

# PRESENTATION

**T**his chapter highlights some of the innovative developments in the Inter-American Court’s jurisprudence during 2020, as well as some of the criteria that reaffirms the jurisprudence already established by the Court. This evolution of jurisprudence establishes important standards for domestic judicial organs and officials when they carry out the control of conventionality within their respective spheres of competence.

In this regard, the Court recalls its awareness that domestic authorities are subject to the rule of law and, consequently, obliged to apply the provisions in force under domestic law. However, when a State is a party to an international treaty such as the American Convention on Human Rights, all its organs, including its judges, are also subject to this legal instrument. This obliges States Parties to ensure that the effects of the provisions of the Convention are not impaired by the application of norms that are contrary to its object and purpose. Thus, the Court has established that all State authorities are obliged to exercise a “control of conventionality” *ex officio* to ensure conformity between domestic law and the American Convention, evidently within their respective spheres of competence and the corresponding procedural regulations. This relates to the analysis that the State’s organs and agents must make (in particular, judges and other agents of justice) of the compatibility of domestic norms and practices with the American Convention. In their specific decisions and actions, these organs and agents must comply with the general obligation to safeguard the rights and freedoms protected by the American Convention, ensuring that they do not apply domestic legal provisions that violate this treaty, and also that they apply the treaty correctly, together with the jurisprudential standards developed by the Inter-American Court, ultimate interpreter of the American Convention.

In the year 2020 the Court has delivered 19 judgments on merits, and 4 on interpretation. Furthermore, this year the Court issued the Advisory Opinion OC-26/20 on “The obligations in matters of human rights of a State that has denounced the American Convention on Human Rights and the Charter of the Organization of American States”. Among the 24 provisional measures that are currently in force, we would like to highlight one that happened in the context of Covid-19.

The Court has continued to rule on innovative issues, as well as to consolidate important international human rights standards. We have been able to reaffirm our case law on the following issues among others: the denunciation of the American Convention and the OAS Charter and the effects on a State’s human rights obligations; the rights of girls to a life free of sexual violence, particularly in educational settings; the prohibition of child labor; prejudice-based violence against the LGBTI community; the use of stereotyping in arrests and racial profiling; access to justice for people in a situation of human mobility; the guarantee of tenure for prosecutors appointed on a provisional basis; freedom of expression of judges and the factor of internal independence; the economic, social, cultural and environmental rights of indigenous peoples, particularly the right to a healthy environment, to adequate food, to water, and to participate in cultural life, and the standards for the permissible limitation of political rights for elected officials.

This section is divided into the substantive rights established in the American Convention on Human Rights that incorporate these standards and that develop their scope and content. In addition, sub-headings have been included that underscore the topics, and the content includes references to specific judgments from which the case law was extracted.

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# RIGHTS TO LIFE AND TO PERSONAL INTEGRITY

## Article 4 and Article 5 of the American Convention

### RIGHT OF CHILDREN TO A LIFE FREE OF SEXUAL VIOLENCE IN THE EDUCATIONAL SPHERE

In the case of *Guzmán Albarracín v. Ecuador*, the Court examined a series of violations of the human rights of a girl, who was a victim of sexual violence in the setting of an educational establishment. In this regard, the Court considered that “the rights to personal integrity and privacy, recognized in Articles 5 and 11 of the American Convention, involve freedoms, including sexual freedom and the control of one’s own body, which can be exercised by adolescents to the extent that they have developed the capacity and maturity to do so”<sup>1</sup>. The Court clarified that the concept of “violence” relevant for determining State responsibility was not limited to physical violence, but included “any gender-based action or conduct that caused death, harm or physical, sexual or psychological suffering to a woman, in both the public and the private sphere”<sup>2</sup>.

The Court considered that, in light of the Convention of Belém do Pará and the Convention on the Rights of the Child, acts of violence against women or girls should be understood to include not only acts of a sexual nature carried out using physical violence, but also other acts of that nature that, committed by other means, are equally harmful to the rights of women or girls, or cause them harm or suffering. The Court indicated that sexual violence against women can be of different degrees according to the circumstances of the case and other diverse factors, including the characteristics of the acts committed, their repetition or continuation, and the pre-existing personal relationship between the woman and her aggressor, or her subordination to him based on a relationship of authority. According to the case, the victim’s personal condition, such as being a child, may also be relevant. This is without prejudice to the progressive autonomy of children and adolescents in the exercise of their rights – which does not deprive them of their right to measures of protection.

Consequently, States must “take the necessary measures to prevent and prohibit all forms of violence and abuse, including sexual abuse, ... in schools by teaching staff,” who, owing to this condition, enjoy a situation of authority and trust in relation to students and even to their families. Moreover, it is necessary to bear in mind the particular vulnerability of adolescent girls, considering that they are “frequently exposed to sexual abuse by ... older men.” In this regard, the Committee on the Rights of the Child has indicated that States have the “strict obligation” to adopt all appropriate measures to deal with violence against children. This obligation “refers to the broad range of measures cutting across all sectors of Government, which must be used and be effective in order to prevent and respond to all forms of violence,” even including the application of effective sanctions”<sup>3</sup>.

1. Case of *Guzmán Albarracín et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of June 24, 2020. Series C No. 405, para. 109.

2. *Ibid.*, para. 110.

3. *Ibid.*, para. 119.

The foregoing reveals that the obligation to prevent, punish and eradicate violence against women and to adopt measures of protection for children, as well as the right to education, entails the obligation to protect young and adolescent girls from sexual violence in an educational setting (and, of course, not to commit such violence in this setting). In this regard, it should be recalled that adolescents, and girl children in particular, are more prone to suffer acts of violence, coercion and discrimination. States must establish actions to check on or monitor the problem of sexual violence in educational institutions and develop policies to prevent it. Moreover, simple, accessible and safe mechanisms should exist so that such acts can be reported, investigated and punished<sup>4</sup>.

The Court determined that, in this case, the relationship of a sexual nature that existed between a child and the assistant principal of her high school was characterized by submission to repeated and continuing acts of sexual violence by the abuse of a position of authority and trust by someone – the assistant principal – who had a duty of care within the school setting, in the context of the child’s vulnerability. In addition, this situation of vulnerability was increased by an absence of effective actions to avoid sexual violence in the educational setting and of institutional tolerance<sup>5</sup>.

This vulnerability of an adolescent female can be “increased by ... an absence of effective actions to avoid sexual violence in the educational setting, and of institutional tolerance,” and also by the absence of sexual and reproductive education<sup>6</sup>. The right to sexual and reproductive education is part of the right to education and “entails a right to education on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate”. A State obligation concerning the right to sexual and reproductive health is to provide “comprehensive education and information,” taking into account “the evolving capacities of children and adolescents.” This education should be appropriate to ensure that children have an adequate understanding of the implications of sexual and emotional relationships, particularly as regards consent to such relations and the exercise of freedom with regard to their sexual and reproductive rights<sup>7</sup>. In this specific case, the absence of sexual and reproductive education prevented Paola Guzmán Albarracín from understanding the sexual violence involved in the acts she endured.

The Court reiterated that, based on the obligation of non-discrimination, States must take positive measures to rectify or change any situations that exist in their societies which discriminate against a specific group of individuals. Therefore, they must take measures that promote the empowerment of girls and reject harmful gender-based patriarchal norms and stereotypes. This obligation relates to Article 19 of the American Convention and Article 7(c) of the Convention of Belém do Pará. Nevertheless, in this case, prior to 2002 the State had not adopted policies that had a real impact on the educational sphere and that were designed to prevent or reverse a situation of gender-based violence against girls in the context of education. Consequently, the acts of harassment and sexual abuse committed against Paola Guzmán Albarracín not only constituted acts of violence and discrimination in which different factors of vulnerability and risk of discrimination, such as her age and condition as a female, coalesced intersectionally; but those acts of violence and discrimination also took place in a structural situation in which, even though sexual violence in the educational setting was a persistent and well-known problem, the State had not taken measures to rectify it<sup>8</sup>.

Sexual violence against girls not only reveals prohibited gender-based discrimination, but may also be discriminatory due to age. Children can be affected disproportionately and in a particularly serious manner by acts of discrimination and gender-based violence<sup>9</sup>.

## RIGHT TO A DECENT LIFE; SEXUAL VIOLENCE AGAINST CHILDREN

In the case *Guzmán Albarracín v. Ecuador*, the Court considered that the effects of violence against children can be extremely serious. Violence against children has numerous consequences, including “psychological and

4. Ibid., para. 120.

5. Ibid., para. 127.

6. Ibid., para. 140.

7. Ibid., para. 139.

8. Ibid., para. 140.

9. Ibid., para. 141.

emotional consequences (such as feelings of rejection and abandonment, affective disorders, trauma, fears, anxiety, insecurity and destruction of self-esteem),” that may even lead to suicide or attempted suicide. The obligation to protect children against violence encompasses self-harm and actual suicide<sup>10</sup>.

## CHILDREN – STATE RESPONSIBILITY AND SPECIAL POSITION OF GUARANTOR IN THE CASE OF MINORS DOING MILITARY SERVICE

In the case of *Noguera et al. v. Paraguay*, the Court considered, with regard to persons in the State’s custody, who include members of the armed forces on full-time active service, that the State must ensure their rights to life and to personal integrity because it has a special position of guarantor with regard to these persons. Regarding such persons in a special situation of subordination in the military sphere, the Court recalled that the State has the obligation to:

- (i) safeguard the integrity and well-being of soldiers on active service;
- (ii) ensure that the manner and method of training do not exceed the inevitable level of suffering inherent in this situation, and
- (iii) provide a satisfactory and convincing explanation concerning the violations of integrity and life of those who are in a special situation of subordination in the military sphere, on either voluntary or mandatory military service, or those who have incorporated the armed forces as cadets or with a rank within the military hierarchy.

The Court indicated that, consequently, the State could be considered responsible for the violations of the rights to personal integrity and life suffered by anyone who has been under the authority and control of State officials, such as the staff of military schools and trainers<sup>11</sup>.

## PERSONS IN THE STATE’S CUSTODY IN MILITARY INSTALLATIONS AND HEALTH CARE

In the case of *Noguera et al. v. Paraguay*, the Court reiterated that, with regard to persons in the State’s custody in military installations, the rights to life and to personal integrity are directly and immediately linked to health care, and the lack of adequate medical treatment can result in the violation of Article 5(1) of the American Convention. The Court considered that one of the safety measures that must be taken during the armed forces training procedures is to have appropriate and good quality medical treatment available during military training sessions, either inside or outside the barracks, including the pertinent specialized emergency medical care<sup>12</sup>.

## CHILDREN IN THE SYSTEM OF JUSTICE: SPECIFIC STATE OBLIGATIONS AND DUTY OF GUARANTEE

In the case of *Mota Abarullo v. Venezuela*, the Court indicated that, since the case referred to youths who entered a juvenile detention center when they were under 18 years of age and who died owing to a fire in that State facility when they had attained their majority, Articles 5(5) and 19 of the American Convention should be understood in relation to the deprivation of an individual’s liberty in order to establish their meaning and content, taking into account, among other instruments, the Convention on the Rights of the Child, which the Court has considered is included among “a very comprehensive international *corpus iuris* for the protection of children and adolescents”<sup>13</sup>.

According to the standards established by that Convention, in particular its Articles 37 and 40, as the Court has indicated, unlawful conducts attributed to children should be dealt with in a “differentiated and specific

10. *Ibid.*, para. 156.

11. Case of *Noguera et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of March 9, 2020. Series C No. 401, para. 67.

12. *Ibid.*, para. 69.

13. Case of *Mota Abarullo et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of November 18, 2020. Series C No. 417, para. 79.

way”; in other words, under a special system, different from the one applicable to adults. Thus, according to paragraph (b) of the said Article 37, the deprivation of liberty of a child “shall only be used as a measure of last resort.” Also, it should be implemented in a way that permits achieving the reintegration purpose of the measure, which includes an education that prepares the child for their return to society<sup>14</sup>.

The foregoing reveals that, since the special system for children is important, it should be implemented in a way that allows this objective to be achieved. In this regard, the Court has indicated that,

**//** pursuant to the principle of specialization, the establishment of a specialized system of justice is required at all stages of the proceedings and during the execution of the measures or sanctions that, eventually, are applied to children under 18 years of age who have committed offenses and who, under domestic laws, are found guilty.

The best interests of the child must be taken into account as the principal consideration, as well as the need “to promote his/her reintegration”<sup>15</sup>.

The rule of separating children from adults in detention centers or prison should be applied and understood in accordance with the above. Thus, the Committee on the Rights of the Child has recognized that:

**//** this rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.<sup>16</sup>

In the specific case of *Mota Abarullo v. Venezuela*, the five deceased youths initially came into contact with the justice system and were deprived of liberty when they were children. Therefore, the Court considered that the State had obligations relating to the rights of the child pursuant to Article 19 of the American Convention. To achieve the socio-educational objectives of measures taken in the case of children who have violated the penal law, even when these involve deprivation of liberty, States should extend the special system to adolescents who reach the age of 18 while they are complying with such measures. Consequently, the mere fact of turning 18 should not remove young people subject to deprivation of liberty in facilities for adolescents from the special protection that the State should provide to them<sup>17</sup>.

The Court determined that, owing to the special regime for minors established in Article 5(5) of the American Convention and Articles 37(c), 40(1) and 40(3) of the Convention on the Rights of the Child, the execution of the sentence imposed on a child should be regulated based on his/her personal status on the date the wrongful act was committed. Therefore, even if he/she attains majority during execution of sentence, this special regime applies with regard to determination of the measures and punishments and imposes differentiated conditions of execution throughout its implementation<sup>18</sup>.

## GENERAL CONSIDERATIONS ON STATE OBLIGATIONS IN RELATION TO THE LIFE AND PERSONAL INTEGRITY OF ADOLESCENTS DEPRIVED OF THEIR LIBERTY

The Court recalled that anyone deprived of their liberty “has the right to live in detention conditions compatible with his/her personal dignity and the State must ensure the rights to life and personal integrity.” The restriction of these rights “not only has no justification in the context of the deprivation of liberty, but is also prohibited by international law.” The Court has also indicated that, ... in the case of persons deprived of liberty, the State is in a special position of guarantor, because the prison authorities exercise strong control or authority over those in their custody, especially in the case of children. In this way, a special relationship and interaction of subordination develops between the person deprived of liberty and the State, characterized

14. Ibid., para. 80.

15. Ibid., para. 81.

16. Ibid., para. 82.

17. Ibid., para. 85.

18. Ibid., para. 86.

by the particular intensity with which the State is able to regulate his/her rights and obligations and due to the circumstances inherent in confinement, where prisoners are prevented from meeting for themselves a series of basic necessities that are essential to lead a decent life<sup>19</sup>.

Based on its position as guarantor, the State must ensure that those deprived of liberty have “minimum conditions compatible with their dignity,” which is necessary “to protect and to ensure” their life and integrity. The Court has already pointed out that it “has incorporated into its case law the principal standards on prison conditions and the duty of prevention that the State must guarantee for persons deprived of liberty<sup>20</sup>.”

This position of guarantor takes special forms in the case of children. When children are deprived of their liberty, the State must assume its special position of guarantor with greater care and responsibility, and must take special measures relating to the principle of the best interest of the child. The Court has already taken into account that Articles 6 and 27 of the Convention on the Rights of the Child include, in the right to life, the State’s obligation to “ensure to the maximum extent possible the survival and development of the child.” The protection of a child’s life “requires the State to pay particular attention to his/her living conditions while deprived of liberty, because that right has not extinguished and is not restricted by his/her detention or confinement.” This calls for States to take efficient measures to avoid violence, including riots or similar acts, and also emergency situations<sup>21</sup>.

The Court reiterated that, in itself, prison overcrowding constituted a violation of personal integrity and impeded the performance of essential functions in detention centers<sup>22</sup>.

Juvenile detention centers should be safe places, which means that they must ensure the protection of those interned in them against dangerous situations and, if they are closed facilities, they must be designed so that the risk of fire is reduced to a minimum and a safe evacuation of the cells and the protection of the inmates is ensured. Devices that can be used include effective fire detection and extinction systems, alarms, and protocols for action in case of emergencies<sup>23</sup>.

In this regard, States should not provide prisoners or inmates with mattresses or other similar items that are not fireproof, or allow them to have such items in their cells, blocks or closed accommodation spaces. Furthermore, guards should have keys or devices immediately available and in good order that permit the rapid opening of cells, blocks or closed spaces. In addition, fire extinguishers and other firefighting devices must be kept in perfect condition<sup>24</sup>.

The Court also determined that the absence of educational programs in a juvenile detention center, and detention conditions that lead to a deterioration in physical, mental and moral integrity, may be contrary to the essential purpose of the punishment and constitute a violation of Article 5(6) of the American Convention. Therefore, when anyone under 18 years of age is sentenced to imprisonment, they should receive education, treatment and care with a view to their release, social reintegration and ability to play a constructive role in society<sup>25</sup>.

## STATE RESPONSIBILITY FOR THE VIOLATION OF THE RIGHTS TO LIFE AND PERSONAL INTEGRITY OWING TO AN EXPLOSION IN A PRIVATELY-OWNED FACTORY

In the case of *the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*, the Court determined that the State was internationally responsible for the violation of the rights to life and personal integrity of women and children who worked in a privately-owned fireworks factory owing to an explosion in that factory. This is

19. Ibid., para. 88.

20. Ibid., para. 89.

21. Ibid., para. 91.

22. Ibid., para. 94.

23. Ibid., para. 98.

24. Ibid., para. 99.

25. Ibid., para. 104.



because the manufacture of fireworks is a hazardous activity and the State was obliged to regulate, supervise and oversee hazardous activities that entailed significant risks to the life and integrity of those persons subject to its Jurisdiction, as a measure to preserve and protect those rights<sup>26</sup>.

In this specific case, the State had classified the manufacture of fireworks as a hazardous activity and regulated the conditions in which it should be carried out. Consequently, it had a clear and enforceable obligation to oversee establishments that produced fireworks, and that obligation included the handling and storage of dangerous substances. The State failed to comply with its obligation to oversee the factory and allowed procedures required for the manufacture of fireworks to be carried out ignoring the minimum standards required by domestic law for this type of activity, Therefore, the omissive conduct of the State contributed to the explosion that violated the right to life of sixty individuals and the right to personal integrity of the six who survived<sup>27</sup>.

## USE OF FORCE BY STATE AGENTS

In the case of *Roche Azaña v. Nicaragua*, the Court reiterated that the use of force by State law enforcement agents should be exceptional in nature and should be planned and limited proportionately by the authorities. The Court has considered that use of force or of instruments of coercion may only be employed when all other methods of control have been utilized and failed. In cases in which the use of force is essential, this should be implemented respecting the principles of legality, legitimate purpose, absolute necessity, and proportionality:

- (i) **Legality:** The exceptional use of force must be established by law and a regulatory framework for its use must exist.
- (ii) **Legitimate objective:** the use of force must be addressed at achieving a legitimate objective.
- (iii) **Absolute necessity:** it must be verified whether other means are available to protect the life and safety of the person or situation that it is sought to protect, in keeping with the circumstances of the case. The use of lethal force and firearms against persons by law enforcement officials should be even more exceptional, and should be prohibited as a general rule. Its exceptional use must be interpreted restrictively so that is minimized in any circumstances, and is only “absolutely necessary” in relation to the force or threat it is intended to repel.
- (iv) **Proportionality:** the level of force used must be in keeping with the level of resistance offered, which implies a balance between the situation faced by the official and the response, taking into consideration the potential damage that could be caused. Thus officials must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control, or use of force, as required. To determine the proportionality of the use of force, the gravity of the situation faced by the official must be evaluated. To this end, it is necessary to consider, among other factors: the level of intensity and danger of the threat; the conduct of the individual; the local environment, and the different means that the official has to deal with the specific situation<sup>28</sup>.

The Court reiterated that States must establish an appropriate legal framework that dissuades any threat to the right to life. Consequently, domestic laws should establish standards that are sufficiently clear regarding the use of lethal force and firearms by State agents<sup>29</sup>.

In the case of *Oliveros Muñoz et al. v. Venezuela*, the Court reiterated the importance of the suitability and due training of prison staff, with special emphasis on prison guards as a measure to ensure a decent treatment of inmates, and to prevent the risk of acts of torture and of any cruel, inhuman or degrading treatment<sup>30</sup>. The

26. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 15, 2020. Series C No. 407, para. 149.

27. *Ibid.*, para. 137.

28. Case of Roche Azaña *et al.* v. Nicaragua. Merits and Reparations. Judgment of June 3, 2020. Series C No. 403, para. 53.

29. *Ibid.*, para. 55.

30. Case of Mota Abarullo *et al.* v. Venezuela. Merits, Reparations and Costs. Judgment of November 18, 2020. Series C No. 417, para. 102.

Court also repeated that the functions of security, custody and supervision of those deprived of liberty should be carried out, preferably, by civilians specifically trained to work in prisons, rather than police or military units. However, when, in exceptional cases, the latter's intervention is required, their participation must be characterized by being:

- (1) extraordinary, so that any intervention is justified and exceptional, temporary and restricted to the strictly necessary in the circumstances of the case;
- (2) subordinated and complementary to the work of the prison authorities;
- (3) regulated by legal mechanisms and protocols on the use of force, by the principles of exceptionality, proportionality and absolute necessity, and based on the corresponding training, and
- (4) monitored by competent, independent and professional civilian organizations<sup>31</sup>.

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31. Ibid., para. 107.



# RIGHT TO PERSONAL INTEGRITY

## Article 5 of the American Convention

### LGBTI PEOPLE – VIOLENCE BASED ON PREJUDICE

In the case of *Azul Rojas Marín v. Peru*, the Court reiterated that, in several cases, it had already recognized that the LGBTI community has historically been the victim of structural discrimination, stigmatization, and different forms of violence and violations of fundamental rights. In this regard, the Court has established that the sexual orientation, and gender identity or gender expression of a person are categories protected by the American Convention. Consequently, the State cannot take action against a person based on their sexual orientation, their gender identity and/or their gender expression.

Numerous forms of discrimination against LGBTI people are evident in the public and private sphere. In the Court's opinion one of the most extreme forms of discrimination against the LGBTI community occurs in violent situations. The Court reiterated its consideration in Advisory Opinion OC-24/17 that:

// [t]he mechanisms for the protection of human rights of the United Nations and the inter-American system have recorded violent acts against LGBTI persons in many regions based on prejudices. The UNHCHR has noted that 'such violence may be physical (including murder, beatings, kidnapping and sexual assault) or psychological (including threats, coercion and the arbitrary deprivation of liberty, including forced psychiatric incarceration)<sup>32</sup>.

Violence against LGBTI people is based on prejudices; that is, perceptions that are usually negative of individuals or situations that are strange or different. In the case of LGBTI people this refers to prejudices based on sexual orientation and gender expression or identity. This type of violence may be driven by "the desire to punish those seen as defying gender norms." In this regard, the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation or gender identity has indicated that:

// At the root of the acts of violence and discrimination ... based on sexual orientation or gender identity] lies the intent to punish based on preconceived notions of what the victim's sexual orientation or gender identity should be, with a binary understanding of what constitutes a male and a female or the masculine and the feminine, or with stereotypes of gender sexuality.<sup>33</sup>

Violence against LGBTI people has a symbolic purpose; the victim is chosen in order to communicate a message of exclusion or subordination. On this point, the Court has indicated that the use of violence for discriminatory

32. Case of *Azul Rojas Marín et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 12, 2020. Series C No. 402, para. 91.

33. *Ibid.*, para. 92.

reasons has the purpose or effect of preventing or annulling the recognition, enjoyment or exercise of the fundamental human rights and freedoms of the person who is the object of the discrimination, regardless of whether that person identifies themselves with a determined category. This violence, fed by hate speech, can result in hate crimes<sup>34</sup>.

The Court has also noted that, at times, it may be difficult to distinguish between discrimination due to sexual orientation and discrimination due to gender expression. Discrimination due to sexual orientation may be based on the real or perceived sexual orientation, so that it includes cases in which a person is discriminated against owing to the perception that others have of his or her sexual orientation. This perception may be influenced, for example, by clothing, hairstyle, mannerisms or behavior that do not correspond to traditional or stereotypical gender standards or that constitute a non-normative gender expression.

## DISCRIMINATION-BASED RAPE OF AN LGBTI PERSON AS TORTURE AND A HATE CRIME

In the case of *Azul Rojas Marín v. Peru*, the Court reiterated that, in cases involving sexual violence, violations of personal integrity entail a violation of a person's privacy, protected by Article 11 of the American Convention, which encompasses their sexual life or sexuality. It has also considered that rape is any act of vaginal or anal penetration without the victim's consent using parts of the aggressor's body or objects, as well as oral penetration by the male organ<sup>35</sup>.

Regarding evidence of a rape, the Court reiterates that this is a particular type of aggression that, in general, is characterized by occurring in the absence of people other than the victim and the aggressor or aggressors. Given the nature of this type of violence, the existence of graphic or documentary evidence cannot be expected and, therefore, the victim's statement constitutes fundamental evidence of the fact<sup>36</sup>.

The Court reiterated that the failure to mention some of the alleged ill-treatment in some of the statements does not mean that the facts are false or untrue because they refer to a traumatic event the impact of which could lead to a certain lack of precision when recalling them. Also, when analyzing the said statements, it must be taken into account that sexual aggression corresponds to a type of offense that, frequently, the victim does not report owing to the stigma that this report usually entails<sup>37</sup>. In addition, not all cases of sexual violence or rape cause physical injuries or diseases that can be verified by a medical examination<sup>38</sup>.

The Court also reiterated that to classify rape as torture, it is necessary to examine the intentionality, the severity of the suffering, and the purpose of the act, taking into consideration the specific circumstances of each case<sup>39</sup>. In this specific case, the Court found that the intentionality and the severity of the suffering had been proved<sup>40</sup>. Regarding the purpose of the act, the Court considered that rape had a discriminatory purpose. In this regard, it took into account the expert opinions according to which to determine whether a case of torture has been motivated by prejudice against LGBTI people, the method and characteristics of the violence inspired by discrimination can be used as indicators; for example, anal rape or the use of other forms of sexual violence; discriminatory insults, comments or gestures by the perpetrators during the act or in its immediate context, referring to the sexual orientation or gender identity of the victim or the absence of other reasons<sup>41</sup>.

Consequently, the Court considered that the anal rape and the comments relating to the victim's sexual orientation revealed a discriminatory purpose, so that it constituted an act of violence based on prejudice<sup>42</sup>

34. *Ibid.*, para. 93.

35. *Ibid.*, para. 142.

36. *Ibid.*, para. 146.

37. *Ibid.*, para. 148.

38. *Ibid.*, para. 153.

39. *Ibid.*, para. 160.

40. *Ibid.*, para. 162.

41. *Ibid.*, para. 163.

42. *Ibid.*, para. 164.

and that the series of abuses and aggressions suffered by the victim, including the rape, constituted an act of torture by State agents<sup>43</sup>.

Furthermore, the Court noted that the case could be considered a “hate crime” because it is clear that the aggression against the victim was based on her sexual orientation; in other words, this crime not only damaged the rights of Azul Rojas Marín, but was also a message to the whole LGBTI community, a threat to the freedom and dignity of this entire social group<sup>44</sup>.

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43. Ibid., para. 166.

44. Ibid., para. 165.

# RIGHT TO PERSONAL LIBERTY

## Article 7 of the American Convention

### LGBTI PEOPLE – ARBITRARY DEPRIVATION OF LIBERTY BASED ON DISCRIMINATION AGAINST LGBTI PEOPLE

In the case of *Azul Rojas Marín v. Peru*, the Court took into consideration the opinion of the Working Group on Arbitrary Detention that deprivation of liberty is for discriminatory reasons “when it is apparent that persons have been deprived of their liberty specifically on the basis of their own or perceived distinguishing characteristics or because of their real or suspected membership of a distinct (and often minority) group.” The Working Group considered that one of the factors to take into account to determine the existence of discriminatory grounds was whether “the authorities have made statements to, or conducted themselves towards, the detained person in a manner that indicates a discriminatory attitude.”<sup>45</sup>

Based on the above criteria, in the specific case of *Rojas Marín v. Peru*, the Court indicated that, in the absence of legal grounds for subjecting the presumed victim to an identity check and the existence of elements that point towards discriminatory treatment based on sexual orientation or non-normative gender expression, the Court must presume that the detention of Ms. Rojas Marín was carried out for discriminatory reasons<sup>46</sup>. Also, in this case, the Court considered that the violence use by the State agents against Ms. Rojas Marín included stereotypical insults and threats of rape. The Court concluded that since this was a detention for discriminatory reasons, it was evidently unreasonable and, therefore, arbitrary.<sup>47</sup>

### DEPRIVATION OF LIBERTY FOR DISCRIMINATORY REASONS RELATED TO RACIAL PROFILING

In the case of *Acosta Martínez et al. v. Argentina*, the Court reiterated that personal liberty and safety are guarantees against unlawful or arbitrary detention or imprisonment. Even though the State has the right and the obligation to ensure safety and maintain public order, its powers are not unlimited because, at all times, it has a duty to use procedures that are in keeping with the law and respect the fundamental rights of every individual subject to its Jurisdiction. The objective of ensuring safety and maintaining public order requires the State to legislate and to take measures of different types to prevent and regulate the conduct of its citizens, one of which is to ensure the presence of law enforcement personnel in public spaces. However, the Court observed that improper actions by such State agents in their interaction with those they should

45. Ibid., para. 127.

46. Ibid., para. 128.

47. Ibid., para. 164.

protect represents one of the main threats to the right to personal liberty, which, when it is violated, results in a risk that other rights will be violated, such as to personal integrity and, in some cases, to life<sup>48</sup>.

In this case, the Court stressed that the actions of the police were motivated more by racial profiling than by the suspicion that an unlawful act was being committed. Indeed, the only individuals who were apprehended on leaving the nightclub were Afro-descendants and, even though they had no criminal record and were not carrying weapons, they were arrested and taken to the police station. The general nature of the provisions of the police legislation allowed the police to justify their intervention, *a posteriori*, and create the appearance of its legality.<sup>49</sup>

The use of racial profiling may also be related to domestic laws or practice. Indeed, as the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has indicated, “official policies may facilitate discretionary practices that allow law enforcement authorities to direct their actions selectively towards individuals or groups based on the color of their skin, their clothing, their facial hair or the language they speak.”<sup>50</sup>

A deprivation of liberty is discriminatory when it is apparent that persons have been deprived of their liberty specifically on the basis of their own or perceived distinguishing characteristics or because of their real or suspected membership of a distinct (and often minority) group.<sup>51</sup>

## STEREOTYPING IN DETENTIONS

In the case of *Fernández Prieto and Tumbeiro v. Argentina*, the Court referred to the biased categorization as suspicious of the attitude or appearance of a person based on the preconceived ideas of police officers about the presumed dangerousness of certain social groups and the elements that determine whether someone belongs to them. The Court recalled that stereotypes consist in preconceptions about the attributes, conducts, roles or characteristics of individuals who belong to an identified group. The use of stereotyped reasoning by law enforcement personnel may result in discriminatory – and therefore arbitrary – actions.

In the absence of objective elements, the characterization of a certain conduct or appearance as suspicious, or of a certain reaction or movement as nervous, responds to the personal convictions of the officials who intervene and to the practices of law enforcement agents that involve a level of arbitrariness that is incompatible with Article 7(3) of the American Convention. When, in addition, these convictions or personal opinions are based on prejudices with regard to the supposed characteristics or conducts of a determined category or group of persons or to their socio-economic status, this may result in a violation of Articles 1(1) and 24 of the Convention.

The use of such profiles supposes a presumption of guilt against anyone who fits them, rather than the case-by-case evaluation of the objective reasons that truly indicate that a person is involved in the perpetration of an offense. Accordingly, the Court has indicated that arrests carried out for discriminatory reasons are manifestly unreasonable and, therefore, arbitrary.

## INADEQUATE LEGISLATION AND PRACTICES THAT VIOLATE THE AMERICAN CONVENTION IN RELATION TO DISCRIMINATORY ACTIONS OF THE POLICE

In the case of *Fernández Prieto and Tumbeiro v. Argentina*, the Court considered that regulations that determine the powers of police officials in relation to crime prevention and investigation must include specific and clear indications of parameters that avoid cars being intercepted or detentions for identification purposes being carried out arbitrarily. Consequently, provisions that include and enable conditions that permit a detention without a court order or *in flagrante delicto*, in addition to meeting the requirements of legitimate purpose, appropriateness and proportionality, must establish the existence of objective factors so that it is not mere

48. Case of *Acosta Martínez et al. v. Argentina*. Merits, Reparations and Costs. Judgment of August 31, 2020. Series C No. 410, para. 95.

49. *Ibid.*, para. 97.

50. *Ibid.*, para. 98.

51. *Ibid.*, para. 99.

police intuition or subjective criteria, which cannot be verified, that are the reasons for a detention. This means that the purpose of the norms enabling this type of detention must be for the authorities to exercise their powers when faced with the existence of real, sufficient and concrete acts or information that, concurrently, would permit an objective observer to reasonably infer that the person detained was probably the perpetrator of a criminal offense or misdemeanor. This type of regulation should also observe the principle of equality and non-discrimination in order to avoid hostility towards certain social groups based on categories prohibited by the American Convention.<sup>52</sup>

The Court considered that the verification of objective elements before intercepting a vehicle or detaining someone for purposes of identification becomes particularly relevant in contexts such as that of Argentina, where the police have normalized the practice of detentions based on suspicion of criminality, justifying this action by crime prevention and where, in addition, the domestic courts have validated this type of practice.<sup>53</sup>

## CONTROL OF CONVENTIONALITY IN THE CREATION AND INTERPRETATION OF LAWS ON ARREST WITHOUT A COURT ORDER

The Court recalled that Article 2 of the American Convention establishes the general duty of the States Parties to adapt their domestic laws to its provisions in order to ensure the rights that it recognizes. This duty involves the adoption of two types of measures. On the one hand, the elimination of laws and practices of any kind that entail a violation of the guarantees established in the Convention; on the other, the enactment of laws and the implementation of practices leading to the effective observance of the said guarantees. It is precisely with regard to the adoption of these measures that the Court has recognized that all the authorities of a State Party to the Convention have the obligation to exercise a control of conventionality so that the application and interpretation of domestic law is consistent with the State's international human rights obligations.

Regarding control of conventionality, the Court has indicated that when a State is a party to an international treaty such as the American Convention all its organs, including its judges, are subject to that instrument and this obliges them to ensure that the effects of the provisions of the Convention are not impaired by the application of norms that are contrary to its object and purpose. The judges and organs involved in the administration of justice at all its levels are obliged to exercise, *ex officio*, a "control of conventionality" between domestic norms and the American Convention, evidently within the framework of their respective terms of reference and the corresponding procedural regulations. In this task, the judges and organs involved in the administration of justice must take into account not only the treaty but also its interpretation by the Inter-American Court, ultimate interpreter of the American Convention. Therefore, when creating and interpreting the regulations that authorize the police to carry out detentions without a court order or *in flagrante delicto*, the domestic authorities, including the courts, are obliged to take into account the interpretation of the American Convention made by the Inter-American Court that such detentions must be carried out in compliance with the standards for personal liberty.

52. Case of Fernández Prieto and Tumbeiro v. Argentina. Merits and Reparations. Judgment of September 1, 2020. Series C No. 411, para. 90.

53. *Ibid.*, para. 96.

# RIGHTS TO JUDICIAL GUARANTEES, JUDICIAL PROTECTION AND EQUAL PROTECTION OF THE LAW

Articles 8(1), 25(1) and 24 of the American Convention

## ACCESS TO JUSTICE IN CASES OF SEXUAL VIOLENCE AGAINST GIRLS

In the specific case of *Guzmán Albarracín et al. v. Ecuador*, the Court indicated that the authorities should have acted with strict diligence, considering that the incident involved a child victim of sexual violence, given the importance of speed to comply with the main objective of the judicial proceedings which was to investigate and punish the perpetrator of this violence, who was a public official; and also to contribute to ensuring that the family members could know the truth of what occurred and to end the denigrating preconceptions, the humiliation and the stigma.<sup>54</sup>

## DUE DILIGENCE IN THE INVESTIGATION OF ACTS OF RAPE AND TORTURE AGAINST LGBTI PEOPLE

In the case of *Azul Rojas Marín et al. v. Peru*, the Court indicated that the specific standards that it had developed in its case law for the investigation of sexual violence should be applied regardless of whether the victim of the sexual violence was a woman or a man and that, therefore, these standards were applicable to the case in which the victim of rape identified himself as a gay man at the time of the facts.<sup>55</sup>

The Court reiterated that, in a criminal investigation into sexual violence, it is necessary that:

- (i) the victim's statement is taken in a safe and comfortable environment that offers privacy and inspires confidence;
- (ii) the victim's statement is recorded to avoid or limit the need to repeat it;
- (iii) the victim is provided with medical, psychological and hygienic care, both on an emergency basis and continuously if required, under a care protocol aimed at reducing the consequences of the rape;

54. Case of *Guzmán Albarracín et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of June 24, 2020. Series C No. 405, para. 190.

55. Case of *Azul Rojas Marín et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 12, 2020. Series C No. 402, para. 52.



- (iv) a complete and detailed medical and psychological examination is performed immediately by appropriate trained personnel, if possible of the sex preferred by the victim, advising the victim that they may be accompanied by a person of confidence if they so wish;
- (v) the investigative measures are coordinated and documented and the evidence is handled diligently, taking sufficient samples, performing tests to determine the possible perpetrator of the act, securing other evidence such as the victim's clothing, investigating the scene of the incident immediately, and guaranteeing the proper chain of custody, and
- (vi) the victim is provided with access to free legal assistance at all stages of the proceedings.<sup>56</sup>

The Court pointed out that when violent acts, such as torture, are investigated, the State authorities have the obligation to take all reasonable measures to discover whether there are possible discriminatory motives. This obligation means that when there are specific indications or suspicions of violence based on discrimination, the State must do everything reasonable, according to the circumstances, to collect and secure the evidence, use all practical means to discover the truth, and issue fully reasoned, impartial and objective decisions, without omitting suspicious facts that could indicate violence based on discrimination. The authorities' failure to investigate possible discriminatory motives may, in itself, constitute a form of discrimination, contrary to the prohibition established in Article 1(1) of the Convention.<sup>57</sup>

The Court recalled that opening lines of investigation into the previous social or sexual behavior of victims in cases of gender-based violence is merely the expression of policies or attitudes based on gender stereotypes. There is no reason why this is not applicable in cases of sexual violence against LGBTI people, or those perceived as such. In this regard, the Court considers that questions regarding the presumed victim's sexual life are unnecessary as well as revictimizing.<sup>58</sup>

In addition, it should be noted that, during the forensic medical examination, during the interrogations, and in the decision of the Administrative Court, the expression "unnatural" was used to refer to anal penetration. The use of this term stigmatizes those who perform this type of sexual act, branding them as "abnormal" because they do not conform to heteronormative social rules.<sup>59</sup>

The Court considered that these types of inquiries and the terms used in the investigation constitute stereotyping. Even though these stereotypes were not explicitly used in the decisions relating to the dismissal of the criminal investigation, their use reveals that the complaints filed by the presumed victim were not being considered objectively.<sup>60</sup>

## SPECIFIC GUARANTEES TO SAFEGUARD JUDICIAL INDEPENDENCE AND THEIR APPLICABILITY TO PROSECUTORS OWING TO THE NATURE OF THEIR FUNCTIONS

In the cases of *Martínez Esquivia v. Colombia* and *Casa Nina v. Peru*, the Court concluded that the guarantee of tenure and irremovability of judges addressed at safeguarding their independence was applicable to prosecutors owing to the nature of their functions<sup>61</sup>.

To reach this conclusion, the Court first reiterated that judges have specific guarantees owing to the necessary independence of the Judiciary, which has been understood to be "essential for the exercise of the judicial function." Accordingly, the Court has indicated that one of the main objectives of the separation of powers is the guarantee of judicial independence. The State must guarantee both the institutional aspect (that is in

56. *Ibid.*, para. 180.

57. *Ibid.*, para. 196.

58. *Ibid.*, para. 202.

59. *Ibid.*, para. 203.

60. *Ibid.*, para. 204.

61. Case of *Martínez Esquivia v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of October 6, 2020. Series C No. 412, paras. 95 and 96, and Case of *Casa Nina v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2020. Series C No. 419, para. 69.

relation to the Judiciary as a system) of this autonomy and also its individual aspect (that is, in relation to the person of the specific judge). In any case, the protection seeks to avoid the judicial system, in general, and its members, in particular, being subjected to possible undue restrictions in the exercise of their functions by organs outside the Judiciary or even by those who exercise functions of review or appeal<sup>62</sup>.

The Court has also indicated that the guarantees of an appropriate appointment procedure, irremovability, and against external pressure are based on the principle of judicial independence. Regarding the guarantee of stability and irremovability of judges, the Court has considered that it involves the following:

- (a) removal from the post must be exclusively for the permitted reasons, either by means of a procedure that complies with judicial guarantees or because the term of office has concluded;
- (b) judges can only be removed due to serious disciplinary offenses or incompetence, and
- (c) any procedure against a judge must be decided based on the established code of judicial conduct and by just proceedings that ensure objectivity and impartiality pursuant to the Constitution and the law<sup>63</sup>.

As indicated, the Court considered that it was necessary to determine whether these guarantees were applicable to prosecutors owing to the nature of their functions. Regarding the specific function of prosecutors, on several occasions the Court has referred to the need for the State to guarantee an independent and objective investigation – in the case of human rights violations and with regard to offenses in general – and emphasized that the authorities in charge of the investigation must enjoy independence, *de jure* and *de facto*, which requires “not only institutional and hierarchical independence, but also real independence”<sup>64</sup>.

In addition, the Court has indicated that the requirements of due process established in Article 8(1) of the Convention, as well as the criteria of independence and objectivity, also extend to the organs responsible for the investigation prior to the judicial proceedings, conducted to determine the existence of sufficient evidence to institute criminal proceedings. Therefore, unless the said requirements are met, the State will be unable to exercise its prosecutorial powers effectively and efficiently, and the courts will be unable to conduct the corresponding judicial proceedings<sup>65</sup>.

Based on the foregoing, the Court considered that the guarantees of an appropriate appointment procedure, irremovability, and protection against external pressure should also protect the work of prosecutors. Otherwise, this would jeopardize the independence and objectivity that are required of their function in order to ensure that the investigations conducted and the claims made before the jurisdictional organs are addressed exclusively at achieving justice in the particular case in keeping with Article 8 of the Convention. Moreover, the Court has clarified that the absence of the guarantee of irremovability of prosecutors – since it makes them vulnerable to reprisals for the decisions they take – results in a violation of their independence that Article 8(1) of the Convention guarantees<sup>66</sup>.

It should be pointed out that prosecutors carry out duties corresponding to agents of justice and, in that capacity, even though they are not judges, they must enjoy guarantees of job security, among others, as a fundamental condition for their independence in the correct performance of their procedural functions.

The Court concluded that, in order to safeguard the independence and impartiality of prosecutors in the exercise of their functions, prosecutors must also be protected by the following guarantees:

- (i) guarantees of an adequate appointment process;
- (ii) fixed term in the position, and
- (iii) protection against external pressures<sup>67</sup>.

62. Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits and Reparations. Judgment of October 6, 2020. Series C No. 412, para. 84.

63. *Ibid.*, para. 85.

64. *Ibid.*, para. 86.

65. *Ibid.*, para. 87.

66. *Ibid.*, para. 88.

67. *Ibid.*, para. 92.

In any case, it should be pointed out that the independence of prosecutors does not assume a specific model of institutional arrangement either at a constitutional or legal level, due to both the position recognized to the prosecutor, public prosecutor, or any other name used in each country's domestic legal system, and to the organization and internal relationships within the said institutions. This is in the understanding that, notwithstanding the foregoing, the independence recognized to prosecutors guarantees that they will not be subject to political pressures or improper obstruction of their actions, nor will they suffer retaliation for the decisions they objectively make, which precisely requires a guarantee of stability and a fixed term in the position. Therefore, this specific guarantee for prosecutors, in an equivalent application of the mechanisms of protection recognized to judges, results in the following:

- (i) that separation from the position must be exclusively for the permitted causes, either through a procedure that complies with judicial guarantees or because the mandate has expired;
- (ii) that prosecutors may only be removed for grave disciplinary offenses or incapacity, and
- (iii) all proceedings against prosecutors must be according to fair procedures that guarantee objectivity and impartiality according to the Constitution or law, given that removal of prosecutors without a cause promotes an objective doubt regarding the possibility that they are able to perform their duties without fear of reprisal<sup>68</sup>.

## THE GUARANTEE OF IRREMOVABILITY OF PROVISIONAL PROSECUTORS

In the case of *Martínez Esquivia v. Colombia*, the Court considered that it was not competent to decide the best institutional framework for guaranteeing the independence and objectivity of prosecutors. However, it observed that the States are bound to ensure that provisional prosecutors are independent and objective and, therefore, must grant them some sort of stability and permanence in office because a provisional appointment does not mean that they can be freely removable from office. The Court observed that the fact that appointments are provisional should in no way modify the safeguards instituted to guarantee that judges may discharge their duties properly and, ultimately, to benefit the parties to a case. In any case, such provisional appointments should not extend indefinitely in time, and should be subject to a resolutive condition, such as a predetermined time limit or the holding and completion of a public competitive selection process whereby a permanent replacement is appointed. Provisional appointments should be exceptional, rather than the rule<sup>69</sup>.

This does not mean that people appointed through a public competitive selection process and those appointed provisionally have equal rights, since the latter are appointed for a limited period of time and subject to a resolutive condition. However, in the context of that appointment and while the said resolutive condition or a serious disciplinary offense has not been verified, the provisional prosecutor must be ensured the same guarantees as those with tenure, given that their functions are identical and require the same protection against external pressures<sup>70</sup>.

In conclusion, the Court considered that the removal of a prosecutor from his position must be the result of legally defined causes, such as:

- (i) the occurrence of the resolutive condition to which the appointment was subject, such as the completion of a predefined time for holding and concluding a public competitive selection process based on which the permanent replacement for the provisional prosecutor is appointed, or
- (ii) serious disciplinary offenses or proven incompetence, resulting from a procedure that complies with due guarantees and ensures the objectivity and impartiality of the decision<sup>71</sup>.

68. *Ibid.*, para. 93.

69. *Ibid.*, para. 97.

70. *Ibid.*, para. 98.

71. *Ibid.*, para. 99.

## JUDICIAL GUARANTEES APPLICABLE TO DISCIPLINARY PROCEEDINGS AGAINST JUDGES

In the case of *Urrutia Laubreaux v. Chile*, the Court indicated that, as one of the minimum guarantees established in Article 8(2) of the Convention, the right to prior and detailed notification of the charges applies in both criminal matters and in the other matters indicated in Article 8(1) of the Convention, even though the information required in the other matters may be less and of another type. That said, in the case of disciplinary proceedings that may result in a sanction, the scope of this guarantee can be understood in different ways but, in any case, means that the person to be disciplined must be informed of the conducts of which he is accused that have violated the disciplinary regime<sup>72</sup>.

In addition, the Court reiterated that the guarantee of impartiality is applicable in disciplinary proceedings conducted against judges. This guarantee requires that the judge who intervenes in a particular dispute must approach the facts of the case free of any subjective prejudice and also offer sufficient objective guarantees to exclude any doubt that the justiciable or the community may entertain as to his/her lack of impartiality. Therefore, this guarantee means that the members of the court should not have a direct interest, preconceived position, or preference for any of the parties, that they are not involved in the dispute and that they inspire the necessary confidence in the parties to the case, as well as in the citizens in a democratic society<sup>73</sup>.

## JUDICIAL GUARANTEES APPLICABLE TO DISCIPLINARY PROCEEDINGS AGAINST PUBLIC OFFICIALS

In the case of *Petro Urrego v. Colombia*, the Court reiterated that Article 8(2) of the American Convention also establishes minimum guarantees that must be ensured by the States in accordance with due process of law. The Court has indicated that these minimum guarantees must be observed in administrative proceedings and in any other procedure that results in decisions that may affect the rights of the individual. In other words, the due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of a punitive administrative or judicial nature<sup>74</sup>.

In particular, in the case of *Maldonado Ordoñez v. Guatemala*, the Court emphasized that “disciplinary law forms part of punitive law ... insofar as it is composed of a series of rules that permit imposing sanctions on those who commit an act defined as a disciplinary offense”<sup>75</sup>, it therefore “is close to the provisions of criminal law” and, owing to its “punitive nature,” the procedural guarantees of criminal law “are applicable *mutatis mutandis* to disciplinary law”<sup>76</sup>.

Based on the foregoing, and regarding the administrative dismissal of public officials, the Court has pointed out that, because of the procedure’s punitive nature and its determination of rights, the procedural guarantees provided for in Article 8 of the American Convention are part of the minimum guarantees that must be respected in order to reach a decision that is not arbitrary and observes due process. In the case of *Petro Urrego v. Colombia*, the Court indicated that the guarantees of impartiality of the disciplinary authority, the presumption of innocence and the right of defense were applicable to the disciplinary proceedings conducted against Mr. Petro<sup>77</sup>.

The Court noted that the concentration of the investigative and punitive powers in the same entity, a common feature of administrative disciplinary processes, is not *per se* incompatible with Article 8(1) of the American Convention, provided that those powers are vested in different bodies or units of the entity concerned, and that

72. Case of *Urrutia Laubreaux v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2020. Series C No. 409, para. 113.

73. *Ibid.*, para. 118.

74. Case of *Petro Urrego v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406, para. 120.

75. Case of *Maldonado Ordóñez v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 3, 2016. Series C No. 311, para. 76.

76. *Ibid.*, para. 77.

77. Case of *Petro Urrego v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406, para. 121.

their composition varies so that the officials who decide on the merits of the accusations made are different from those who have brought the disciplinary charges and that they are not subordinate to the latter<sup>78</sup>.

In this specific case, the Court indicated that Mr. Petro was dismissed as mayor and disqualified from holding public office through an administrative disciplinary procedure before the Disciplinary Chamber of the Attorney General's Office. Given that the sanction of dismissal and disqualification can only be imposed by a competent judge after conviction in criminal proceedings, the Court finds that the principle of Jurisdiction was breached. This is so because the sanction against Mr. Petro was ordered by an administrative authority which, pursuant to the provisions of Article 23(2) of the American Convention and the case law of this Court, lacks Jurisdiction in this regard<sup>79</sup>.

## THE SCOPE OF THE PRINCIPLE OF LEGALITY IN DISCIPLINARY MATTERS

In the case of *Urrutia Laubreaux v. Chile*, the Court reiterated that the principle of legality is also in force in relation to disciplinary matters; however, its scope depends to a considerable extent on the matter regulated. The precision of a punitive rule of a disciplinary nature may be different from that required by the principle of legality in criminal matters owing to the nature of the disputes that each one is intended to settle<sup>80</sup>.

In addition, in the case of disciplinary sanctions imposed on judges, compliance with the principle of legality is even more important because it constitutes a guarantee against external pressures on judges and, consequently, of their independence. On this point, the Statute of the Iberoamerican Judge establishes that<sup>81</sup>:

**// Art. 19. Principle of legality in the judge's responsibility.** Judges shall be held criminally, civilly and disciplinarily responsible pursuant to the provisions of the law. The requirement of responsibility shall not protect attacks on judicial independence that it is attempted to conceal by their official nature.

In this specific case, the Court considered that the disciplinary provision applied to Mr. Urrutia Laubreaux not only permitted a discretionality that was incompatible with the degree of predictability that the regulation should reveal in violation of the principle of legality contained in Article 9 of the American Convention, but also judicial independence<sup>82</sup>.

Although it is evident that there are limitations inherent in the judicial function in relation to public statements, especially with regard to the cases submitted to the jurisdictional decisions of judges, these should not be confused with statements that criticize other judges and, especially, statements made in public defense of their own functional performance<sup>83</sup>. Prohibiting judges from criticizing the functioning of the power of the State of which they form part, which necessarily involves the criticism of the conduct of other judges, or requiring that they request authorization from the President of the highest court to do this and, moreover, that they must act in the same way when they wish to defend their own judicial actions, signifies opting for a hierarchized model of the Judiciary in the form of a corporation in which judges lack internal independence, with a propensity towards unconditional subordination to the authority of their own collegiate organs and although, formally, the intention may be to limit this to the disciplinary sphere, in practice, owing to an inherent fear of this power, it results in subjugation to so-called "superior" jurisprudence and paralyzes the interpretive dynamic in the application of the law<sup>84</sup>.

78. Ibid., para. 129.

79. Ibid., para. 132.

80. Case of *Urrutia Laubreaux v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2020. Series C No. 409, para. 129.

81. Ibid., para. 131.

82. Ibid., para. 135.

83. Ibid., para. 137.

84. Ibid., para. 137.

## OBLIGATION TO INVESTIGATE HUMAN RIGHTS VIOLATIONS COMMITTED AGAINST MIGRANTS

In the case of *Roche Azaña v. Nicaragua*, the Court recalled that due process of law is a right that must be guaranteed to everyone, regardless of their migratory status. The Court also considered that States have the duty to ensure that anyone who has suffered abuse or violation of their human rights as a result of border control measures has equal and effective access to justice, access to an effective remedy and to adequate, effective and prompt reparation of the harm suffered, and also pertinent information on the violations of his rights and the mechanisms for obtaining redress.

In the context of border area operations, States have the duty to investigate and, when applicable, prosecute abuses and violations of human rights, impose punishments in keeping with the severity of the offenses, and take measures to guarantee that these are not repeated<sup>85</sup>.

States are obliged to take certain special measures that contribute to reducing or eliminating the obstacles and shortcomings that prevent the effective defense of a person's interests, merely for being a migrant. In the absence of such measures to ensure an effective and equal access to justice for individuals in a vulnerable situation, it can hardly be said that those who are in such disadvantageous conditions enjoy true access to justice and benefit from due process of law in equal conditions to those who are not faced with these disadvantages<sup>86</sup>.

Regarding Mr. Roche Azaña, the Court noted that the State failed to inform him of the existence of criminal proceedings against the perpetrators of the shots that violated his personal integrity, and did not provide him with any type of professional assistance that could have compensated for his unfamiliarity with a legal system – foreign and alien to him – that supposedly protected him. The purpose of this would have been that Patricio Fernando Roche Azaña could have asserted his rights and defended his interests effectively and in equal procedural conditions to other justiciables. Consequently, the Court found that the State had failed to ensure his right of access to justice<sup>87</sup>.

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85. Case of Roche Azaña *et al.* v. Nicaragua. Merits and Reparations. Judgment of June 3, 2020. Series C No. 403, para. 91.

86. *Ibid.*, para. 92.

87. *Ibid.*, para. 92.



# RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION

## Article 13 of the American Convention

### FREEDOM OF EXPRESSION OF OFFICIALS DEDICATED TO THE ADMINISTRATION OF JUSTICE

In the case of *Urrutia Laubreaux v. Chile*, the Court reiterated that the American Convention ensures the right to freedom of expression to everyone, irrespective of any other consideration. In the case of those who exercise jurisdictional functions, the Court has indicated that, owing to their functions in the administration of justice, the freedom of expression of judges may be subject to different restrictions and in a way that does not affect other persons, including other public officials<sup>88</sup>.

The general purpose of guaranteeing independence and impartiality is, in principle, a legitimate reason for restricting certain rights of judges. Article 8(1) of the American Convention establishes that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or tribunal.” In this regard, the State has the obligation to establish rules to ensure that its judges and courts comply with these precepts. Therefore, the restriction of some specific conducts by judges in order to protect independence and impartiality in the exercise of justice is in keeping with the American Convention as a “right or freedom of others.” The compatibility of such restrictions with the American Convention must be examined in each specific case, taking into account the content of the views and the circumstances. Thus, for example, opinions expressed in an academic context could be more permissible than those expressed in the media<sup>89</sup>.

In its case law, this Court has reiterated that Article 13(2) of the American Convention establishes that subsequent imposition of liability for the exercise of freedom of expression must comply with the following requirements concurrently:

- (i) be previously established by law, in both form and substance;
- (ii) respond to a purpose permitted by the American Convention (“respect for the rights or reputations of others” or “the protection of national security, public order, or public health or morals”), and
- (iii) be necessary in a democratic society (and therefore comply with the requirements of suitability, necessity and proportionality)<sup>90</sup>.

88. Case of *Urrutia Laubreaux v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2020. Series C No. 409, para. 82.

89. *Ibid.*, para. 84.

90. *Ibid.*, para. 85.



This Court considered that, although the freedom of expression of those who exercise jurisdictional functions may be subject to greater restrictions than that of other individuals, this does not mean that any expression by a judge can be restricted. Thus, it was not in keeping with the American Convention to sanction the views included in an academic paper on a general topic and not on a specific case, such as that of *Urrutia Laubreaux v. Chile*<sup>91</sup>.

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91. *Ibid.*, para. 89.

# RIGHT TO PROPERTY

## Article 21 of the American Convention

### RIGHT TO INDIGENOUS COMMUNAL PROPERTY

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court reiterated its case law established in 2001 in the case of *the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. In this regard, the Court recalled that the right to private property recognized in Article 21 of the Convention included, in the case of indigenous peoples, the communal ownership of their lands. It explained that among indigenous people there is a community tradition that relates to a communal form of collective ownership of the land, in the sense that its possession is not centered on an individual, but rather on the group and its community. Indigenous people, due to their very existence, have the right to live freely on their own territories; the close relationship that indigenous people have with the land should be recognized and understood as the very foundation of their cultures, their spiritual life, their integrity, and their economic survival<sup>92</sup>.

Similarly, in the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court reiterated its considerations in the 2005 case of *the Yakye Axa Indigenous Community v. Paraguay*, where it understood that that the right to property protected not only the connection of the indigenous communities to their territories, but also to “the natural resources these territories contain that are connected to their culture, as well as the intangible elements derived from them.” The Court also recalled that, in the case of the *Saramaka People v. Suriname*, it had established that the right to the use and enjoyment of the territory would have no meaning if it were not connected to the natural resources that are found within that territory.” Consequently, the ownership of the land relates to the need to ensure the security and permanence of the control and use of the natural resources which, in turn, preserve the way of life of the communities. The resources that are protected by the right to communal property are those that the communities have used traditionally and that are necessary for the very survival, development and continuity of their way of life<sup>93</sup>.

In addition in the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court reiterated that, in the 2001 case of *the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, it had determined that the possession of the land should suffice for the indigenous communities to obtain official recognition of their communal ownership and its consequent registration. This action declares the pre-existing right; it does not constitute the right. Furthermore, the Court reiterated that, in the 2005 case of the *Yakye Axa Indigenous Community v. Paraguay*, it had stressed that the State should not only acknowledge the right to communal property, but should also make this “truly effective in practice,” and in the 2006 case of *the Sawhoyamaya Indigenous Community v. Paraguay*, the Court stipulated that:

- (1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title;

92. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400, para. 93.

93. *Ibid.*, para. 94.

- (2) traditional possession entitles indigenous people to demand official recognition and registration of property title;
- (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith, and
- (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality<sup>94</sup>.

In this regard, in the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court recalled that the State was obliged to give “geographical certainty” to the communal property, as it had indicated when deciding the case of *the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. On that occasion, and in subsequent decisions, the Court had referred to the obligation “to delimit” and “to demarcate” the territory, in addition to the obligation to “grant title to it.”<sup>95</sup> Accordingly, the State must ensure that the indigenous peoples have real ownership and, therefore, it must:

- (a) delimit indigenous lands from others and grant collective title to the lands of the communities;
- (b) “refrain from carrying out actions that may result in agents of the State or third parties acting with its acquiescence or tolerance, adversely affecting the existence, value, use and enjoyment of their territory,” and
- (c) guarantee the right of the indigenous peoples to truly control and use their territory and natural resources, and to own their territory without any type of external interference from third parties<sup>96</sup>.

## INDIGENOUS COMMUNAL PROPERTY AND THE RIGHT TO RECOGNITION OF JURIDICAL PERSONALITY (ARTICLES 21 AND 3 OF THE AMERICAN CONVENTION)

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court considered that the State should recognize the juridical personality of the communities to enable them to take a decision on the land in accordance with their traditions and forms of organization<sup>97</sup>.

## RIGHT TO PARTICIPATION IN RELATION TO PROJECTS OR PUBLIC WORKS ON THE COMMUNAL PROPERTY (ARTICLES 21 AND 23 OF THE AMERICAN CONVENTION)

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court understood that, bearing in mind the circumstances, it might be pertinent – in relation to the right to consultation – to distinguish between maintenance or improvement of existing infrastructure and the execution of new projects or public works. Activities merely to adequately maintain or improve public works do not always require the intervention of prior consultation procedures. Otherwise, this could entail an unreasonable or excessive understanding of the State’s obligations with regard to the rights to consultation and participation, a matter that must be evaluated based on the specific circumstances<sup>98</sup>.

The “importance” of a public work (in this case, an international bridge) which “involves State policies and the administration of territorial borders, as well as decisions with implications for the economy, the State’s

94. Ibid., para. 95.

95. Ibid., para. 96.

96. Ibid., para. 98.

97. Ibid., para. 155.

98. Ibid., para. 179.

interests and its sovereignty ... , as well as the government's management of the interests of the ... population in general" does not authorize the State to disregard the right of the communities to be consulted"<sup>99</sup>.

## DETERMINATION OF PRESUMED VICTIMS TAKING CULTURAL CHARACTERISTICS INTO CONSIDERATION

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court indicated that, in order to determine which indigenous communities should be considered presumed victims in a case before the Court, it was necessary to consider their inherent cultural characteristics, if this was relevant. Moreover, this is necessary even if it is complicated or contrary to formal delimitations that could be established for practical reasons. The Court found that delimiting the presumed victims by ignoring the cultural characteristics of the communities concerned would be inconsistent with the protection of the rights of indigenous peoples and communities based on their cultural identity; it could also impact the effectiveness of the decision taken by the Court<sup>100</sup>.

## RIGHTS OF "CRIOLLOS" OR PEASANT FARMERS (NOT NECESSARILY INDIGENOUS PEOPLE)

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court took into consideration the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UN General Assembly resolution A/RES/73/165, adopted on December 17, 2018). Based on its content, the Court noted that "the State has obligations towards the *criollo* population, because, given their vulnerable situation, the State must take positive steps to ensure their rights"<sup>101</sup>. Accordingly, in this specific case, the Court considered that although the *criollo* population were not "a formal party to the international judicial proceedings ... it is undeniable that they are a party, in the physical sense, to the substantive conflict related to the use and ownership of the land, and [it was] relevant to take their situation into account in order to examine this case appropriately and to ensure the effectiveness of the decision adopted [by the Court]"<sup>102</sup>. Therefore, the Court understood that when taking actions to demarcate the indigenous property and to transfer or relocate the *criollo* population outside this property, the State "should respect the rights of the *criollo* population"<sup>103</sup>.

These considerations had an impact on the type of measures of reparation required in the specific case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, and that were established in favor of the indigenous communities (and not the *criollo* population). The Court established certain standards for the relocation of the *criollo* population outside the indigenous territory:

- //** (a) The State must facilitate procedures aimed at the voluntary relocation of the *criollo* population, endeavoring to avoid compulsory evictions; (b) To guarantee this, during the first three years following notification of this judgment, the State, judicial, administrative and any other authorities, whether provincial or national, may not execute compulsory or enforced evictions of *criollo* settlers; (c) Notwithstanding the process of agreements ... described in this judgment, the State must make mediation or arbitral procedures available to interested parties to determine relocation conditions; if such procedures are not used, recourse may be had to the corresponding legal proceedings. During these procedures, those concerned may argue their claims and the rights they consider they possess, but they may not challenge the right to indigenous communal property determined in this judgment and, consequently, the admissibility of their relocation outside indigenous territory. The authorities that

99. Ibid., paras. 181 and 182.

100. Ibid., para. 34.

101. Ibid., paras. 136 and 137.

102. Ibid., para. 136.

103. Ibid., para. 138.

have to decide these procedures may not take decisions that prevent compliance with this judgment; (d) In any case, the competent administrative, judicial or other authorities must ensure that the relocation of the *criollo* population is implemented, safeguarding their rights. Accordingly, provision should be made for resettlement and access to productive land with adequate property infrastructure (including implanting pasture and access to sufficient water for production and consumption, as well as the installation of the necessary fencing) and, if necessary, technical assistance and training for productive activities<sup>104</sup>.

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104. Ibid., para. 329.

# FREEDOM OF EXPRESSION AND INCOMPATIBILITY OF THE USE OF CRIMINAL LAW AGAINST THE DISSEMINATION OF A PUBLIC INTEREST NOTE REFERRING TO A PUBLIC OFFICIAL

## Article 13 of the American Convention

In the case of *Petro Urrego v. Colombia*, the Court reiterated, in relation to the protection of political rights, that representative democracy is one of the pillars of the entire system of which the Convention forms part, and constitutes a principle reaffirmed by the American States in the Charter of the Organization of American States (the OAS Charter). In this regard, the OAS Charter, a constitutive treaty of the organization to which Colombia has been a party since July 12, 1951, establishes as one of its essential purposes “the promotion and consolidation of representative democracy, with due respect for the principle of non-intervention”<sup>105</sup>.

In the inter-American system, the relationship between human rights, representative democracy and political rights in particular, was embodied in the Inter-American Democratic Charter, approved in the first plenary session of September 11, 2001, during the twenty-eighth OAS General Assembly<sup>106</sup>. The Inter-American Democratic Charter refers to the peoples’ right to democracy and also stresses the importance, under representative democracy, of the permanent participation of citizens within the framework of the legal and constitutional order in force. Furthermore, it indicates that one of the constituent elements of representative democracy is “the access to and the exercise of power in accordance with the rule of law.” For its part, Article 23 of the American Convention recognizes the rights of citizens, which have an individual and collective dimension, protecting both those who participate as candidates and their electors. The first paragraph of this Article recognizes the rights of all citizens:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

105. Case of *Petro Urrego v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406, para. 90.

106. *Ibid.*, para. 91.

- (b) to vote and to be elected in genuine and periodic elections, which must be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- (c) to have access, under general conditions of equality, to the public service of their country<sup>107</sup>.

The effective exercise of political rights constitutes an end in itself and, also, an essential means that democratic societies have to ensure the other human rights established in the Convention. Moreover, according to Article 23 of the Convention, the holders of these rights – in other words, the citizens – should enjoy not only these rights, but also “opportunities.” The latter term entails the obligation to ensure, by taking positive measures, that anyone who is the formal holder of political rights has the real possibility of exercising them. Political rights and their exercise promote the strengthening of democracy and political pluralism. Consequently, the State must facilitate ways and means to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination. Political participation may include diverse and wide-ranging activities that the population carries out individually or on an organized basis in order to intervene in the appointment of those who will govern a State or who will be in charge of managing public affairs, as well as to influence the development of State policies through direct participation mechanisms or, in general, to intervene in matters of public interest, such as the defense of democracy<sup>108</sup>.

At the same time, the Court recalls that political rights are not absolute rights, and their exercise may be subject to regulations or restrictions. However, the authority to regulate or restrict rights is not discretionary, but is limited by international law and is subject to compliance with certain requirements which, if not respected, render that restriction illegitimate and contrary to the American Convention. In this regard, paragraph 2 of Article 23 of the Convention establishes that the law may regulate the exercise of the rights and opportunities referred to in the first paragraph of this article “only” on the basis of “age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings. It should also be recalled that, pursuant to Article 29 of the Convention, no provision of the Convention may be interpreted as restricting rights to a greater extent than is provided for in the Convention<sup>109</sup>.

In the specific case of *Petro Urrego v. Colombia*, the Court noted that the Commission and the parties hold different interpretations regarding the scope of Article 23(2) of the Convention, in particular whether the said article allows for restrictions of the political rights of democratically elected authorities as a result of sanctions imposed by authorities other than a “competent judge in criminal proceedings,” and the conditions under which such restrictions may be valid. In this regard, the Court recalls that in the case of *López Mendoza v. Venezuela*, it ruled on the scope of the restrictions imposed by Article 23(2) in relation to the disqualification of Leopoldo López Mendoza by the Comptroller General, who banned him from participating in the 2008 regional elections in Venezuela. In that case, the Court stated the following<sup>110</sup>:

**//** 107. Article 23(2) of the Convention sets out the various causes that can restrict the rights recognized in Article 23(1) and, where applicable, the requirements that must be met for such a restriction to be applied appropriately. In this case, which concerns a restriction imposed by way of a sanction, it should relate to a ‘conviction by a competent court in criminal proceedings.’ None of these requirements have been fulfilled, given that the body that imposed the sanctions was not a ‘competent court,’ there was no ‘conviction,’ and the sanctions were not applied as a result of a ‘criminal proceeding,’ where the judicial guarantees enshrined in Article 8 of the American Convention should have been respected.

The Court reiterated that Article 23(2) of the American Convention makes clear that this instrument does not allow any administrative body to apply a sanction involving a restriction (for example, imposing a sanction of disqualification or dismissal) on a person for social misconduct (in the performance of public service or outside of it) in the exercise of their political rights to elect and be elected. This may only occur through a judicial act (judgment) by a competent judge in the corresponding criminal proceedings. The Court considers

107. Ibid., para. 92.

108. Ibid., para. 93.

109. Ibid., para. 94.

110. Ibid., para. 94.



that the literal interpretation of this provision makes it possible to reach this conclusion, since both dismissal and disqualification are restrictions on the political rights, not only of popularly elected public officials, but also of their constituents<sup>111</sup>.

According to the Court, this literal interpretation is corroborated by considering the object and purpose of the American Convention to understand the scope of Article 23(2). The Court has stated that the object and purpose of the Convention is “the protection of the fundamental rights of human beings, as well as the consolidation and protection of a democratic system. Article 23(2) of the Convention corroborates that objective, since it allows for the possibility of establishing regulations that facilitate conditions for the enjoyment and exercise of political rights. Similarly, the American Declaration does so in Article XXVIII, by recognizing the possibility of establishing restrictions on the exercise of political rights when these are “necessary in a democratic society.” For the same purposes, Article 32(2) of the Convention is relevant inasmuch as it provides that “[t]he rights of each person are limited by the rights of others, by the security of all and by the just demands of the general welfare, in a democratic society”<sup>112</sup>.

A teleological interpretation emphasizes that, in any restrictions on the rights recognized by the Convention, there must be strict respect for the guarantees established in the treaty. The Court considers that Article 23(2) of the Convention, by providing a list of possible reasons for restricting or regulating political rights, aims to identify clear criteria and specific systems under which such rights may be limited. This seeks to ensure that the restriction of political rights is not left to the discretion or will of the incumbent government, in order to allow the political opposition to exercise its rights without undue constraints. Thus, the Court considers that the sanctions of dismissal and disqualification of democratically elected public officials by a disciplinary administrative authority are restrictions on political rights not included among those permitted by the American Convention. They are incompatible not only with the literal meaning of Article 23(2) of the Convention, but also with the object and purpose of that instrument<sup>113</sup>.

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111. *Ibid.*, para. 96.

112. *Ibid.*, para. 97.

113. *Ibid.*, para. 98.

# ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS

## Article 26 of the American Convention

### PROHIBITION OF CHILD LABOR IN HAZARDOUS AND UNHEALTHY CONDITIONS AND THE EMPLOYMENT OF CHILDREN OF LESS THAN 14 YEARS OF AGE

In the case of *the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*, the Court found that several children and adolescents worked in the fireworks factory. Of the 60 people who died, 19 were girls and one was a boy, the youngest of whom was 11 years of age. Meanwhile, the survivors included a girl and two boys who were between 15 and 17 years of age<sup>114</sup>. In this regard, Article 19 of the American Convention establishes that children have the right to special measures of protection. According to the Court's case law, this mandate has an impact on the interpretation of the other rights recognized in the Convention, including the right to work in the terms defined in the previous section. In addition, this Court has understood that Article 19 of the Convention establishes an obligation for the State to respect and ensure the rights recognized to children in other international instruments; accordingly, when defining the meaning and scope of the State's obligations in relation to the rights of the child it is necessary to have recourse to the international *corpus iuris*, in particular, to the Convention on the Rights of the Child (CRC)<sup>115</sup>.

Based on the standards described above, the Court finds that, in light of the American Convention, children have a right to special measures of protection. These measures, according to the CRC, include protection from work that may interfere with their education or be harmful to their health and development, as in the case of the manufacture of fireworks. In addition, the Court finds, in application of Article 29(b) of the American Convention and in light of the laws of Brazil, that hazardous, unhealthy and night work was absolutely prohibited in Brazil for children under 18 years of age at the date of the facts. Therefore, the State should have taken every measure available to it to ensure that no child was working in activities such as those carried out in the fireworks factory.

114. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 15, 2020. Series C No. 407, para. 177.

115. *Ibid.*, para. 178.

## INDIGENOUS AND TRIBAL PEOPLES – RIGHTS TO A HEALTHY ENVIRONMENT, TO ADEQUATE FOOD, TO WATER AND TO PARTICIPATE IN CULTURAL LIFE

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court declared, for the first time, a violation of the rights to a healthy environment, to adequate food, to water, and to participate in cultural life based on Article 26 of the American Convention.

### THE RIGHT TO A HEALTHY ENVIRONMENT

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court referred back to some crucial aspects developed in Advisory Opinion 23/17 on “The Environment and Human Rights,” issued on November 15, 2017. In this regard, it reiterated that the right to a healthy environment “must be considered one of the rights ... protected by Article 26 of the American Convention,” given the obligation of the State to ensure “integral development for their peoples,” as revealed by Articles 30, 31, 33 and 34 of the Charter<sup>116</sup>. Accordingly, the Court reaffirmed its considerations in the said Opinion to the effect that “the right to a healthy environment “constitutes a universal value”; it “is a fundamental right for the existence of humankind,” and “as an autonomous right ... it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that nature must be protected, not only because of its benefits or effects for humanity, “but because of its importance for the other living organisms with which we share the planet.” This evidently does not mean that other human rights will not be violated as a result of damage to the environment<sup>117</sup>.

Also, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (hereinafter “Protocol of San Salvador”), and its Article 11, entitled “Right to a Healthy Environment” establishes that:

- // 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment<sup>118</sup>.

Additionally, the Court noted that the right to a healthy environment has been recognized by various countries of the Americas and, as the Court has already noted, at least 16 States of the hemisphere include this in their Constitutions<sup>119</sup>.

In the specific case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court considered that, regarding the right to a healthy environment, not only the obligation to respect right applies, but also the obligation to ensure rights established in Article 1(1) of the Convention, and one of the ways of complying with this is to prevent violations. This obligation extends to the “private sphere” in order to avoid “third parties violating the protected rights,” and “encompasses all those legal, political, administrative and cultural measures that promote the safeguard of human rights and that ensure that eventual violations of those rights are examined and dealt with as wrongful acts.” In this regard, the Court has indicated that, at times, the States have the obligation to establish adequate mechanisms to monitor and supervise certain activities in order to ensure human rights, protecting them from actions of public entities and also private individuals. The obligation to prevent is an obligation of means or conduct and non-compliance is not proved by the mere fact that a right has been violated.

The Court underscored that the principle of prevention of environmental harm forms part of customary international law and entails the State obligation to implement the necessary measures *ex ante* damage is caused to the environment, taking into account that, owing to its particularities, after the damage has occurred, it will frequently not be possible to restore the previous situation. Based on the duty of prevention, the Court

116. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400, para. 202.

117. *Ibid.*, para. 203.

118. *Ibid.*, para. 205.

119. *Ibid.*, para. 206.

has pointed out that States are bound to use all the means at their disposal to avoid activities under their Jurisdiction causing significant harm to the environment.

This obligation must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm. Even though it is not possible to include a detailed list of all the measures that States could take to comply with this obligation, the following are some measures that must be taken in relation to activities that could potentially cause harm:

- (i) regulate;
- (ii) supervise and monitor;
- (iii) require and approve environmental impact assessments;
- (iv) establish contingency plans, and
- (v) mitigate, when environmental damage has occurred<sup>120</sup>.

## RIGHT TO ADEQUATE FOOD

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court considered that, from Article 34(j) of the Charter, interpreted in light of the American Declaration, and considering the other instruments cited, it is possible to derive elements that constitute the right to adequate food. The Court considered that, essentially, this right protects access to food that permits nutrition that is adequate and appropriate to ensure health. As the United Nations Committee on Economic, Social and Cultural Rights (the CESCR) has indicated, this right is realized when everyone has “physical and economic access at all times to adequate food or means for its procurement . . . and shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients”<sup>121</sup>. The concepts of “adequacy” and “food security” are particularly important in relation to the right to food. The former serves to underline that it is not just any type of food that satisfies the right; rather there are a number of factors that must be taken into account when determining whether a particular food is “appropriate.” The second concept relates to “sustainability” and “implies food being accessible for both present and future generations.” The CESCR also explained the need for “cultural or consumer acceptability, [which] implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food and food consumption”<sup>122</sup>.

States have the obligation not only to respect, but also to ensure the right to food, and should understand that this obligation includes the obligation to “protect” this right as this was conceived by the CESCR:

**//** [t]he obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.”

Accordingly, the right is violated by a State’s “failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others”<sup>123</sup>.

## RIGHT TO WATER

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court considered that the right to water is protected by Article 26 of the American Convention and this is revealed by the provisions of the OAS Charter that permit deriving rights from which, in turn, the right to water can be understood. In this regard, it is sufficient to indicate that they include the right to a healthy environment and the right to adequate food, and their inclusion in Article 26 has been established in the judgment, as has

120. *Ibid.*, para. 208.

121. *Ibid.*, para. 216.

122. *Ibid.*, para. 220.

123. *Ibid.*, para. 221.

the right to health, which the Court has also indicated is included in this article. The right to water may be connected to other rights, even the right to take part in cultural life, which is also addressed in this judgment<sup>124</sup>.

Having described the legal provisions that support this right, it is relevant to indicate its content. The CESCR has indicated that:

// The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements<sup>125</sup>.

Similarly, the Court, following the guidance of the CESCR has stated that

// access to ... water ... includes 'consumption, sanitation, laundry, food preparation, and personal and domestic hygiene,' and for some individuals and groups it will also include 'additional water resources based on health, climate and working conditions'<sup>126</sup>.

Regarding the obligations entailed by the right to water, it is worth adding some more specific elements. Clearly, there is an obligation to respect the exercise of this right, as well as the obligation to ensure it, as established in Article 1(1) of the Convention. This Court has indicated that "access to water" involves "obligations to be realized progressively"; "however, States have immediate obligations such as ensuring [access] without discrimination and taking measures to achieve [its] full realization." The State duties that it can be understood are contained in the obligation to ensure this right include providing protection against actions by private individuals, and this requires the States to prevent third parties from impairing the enjoyment of the right to water, as well as "ensuring an essential minimum of water" in "specific cases of individuals or groups of individuals who are unable to access water ... by themselves for reasons beyond their control"<sup>127</sup>.

The Court agreed with the CESCR that, in compliance with their obligations in relation to the right to water, States "should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including ... indigenous peoples." They should also ensure that

// [i]ndigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution ... [and] provide resources for indigenous peoples to design, deliver and control their access to water," and also that "nomadic and traveller communities have access to adequate water at traditional ... halting sites"<sup>128</sup>.

## RIGHT TO TAKE PART IN CULTURAL LIFE

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court considered that the right to take part in cultural life, which includes the right to cultural identity, was established in Articles 30, 45(f), 47 and 48 of the OAS Charter. In particular, this establishes the commitment of the States to ensure:

- (a) the integral development [of] their people ... [which] encompasses the ... cultural [aspect]";
- (b) "the incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the ... cultural ... life of the nation, in order to achieve the full integration of the national community";
- (c) the "encouragement of ... culture," and
- (d) the "preserv[ation] and enrich[ment of] the cultural heritage of the American peoples"<sup>129</sup>.

The provisions indicated should be understood and applied in harmony with other international commitments made by the States, such as those that arise from Article 15 of the International Covenant on Economic, Social and Cultural Rights and Article 27 of the International Covenant on Civil and Political Rights or Convention 169

128. Ibid., para. 230.

129. Ibid., para. 231.

of the International Labour Organization. Therefore, it should not be understood that such norms call for State policies that encourage the assimilation of minorities or groups with their own cultural patterns into a culture that is considered majority or dominant. To the contrary, the mandates to ensure integral development, to incorporate and to increase the participation of sectors of the population to seek their full integration, to stimulate culture and to preserve and enrich the cultural heritage should be understood in the context of respect for the characteristic cultural life of the different groups such as indigenous communities. Therefore, participation, integration or incorporation into cultural life should be sought respecting cultural diversity and the rights of the different groups and their members<sup>130</sup>.

That said, regarding the concept of “culture,” it is useful to take into account the definition of the United Nations Educational, Scientific and Cultural Organization (UNESCO), that this is “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs<sup>131</sup>.”

Cultural diversity and its richness should be protected by the States because, in the words of UNESCO, it “is as necessary for humankind as biodiversity is for nature[.] it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.” States are obliged to protect and promote cultural diversity and policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Therefore, cultural pluralism gives policy expression to the reality of cultural diversity<sup>132</sup>.

The Court understands that the right to cultural identity protects the freedom of individuals, including when they are acting together or as a community, to identify with one or several societies, communities or social groups, to follow a way of life connected to the culture to which they belong and to take part in its development. Thus, this right protects the distinctive features that characterize a social group without denying the historical, dynamic and evolutive nature of culture”<sup>133</sup>.

Among the State obligations relating to the right to take part in cultural life, the CESCR has indicated “the obligation to fulfill” that requires States to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right, and “the obligation to protect” that requires States to take steps to prevent third parties from interfering in the right to take part in cultural life. The CESCR explained that the States have “minimum core obligations,” which include “[t]o protect the right of everyone to engage in their own cultural practices.” It also indicated the right is violated through the omission or failure of a State party to take the necessary measures to comply with its [respective] legal obligations<sup>134</sup>.

## INTERDEPENDENCE BETWEEN THE RIGHTS TO A HEALTHY ENVIRONMENT, ADEQUATE FOOD, WATER AND CULTURAL IDENTITY AND SPECIFICITY IN RELATION TO INDIGENOUS PEOPLES

In the case of *the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court indicated that the rights to a healthy environment, to adequate food, to water and to cultural identity are closely related, so that some aspects related to the observance of one of them may overlap with the realization of others<sup>135</sup>. Thus, there are threats to the environment that may have an impact on food. The right to food, and also the right to take part in cultural life and the right to water, are particularly vulnerable to environmental impacts<sup>136</sup>.

It is also important to emphasize that the management by the indigenous communities of the resources that exist in their territories should be understood in pragmatic terms, favorable to environmental preservation.

130. Ibid., para. 234.

131. Ibid., para. 237.

132. Ibid., para. 238.

133. Ibid., para. 240.

134. Ibid., para. 242.

135. Ibid., para. 243.

136. Ibid., para. 245.



Principle 22 of the Rio Declaration is very clear in this regard when it indicates that indigenous people and their communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development<sup>137</sup>.

Additionally, it is necessary to take into account the indications of the Human Rights Committee that the right of the people to enjoy a particular culture “may consist in a way of life closely associated with territory and the use of its resources” as in the case of members of indigenous communities. The right to cultural identity may be expressed in different ways; in the case of indigenous peoples this includes “a particular way of life associated with the use of land resources. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. In this regard, the Court has had occasion to note that the right to collective ownership of indigenous people is connected to the protection of and access to the natural resources that are on their territories<sup>138</sup>.

It is necessary to take into consideration the interdependence of the rights analyzed and the correlation that the enjoyment of these rights has, in the circumstances of the case. In addition, these rights should not be understood restrictively. It has already been indicated that the environment is connected to other rights and that there are “threats to the environment” that may have an impact on food, water and cultural life. Furthermore, it is not just any food that meets the requirements of the respective right, but it must be acceptable to a specific culture, which means that values that are unrelated to nutrition must be taken into account. At the same time, food is essential for the enjoyment of other rights and, for it to be “adequate,” this may depend on environmental and cultural factors. Thus, food is, in itself, a cultural expression. In this regard it may be considered as one of the “distinctive features” that characterize a social group and, consequently, included in the protection of the right to cultural identity by the safeguard of such features, without this entailing a denial of the historical, dynamic and evolutive nature of culture<sup>139</sup>.

This is even more evident in the case of indigenous peoples, regarding whom there are specific laws that require the safeguard of their environment, the protection of the productive capacity of their lands and resources, and considering traditional activities and those related to their subsistence economy such as hunting, gathering and others as “important factors for preserving their culture.” The Court has emphasized that the lack of access to the territories and corresponding natural resources may expose the indigenous communities to several violations of their human rights in addition to causing them suffering and prejudicing the preservation of their way of life, customs and language. In addition, it has noted that “States must protect the close relationship that indigenous peoples have with the land” and their life project, in both its individual and its collective dimensions<sup>140</sup>.

The Court considered it necessary to point out that, given the evolutive and dynamic nature of culture, the inherent cultural patterns of the indigenous peoples may change over time and based on their contact with other human groups. Evidently, this does not take away the indigenous nature of the respective peoples. In addition, this dynamic characteristic cannot, in itself, lead to denying the occurrence, when applicable, of real harm to cultural identity. In the circumstances of this case, the changes in the way of life of the communities, noted by both the State and the representatives, have been related to the interference in their territory by non-indigenous settlers and activities alien to their traditional customs. This interference, which was never agreed to by the communities but occurred in a context of a violation of the free enjoyment of their ancestral territory, affected natural or environmental resources on this territory that had an impact on the indigenous communities’ traditional means of feeding themselves and on their access to water. In this context, the alterations to the indigenous way of life cannot be considered, as the State claims, as introduced by the communities themselves, as if they had been the result of a deliberate and voluntary decision. Consequently, there has been harm to cultural identity related to natural and food resources<sup>141</sup>.

137. Ibid., para. 250.

138. Ibid., para. 251.

139. Ibid., para. 274.

140. Ibid., para. 274.

141. Ibid., para. 284.



## LABOR RIGHTS – RIGHT TO JUST AND SATISFACTORY WORKING CONDITIONS THAT ENSURE OCCUPATIONAL SAFETY, HEALTH AND HYGIENE

In the case of *Spoltore v. Argentina*, the Court considered that the nature and scope of the obligations derived from protection of the right to working conditions that ensure the worker's health include aspects that can be required immediately, and also aspects of a progressive nature. In this regard, the Court recalled that, in the case of the former (obligations that can be required immediately), States must take effective measures to ensure access, without discrimination, to the safeguards recognized by the right to working conditions that ensure the worker's health. These obligations include that of making adequate and effective mechanisms available so that workers affected by an occupational accident or disease can request compensation. In the case of the latter (obligations of a progressive nature), the progressive realization means that the States Parties have the specific and constant obligation to progress as rapidly and efficiently as possible towards the full effectiveness of this rights, subject to available resources, by legislative or other appropriate means. Also, there is an obligation of non-retrogressivity in relation to the rights achieved. Based on the foregoing, the Convention-based obligations to respect and to ensure rights, as well as to adopt domestic legislative measures (Articles 1(1) and 2), are fundamental to achieve their effectiveness<sup>142</sup>.

In the specific case of *Spoltore v. Argentina*, the Court considered that, based on the criteria and elements that constitute the right to working conditions that ensure the worker's health, among other obligations, States must ensure that workers who suffer a preventable occupational accident or disease have access to adequate complaints mechanisms, such as courts, to request reparation or compensation. The Court reiterated that access to justice is one of the components of the right to working conditions that ensure the worker's health. The Court has indicated that labor rights and the right to social security include the obligation to have effective complaints mechanisms if they are violated in order to guarantee the right of access to justice and to effective judicial protection, in both the public and private sphere of labor relations. This is also applicable to the right to just and satisfactory working conditions that ensure the worker's health<sup>143</sup>.

In the case of *the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*, the Court concluded that the right to just and favorable conditions that ensure occupational safety, health and hygiene meant that that the worker must be able to carry out his work in adequate conditions of safety, hygiene and health that prevent occupational accidents and this is especially relevant in the case of activities that involve significant risk to the life and integrity of the workers. This right involves the adoption of measures to prevent or reduce work-related risks and occupational accidents; the obligation to provide adequate protection equipment for work-related hazards; the classification by the labor authorities of unhealthy and unsafe workplaces, and the obligation to oversee such conditions, also under the responsibility of the labor authorities<sup>144</sup>.

142. Case of *Spoltore v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 9, 2020. Series C No. 404, para. 97.

143. *Ibid.*, para. 101.

144. Case of the *Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 15, 2020. Series C No. 407, para. 174.

# PROVISIONAL MEASURES

## Article 63(2) of the American Convention

### COVID-19 AND MIGRANTS

In its order on provisional measures in the case of *Vélez Looor v. Panama*, the Court considered that, in the actual context resulting from the COVID-19 pandemic, migrants who are in transit are prevented from moving on and continuing their travels, and this could result in exceeding the operating capacity of existing shelters. Consequently, the State must take appropriate additional measures to prevent the spread of COVID-19 and provide the required medical care. This situation highlights the urgent need to provide assistance to the migrant population – which consists of flows of migrants from different countries, and even from other continents – in such essential areas as health care for pre-existing conditions, inputs for adequate hygiene, food and accommodation in shelters until they are able to resume their travels, as well as the special needs for protection based on age and gender, among other factors<sup>145</sup>.

In the Court's opinion, the situation described revealed a risk to the health, personal integrity and life of numerous individuals, and the severity of this risk warranted an immediate intervention in favor of a group of individuals in a vulnerable situation, as are migrants and other aliens in a context of human migration that may require international protection. This vulnerability is increased owing to the pandemic and, consequently, requires the State to provide special protection. The worldwide public health situation resulting from the COVID-19 pandemic has led States to take a series of measures to address the crisis that have impaired the exercise and enjoyment of a series of rights, with a particular impact on migrants. The Court noted this in its Statement 1/20 "COVID-19 and Human Rights: The problems and challenges that must be addressed from the perspective of human rights and respect for international obligations," and so have other specialized international bodies<sup>146</sup>.

States have a special position of guarantor of the rights of those who are in their custody in the Migrant Reception Stations. COVID-19 requires taking rigorous measures to mitigate the risk to life, personal integrity and health of those who are retained in them, including:

- (a) Reduce overcrowding as much as possible in order to respect the recommended rules on social distancing to prevent the virus from spreading, paying special attention to individuals with risk factors and including the possibility of examining alternative community-based measures;
- (b) Determine, when possible, based on best interest, options of family or community hosting for unaccompanied child and adolescent migrants, as well as for those who are with their families to preserve the family unit, as established in Advisory Opinion OC-21/2014;

145. Case of *Vélez Looor v. Panama*. Provisional measures. Adoption of provisional measures. Order of the Inter-American Court of Human Rights of July 29, 2020, considering paragraph 22.

146. *Ibid.*, considering paragraph 23.

- (c) Ensure respect for the principle of *non-refoulement* for all aliens when their life, safety or personal integrity is at risk, as well as effective access to asylum procedures when appropriate;
- (d) Take measures to prevent the risk of violence and, in particular, sexual violence, to which women and child migrants are exposed;
- (e) Establish protocols or actions plans to prevent the spread of COVID-19 and treat migrants who become infected, based on the recommended standards. Among other aspects, ensure health screening for everyone who enters the facility, verifying whether they have a temperature or symptoms of the disease; carry out biological testing for all cases classified as “suspicious,” and take the necessary medical, quarantine and/or isolation measures;
- (f) Provide migrants with free access, without discrimination, to health care services, including those required to address COVID-19, guaranteeing good quality and effective medical care, of the same standard available in the community;
- (g) Provide pregnant women with free access to sexual and reproductive health care services, as well as maternity care services, and facilitate adequate health care services for children;
- (h) Take all necessary measures to overcome legal, language and cultural barriers that hinder access to health care and information;
- (i) Take measures to ensure natural ventilation, maximum cleanliness, sanitization, and collection of waste to avoid the spread of the virus;
- (j) Continue to provide, free of charge, masks, gloves, alcohol, paper towels, toilet paper, and garbage bags, among other elements, for both the population in the facilities, and for staff and cleaning personnel;
- (k) Promote, by providing the necessary information and supplies, the personal hygiene measures recommended by the health authorities, such as regular hand and body washing with soap and water to prevent the spread of the virus and other infectious diseases;
- (l) Provide sufficient food and drinking water, paying special attention to pre- and post-natal nutritional requirements;
- (m) Enable access to mental health services for those who require this, taking into account anxiety and/or other pathologies that may result from fear caused by the COVID-19 situation;
- (n) Guarantee access to the Migrant Reception Stations for the Ombudsman and other independent monitoring mechanisms, and also international agencies and civil society; and
- (o) Avoid the measures taken promoting xenophobia, racism or any other form of discrimination.

The Court recalled its Statement of April 9, 2020, in which it indicated, in particular, that

**“** [t]he extraordinary problems and challenges resulting from this pandemic must be addressed through dialogue, together with regional and international cooperation that is implemented jointly, transparently and in a spirit of solidarity between all the States. Multilateralism is essential in order to coordinate regional efforts to contain the pandemic.

In this regard, the Court recommended that

**“** multilateral agencies, whatever their nature, must help and cooperate with the States, with a human rights-based approach, to seek solutions to the present and future problems and challenges that this pandemic is causing and will cause<sup>147</sup>.

The Court emphasized that the difficulties of the current circumstances called for synergy and solidarity between States, international organizations and civil society to provide an effective regional and global response to the pandemic-related challenges faced by migrants. In light of the principle of shared responsibility, and taking into account the complex and transborder characteristics of the phenomenon of migration, increased by the pandemic, the Court deemed it pertinent to recall the importance of encouraging national, bilateral and

147. *Ibid.*, considering paragraph 36.

regional dialogue to create the conditions to make safe, orderly and regular transit possible, that guarantees, effectively, the rights of migrants<sup>148</sup>.

## HUMAN RIGHTS OBLIGATIONS OF A STATE THAT HAS DENOUNCED THE AMERICAN CONVENTION ON HUMAN RIGHTS AND THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES

In Advisory Opinion OC-26/20, the Court considered that, as a general rule, the denunciation of an international treaty must be consistent with the terms and conditions established in the treaty's text. The Court noted that the denunciation of the American Convention represents a backward step in the level of inter-American protection of human rights and in the quest to universalize the inter-American system<sup>149</sup>.

## THE SPECIFICITY OF HUMAN RIGHTS TREATIES

The Court has repeatedly stated that international human rights treaties, such as the American Convention, are of a different juridical nature from general international public law. On the one hand, their object and purpose is the protection of the human rights of individuals and therefore their provisions should be interpreted on the basis of those values that the inter-American system seeks to safeguard from the perspective of the "best approach" for the protection of the individual. On the other hand, they create a legal order in which States assume obligations, not in relation to other States, but towards the individuals subject to their Jurisdiction<sup>150</sup>.

## THE DENUNCIATION CLAUSE CONTAINED IN THE AMERICAN CONVENTION ON HUMAN RIGHTS AND ITS PROCEDURAL NORMS

In the case of the American Convention on Human Rights, Article 78 describes two procedural requirements that must be met at the international level to validly denounce the American Convention in its entirety, namely:

- (i) at least five years' membership from the date of the treaty's entry into force, and
- (ii) notice, submitted one year in advance, to the OAS Secretary General who, as custodian of the treaty, must inform the other States Parties. In this regard, the Court emphasizes that a State's intention to denounce the treaty cannot be presumed or inferred from domestic acts; such a denunciation must be made expressly and formally through the procedure established at the international level<sup>151</sup>.

That said, the Inter-American Court pointed out that the American Convention does not expressly establish the procedures required under a State's domestic law for taking a decision of this nature. However, the Court observed a tendency to require the participation of the legislature in the approval of the denunciation in countries where this is regulated by a Constitution<sup>152</sup>. However, the Court noted that, regardless of the different domestic procedures in the region for denouncing treaties, the denunciation of a human rights treaty in the region – particularly one that establishes a jurisdictional system for the protection of human rights, such as the American Convention – must be subject to a pluralistic, public and transparent debate within the States as it is a matter of great public interest because it implies a possible curtailment of rights and, in turn, of access to international justice. In this regard, the Court considered it pertinent to have recourse to the principle of parallelism of forms, which signifies that if a State has established a constitutional procedure for assuming

148. Ibid., considering paragraph 37.

149. The obligations in matters of human rights of a State that has denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States). Advisory Opinion OC-26/20 of November 9, 2020. Series A No. 26, para. 54.

150. Ibid., para. 51.

151. Ibid., para. 59.

152. Ibid., para. 61.

international obligations it would be appropriate to follow a similar procedure when it seeks to extricate itself from those obligations in order to guarantee public debate<sup>153</sup>.

## THE EFFECTS ON THE INTERNATIONAL OBLIGATIONS OF A MEMBER STATE OF THE ORGANIZATION OF AMERICAN STATES THAT HAS DENOUNCED THE AMERICAN CONVENTION, AND ON THE PERSONS SUBJECT TO ITS JURISDICTION

On the issue of the effects of denunciation of the American Convention, the Court determined that the main effect is to deprive the persons subject to the Jurisdiction of the State concerned of the possibility of having recourse to international judicial bodies such as the Inter-American Court to claim a complementary level of judicial protection of their rights. However, the Court considered that certain international human rights obligations will remain in effect for a Member State of the OAS<sup>154</sup>.

In particular, the Court determined that, when an OAS Member State denounces the American Convention on Human Rights, its international human rights obligations stand as follows:

- (1) Convention-based obligations remain intact during the period of transition to full denunciation<sup>155</sup>;
- (2) definitive denunciation of the American Convention produces no retroactive effects<sup>156</sup>;
- (3) the validity of the obligations established through ratification of other inter-American human rights treaties remains in place<sup>157</sup>;
- (4) the definitive denunciation of the American Convention does not invalidate the domestic efficacy of principles derived from Convention-based precepts interpreted as a standard for the prevention of human rights violations<sup>158</sup>;
- (5) obligations associated with the minimum threshold of protection through the Charter of the OAS and the American Declaration remain under the supervision of the Inter-American Commission<sup>159</sup>, and
- (6) customary norms, those derived from general principles of international law and those pertaining to *jus cogens* continue to bind the State by virtue of general international law<sup>160</sup>.

On this last point, namely, that norms derived from general principles of international law and those pertaining to *jus cogens* continue to bind the State by virtue of general international law, the Court considered that *jus cogens* is presented as the legal expression of the international community as a whole, based on universal and superior values, embodying basic standards that guarantee essential or fundamental human values related to life, human dignity, peace and security. The prohibition of acts of aggression, genocide, slavery and human trafficking, torture, racial discrimination and apartheid, crimes against humanity, as well as the right to self-determination, together with the norms of international humanitarian law, have been recognized as norms of *jus cogens*, which protect fundamental rights and universal values without which society would not prosper, and therefore produce obligations *erga omnes*<sup>161</sup>.

Throughout its case law, the Inter-American Court has recognized the following *jus cogens* norms:

- Principle of equality and prohibition of discrimination;
- Absolute prohibition of all forms of torture, both physical and psychological;

153. Ibid., para. 64.

154. Ibid., para. 114.

155. Ibid., paras. 68 to 75.

156. Ibid., paras. 76 to 82.

157. Ibid., paras. 83 to 89.

158. Ibid., paras. 90 to 93.

159. Ibid., paras. 94 to 99.

160. Ibid., paras. 100 to 110.

161. Ibid., para. 105.

- Prohibition of cruel, inhuman or degrading treatment or punishment;
- Prohibition of enforced disappearance of persons;
- Prohibition of slavery and other similar practices;
- Principle of *non-refoulement*, including non-rejection at borders and indirect *refoulement*;
- Prohibition to commit or tolerate serious, massive or systematic human rights violations, including extrajudicial executions, forced disappearances and torture;
- Prohibition of crimes against humanity and the associated obligation to prosecute, investigate and punish those crimes.

## THE EFFECTS ON INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF THE DENUNCIATION OF THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES BY A MEMBER STATE THAT IS NOT A PARTY TO THE AMERICAN CONVENTION

The Court considered that the OAS Charter can be denounced pursuant to its Article 143. This article establishes:

// (1) the requirement to inform the General Secretariat in writing of the decision to denounce the treaty, and the latter's obligation, as custodian of the treaty, to communicate the denunciation to all other Member States; (2) a two-year transition period, and (3) the effects derived from the entry into force of the denunciation. On this last point the article establishes, on the one hand, that the Charter shall cease to be in force with respect to the denouncing State and, on the other, that the denouncing State 'shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter.' The Court determined that this meant that denunciation becomes effective once the transition period has elapsed, at which point the Charter ceases to apply, although certain obligations arising from it remain<sup>162</sup>.

In this regard, the Court appreciated that the phrase "obligations arising from the present Charter" contained in Article 143 of the Charter is comprehensive, and its wording does not limit compliance to a specific type of obligation. Therefore, the Court had recourse to the means of interpretation of international treaties, as well as the *travaux préparatoires* of the OAS Charter to interpret this phrase and concluded that human rights obligations are part of the "obligations arising from" the OAS Charter pursuant to Article 143. Specifically, the Court interpreted that such obligations include those that arise from the perpetration of an internationally wrongful act and that were acquired under the mechanisms and procedures for the international protection of human rights of the inter-American system. They include both compliance with reparations ordered by the Inter-American Court under the *pacta sunt servanda* principle, as well as best efforts to comply with recommendations issued by the Inter-American Commission.

Second, the Court analyzed the effects of the denunciation and withdrawal from the OAS Charter on the international human rights obligations arising from this instrument. In this regard, the Court stressed that a State's denunciation of the OAS Charter and its withdrawal from the Organization, would leave those persons subject to the denouncing State's Jurisdiction entirely unprotected by the regional organs of international protection. On this point, the Court recalled that a denunciation of the American Convention cannot take effect immediately, so that the two-year transition period acquires special relevance so that the other OAS Member States, as collective guarantors of its efficacy in relation to the observance of human rights, have an opportunity to express any observations or objections deemed pertinent in a timely manner, using institutional channels, regarding denunciations that do not withstand scrutiny under the democratic principle and which undermine the inter-American public interest, so as to activate the collective guarantee<sup>163</sup>.

162. Ibid., para. 107.

163. Ibid., para. 161.



In conclusion, the Court decided that, when a Member State of the Organization of American States denounces the Charter, its international human rights obligations stand as follows:

- (1) human rights obligations derived from the OAS Charter remain unaltered during the period of transition to full denunciation;
- (2) definitive denunciation of the OAS Charter produces no retroactive effects;
- (3) the duty to abide by obligations derived from decisions by the human rights protection bodies of the inter-American system remains in force until compliance is final;
- (4) the duty to abide by inter-American human rights treaties ratified and not denounced under their own procedures remains in effect;
- (5) customary norms, those derived from general principles of law and those pertaining to *jus cogens* continue to bind the State by virtue of general international law and, moreover, the duty to abide by the obligations inherent in the United Nations Charter remains in effect<sup>164</sup>.

## THE NOTION OF COLLECTIVE GUARANTEE THAT UNDERLIES THE INTER-AMERICAN SYSTEM

The Court clarified that the notion of the “collective guarantee” underlies the entire inter-American system, particularly as the OAS Charter refers to the solidarity and good neighborliness among the States of the Americas. The Court has also considered that, in accordance with the collective guarantee mechanism underlying the American Convention, it is incumbent upon all States of the inter-American system to cooperate with each other in order to comply with their international obligations, both regional and universal<sup>165</sup>.

The collective guarantee translates into a general duty of protection required of States Parties to the American Convention and the OAS Charter, in order to ensure the effectiveness of those instruments, as a rule of an *erga omnes partes* nature. Thus, the Court emphasized that human rights standards, both Convention-based and those derived from the OAS Charter and the American Declaration, reflect shared values and common interests that are considered important and, therefore, benefit from collective application. In this regard, the Court has affirmed that

**//** the duty of cooperation among States in the promotion and observance of human rights is a rule of an *erga omnes* nature, since it must be observed by all States, and is of a binding nature in international law.

The Court also observed that, given the nature, object and purpose of human rights treaties, as well as the asymmetrical relationship between the individual and the State, the collective guarantee also ensures that persons under the Jurisdiction of the denouncing State are not deprived of a minimum threshold of protection of their human rights<sup>166</sup>.

In its case law, the Court has referred to various types of collective guarantee mechanisms provided under the American Convention, which translate into provisions and specific mandates. As an expression of the notion of collective guarantee, the Court has considered that, under Article 27(3), the States Parties to the American Convention have an international obligation to immediately inform the other States Parties, through the Secretary General of the OAS, of the provisions of the Convention that have been suspended, of the reasons that gave rise to the suspension and the date set for the termination of the suspension. This obligation also “constitutes a safeguard to prevent abuse of the exceptional powers of the suspension of guarantees and allows other State Parties to determine whether the scope of this suspension is consistent with the provisions of the Convention”<sup>167</sup>.

164. Ibid., para. 162.

165. Ibid., para. 163.

166. Ibid., para. 164.

167. Ibid., para. 166.



Similarly, the Court underscored that Article 65 of the Convention requires that the Inter-American Court indicate in its annual report to the OAS General Assembly the cases in which a State has not complied with its judgments, so that this body can ensure compliance with the Court's decisions. Thus, the notion of collective enforcement also plays an important role in the implementation of the international decisions of human rights bodies, such as the Inter-American Court<sup>168</sup>.

Regarding denunciations of the American Convention and the OAS Charter, the Court emphasized that the transition period established in Articles 78 and 143, respectively, of those instruments provides safeguards against sudden or untimely denunciations. That period is crucial for States to express any observations or objections deemed pertinent when such denunciations are based on any of the assumptions mentioned in paragraph 73, which do not withstand scrutiny in light of the democratic principle, undermine the inter-American public interest, and weaken the operation of the inter-American system for the protection of human rights<sup>169</sup>.

Ultimately, the notion of collective guarantee is considered to be of direct interest to each OAS Member State, and to all the States as a whole, and is activated through the political organs of the Organization of American States. It mandates the implementation of various institutional and peaceful mechanisms for taking swift, collective action to address possible denunciations of the American Convention and/or of the OAS Charter in situations in which democratic stability, peace and security may be affected and lead to human rights violations<sup>170</sup>.

In this regard, as an initial or minimal measure to contain a government's impulse to extricate itself from its international human rights obligations, it is appropriate to examine, within the framework of the collective guarantee, the context and formal conditions in which the decision to denounce is taken at the domestic level and its correspondence with the established constitutional procedures. However, the Court stresses that, pursuant to Article 27 of the Vienna Convention, domestic provisions and procedures may not be used as a pretext or an obstacle to the fulfilment of human rights obligations previously acquired<sup>171</sup>.

Consequently, that first level of formal analysis, which would no longer act as a general system of protection, must be complemented and reinforced through the collective guarantee and an assessment of the democratic nature of the decision to denounce the treaty, and the general conditions and context in which the matter was decided and adopted. This is associated with the good faith of the denunciation; in other words, it must reflect the principles of the States of the Americas which "require the political organization of these States on the basis of the effective exercise of representative democracy"<sup>172</sup>.

Lastly, in relation to the effects and consequences on human rights obligations, the Court finds it pertinent to point out that the collective guarantee implies a duty by the States to act jointly and cooperate to protect the rights and freedoms which they have undertaken to uphold internationally through their membership of the regional Organization and, in particular to:

- (1) present in a timely manner their observations or objections regarding denunciations of the American Convention and/or of the OAS Charter that do not withstand scrutiny in light of democratic principle and that undermine the inter-American public interest;
- (2) ensure that the denouncing State does not consider itself disengaged from the OAS until it has complied with the human rights obligations acquired through the various protection mechanisms within the framework of their respective competencies and, in particular, those related to compliance with the reparations ordered by the Inter-American Court until conclusion of the proceedings;
- (3) cooperate with each other to put an end to impunity by investigating and prosecuting serious human rights violations;
- (4) grant international protection, in accordance with commitments arising from international human rights law, international humanitarian law and refugee law, by admitting potential asylum seekers

168. Ibid., para. 167.

169. Ibid., para. 168.

170. Ibid., para. 169.

171. Ibid., para. 170.

172. Ibid., para. 171.

to the territory, guaranteeing their right to seek and receive asylum, and respecting the principle of *non-refoulement*, among other rights, until a lasting solution is achieved, and

- (5) engage in bilateral and multilateral diplomatic efforts, and peacefully exercise their good offices so that those States that have withdrawn from the OAS may rejoin the regional system. All this without prejudice to universal or other types of forums or mechanisms that may prosper<sup>173</sup>.

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173. Ibid., para. 172.