraph, within one year of notification of this Judgment, submit a report to the Court on the measures adopted to comply with the Judgment.

9. The Court will monitor full compliance with this Judgment, in exercise of its authority and to meet its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Done, at Guayaquil, Ecuador, on April 27, 2012, in the Spanish and English languages, the Spanish version being authentic.

Diego García-Sayán
President

Manuel Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary