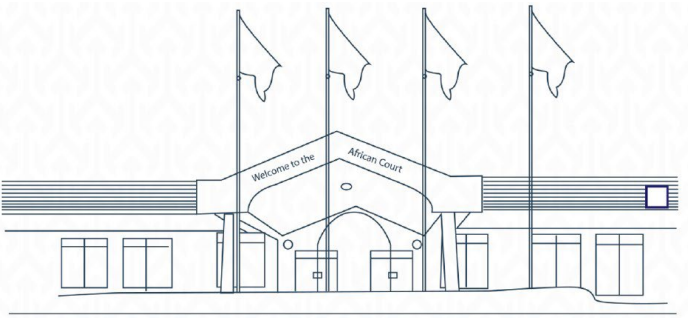
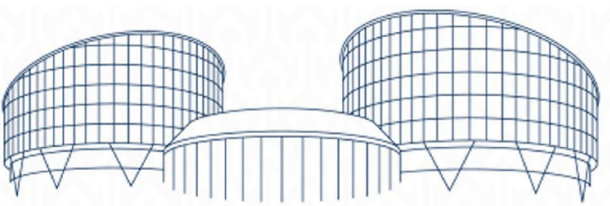
2020 JOINT LAW REPORT



AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

INTER-AMERICAN COURT OF HUMAN RIGHTS

EUROPEAN COURT OF HUMAN RIGHTS
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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2020 JOINT LAW REPORT

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

EUROPEAN COURT OF HUMAN RIGHTS

INTER-AMERICAN COURT OF HUMAN RIGHTS

SUMMARY

FOREWORD

The year 2020 has been indelibly marked by the Covid-19 global pandemic. This public health crisis, with serious economic and social ramifications, has also created new challenges for judicial systems, whether they be national or international. Our three regional human rights Courts have had to adapt to this unprecedented situation through numerous changes to our working methods. Yet despite the challenging times we are living through, we have been able to innovate, often using IT solutions, in order to continue delivering judgments and decisions and thereby defending the rights and fundamental freedoms of millions of people on our three continents.

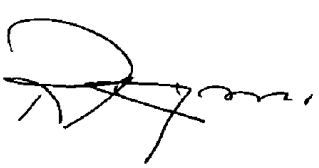
Despite the difficulties faced, it has been more important than ever for our three Courts to maintain our regular cooperation and dialogue as foreseen in the San José and Kampala Declarations from 2018 and 2019 respectively. Accordingly, on 9 July 2020, the first online dialogue between our three Courts took place on "The impact of Covid-19 on human rights. The perspectives of the three human rights courts of the world". This dialogue provided a unique opportunity for our Courts to exchange information on our respective experiences, challenges and case-law. At the heart of our exchanges were the proportionality of measures taken by public authorities in the context of the pandemic, the current vital role of new technologies, and the fundamental importance defending the rule of law during this period.

This second Joint Law Report for 2020 keeps the same format as the first. It is divided into three chapters, one for each Court, with an introduction by each Court's Registrar. Each chapter highlights major cases that represent new standards or innovative case-law developments during the year.

The purpose of our Joint Law Report is to highlight our points of convergence, but also our different perspectives, so that an open dialogue can be maintained between our respective Courts. What is absolutely clear is that the values of human rights, democracy and the rule of law as safeguarded by our three regional human rights courts are as important and relevant as they have ever been, indeed perhaps more so.

Judge Imani Daud Aboud
President of the African Court on Human and Peoples' Rights

Judge Robert Spano
President of the European Court of Human Rights



Judge Elizabeth Odio Benito
President of the Inter-American Court of Human Rights

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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PRESENTATION

In the maiden edition of this Joint Law Report (2019), the African Court reported on a number of landmark decisions it delivered relating to, among others, fair trial; freedom of movement; right to liberty; right to life and compatibility of mandatory death penalty; right to nationality; and the right to participate in government. Given the reputation it has carved for itself over the years, the Court has begun to receive many more cases, some of which are not in the domain of classical civil and political rights that characterise actions before international human rights tribunals.

In 2020, the Court delivered a total of sixty-one (61) decisions[1], fourteen of them judgments on merits and reparations.

In this edition, we focus on two judgments: *XYZ v. Republic of Benin* (Judgment of 27 November 2020)[2] and *Jebra Kambole v. United Republic of Tanzania* (Judgment of 15 July 2020).[3]

These two Applications are similar in the sense that the Applicants were challenging the constitutionality of provisions of the constitutions *vis-à-vis* their conformity to international human rights instruments the States have ratified. Both cases also pertain to important questions of human rights as they relate to political participation and democracy in Africa.

In *XYZ*, the Court was called upon to consider, for the first time, questions relating to the right to information, the right to economic, social and cultural development, and national peace and security. The Court also had to pronounce, for the first time, on the question relating to the need for government to obtain national consensus before amending the Constitution and the question of independence and impartiality of the judiciary. In a ground-breaking decision, the Court held that the lack of consensus in the amendment of the Constitution breached the social pact and posed an actual threat to peace. It could be argued the Court was treading on slippery grounds, but if one considers that constitutional amendments in many African countries have, in most cases, led to violence, then it will be easier to contextualise the decision.

In *Jebra Kambole*, the Applicant averred that provisions of the Constitution that oust the jurisdiction of domestic courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner was a violation of human rights, including freedom from discrimination, equal protection of the law and the right to have one's cause heard. The Court held that the Respondent State's Constitution, in so far as it ousts the jurisdiction of courts to consider such challenges, violated the African Charter.

In both cases, the Court reiterated its reluctance to award pecuniary damages for violations that affect the entire or a significant section of the population in the Respondent State, and held the view that the judgment in itself was just satisfaction.

Dr. Robert W. Eno

Registrar of the African Court on
Human and Peoples' Rights

1. The Court has defined its decisions to mean "any pronouncement of the Court, in the exercise of its judicial powers, which is in the form of a judgment, ruling, opinion or order".

2. Application 010/2020.

3. Application 018/2018.

CASE OF XYZ v. REPUBLIC OF BENIN

Judgment of 27 November 2020

FACTS OF THE CASE

On 14 November 2017, the Applicant filed an Application before the African Court challenging Law No. 2019-40 of 07 November 2019 amending the Constitution of the Republic of Benin.

He asserted that the Amendment Law was adopted in secret by a parliament elected in illegal elections and which does not represent the reality of the political forces of the country, and moreover without all the components of Beninese society being invited to it, whereas the international instruments to which the Respondent State has adhered oblige it to ensure that the process of amending or revising the Constitution is based on a national consensus.

The Applicant further avers that the Constitutional Court of Benin declared the Amendment Law in conformity with the Constitution by decision DCC 19-504 of 06 November 2019. According to the Applicant, this decision reflects the partiality and lack of independence of the Constitutional Court.

ALLEGED VIOLATIONS

The Applicant alleges that the Respondent State has violated

(i) the obligation to guarantee the independence and impartiality of the Courts and Tribunals provided for in Articles 26 and 7 of the African Charter on Human and Peoples' Rights (the Charter);

(ii) the obligation to ensure that the constitutional review process is based on a national consensus including, where appropriate, recourse to a referendum, as provided for in Article 10(2) of the African Charter on Democracy, Elections and Good Governance (ACDEG);

(iii) the right to information protected by Article 9(1) of the Charter;

(iv) the right to economic, social and cultural development protected by Article 22(1) of the Charter; and

(v) the right to national peace and security protected by Article 23(1) of the Charter.

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

The Applicant asked the Court to:

– find that the relevant human rights instruments have been violated;

- declare and rule that the Republic of Benin has committed the crime of unconstitutional change by revising the Constitution and seizing the powers of the legislature and manipulating the rules on the vacancy of power outside of any consensus and any recourse to a referendum through the nine (9) members of the Committee of Experts;
- order the Republic of Benin to annul the above-mentioned decision DCC 2019-504 of 06 November 2019 of the Constitutional Court and Law No. 2019-40 Amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all laws derived from it;
- proceed urgently to reinstate Law No. 90-032 of 11 December 1990; and
- order the Respondent State to pay him the sum of one billion (1,000,000,000) FCFA as damages.

In the examination of the merits, while the questions relating to the right to information, the right to economic, social and cultural development, and national peace and security were not novel, this was not the case for the question relating to national consensus and the question of independence and impartiality, which was before the Court for the first time.

> The obligation to ensure that the constitutional review process is based on a national consensus, including, where appropriate, recourse to a referendum, is enshrined in Article 10(2) of the African Democracy Charter, which provides that "States Parties shall ensure that the process of amending or revising their Constitution is based on a national consensus, including, where appropriate, recourse to a referendum"

The Court held that its competence to apply this instrument is derived from Article 3(1) of the Protocol establishing the Court, which gives it jurisdiction over all cases and disputes brought before it concerning the interpretation and application of the Charter, the Protocol establishing the Court and any other relevant human rights instrument ratified by the States concerned.

Specifically, in its judgment of 18 November 2016 in Application No. 001/2014, *Actions pour la Protection des Droits de l'Homme (APDH) v. Republic of Côte d'Ivoire*, the Court concluded that the African Democracy Charter and the ECOWAS Democracy Protocol are human rights instruments, within the meaning of Article 3 of the African Court Protocol, which it has jurisdiction to interpret and apply.

This being the case, the issue before the Court, in light of the facts of the case, was whether the Constitution Amendment Law No. 2019-40 of 07 November 2019 could be considered consensual within the meaning of Article 10(2) of the African Democracy Charter since it was adopted unanimously by elected MPs.

It is worth noting that in answering this question, the Court largely relied on some decisions of the Constitutional Court of the Respondent State dealing with review of previous constitutional amendments that it declared unconstitutional.

The Court noted that before the ratification of the African Charter on Democracy on 11 July 2021, the Respondent State had established the national consensus as a principle of constitutional value through the Constitutional Court decision DCC 06-074 of 8 July 2006, which stated that

> "Even if the Constitution has provided for the modalities of its amendment, the commitment of the Beninese people to create a state governed by the rule of law and multiparty democracy, the need to safeguard legal certainty and national cohesion require that any amendment should take into account the ideals that presided over the adoption of the Constitution of 11 December 1990, in particular national consensus, which is a principle of constitutional value.

Furthermore, the Court noted that the same Constitutional Court gave a specific definition of the concept of 'consensus' through its decisions DCC 10-049 of 5 April 2010 and DCC 10-117 of 8 September 2010, where it held that

> Consensus, a principle of constitutional value, as affirmed by Decision DCC 06-074 of 8 July 2006 …, far from meaning unanimity, is first of all a process of choice or decision without going through a vote; … it allows, on a given issue, to find by an appropriate way, the solution satisfying the greatest number of people.

Against this finding, which it endorsed, the African Court held that the concept of 'national consensus' requires that the Beninese people be consulted either directly or through opinion leaders and all stakeholders, including the representatives of the people, if the latter truly represent the various forces or components of society, which is not the case here, since all the members of parliament who adopted the Amendment of the Constitution belong to the ruling coalition.

Consequently, in the Court's view, the fact that the amendment bill was adopted unanimously should not obliterate the need for national consensus, which could have only been achieved if the amendment procedure was preceded by a consultation of all the living forces and different groups with a view to reaching a consensus, or if it was followed, if necessary, by a referendum.

Consequently, the Court held that the amendment bill was adopted in violation of the principle of national consensus enshrined in Article 10(2) of the Charter.

The second issue that the Court was called upon to rule on, for the first time, concerned the alleged violation of the obligation to guarantee the independence and impartiality of the Constitutional Court under Articles 26 and 7 of the Charter

It was the Applicant's submission that the lack of independence of the Constitutional Court is evidenced by the fact that the terms of office of the Judges were renewable and the Court did not enjoy financial autonomy. He also averred that the close relationship between the President of the Constitutional Court and the President of the Republic, and the fact that the former had, in his capacity as Minister of Justice and Legislation, participated in the approval of previous attempts to amend the Constitution, had an impact on the impartiality of the Constitutional Court.

The African Court considered that although the Organic Law No. 91-009 of 4 March 1991 on the Constitutional Court contains provisions guaranteeing the administrative and financial autonomy of the said Court, the renewable nature of the Judges' terms in office is likely to weaken their independence, in particular the Judges who seek a renewal of their terms. The African Court thus concluded that the Respondent State had violated Article 26 of the Charter which guarantees independence of the judiciary.

On the other hand, with regard to the alleged violation of the obligation to guarantee the impartiality of the Constitutional Court, the African Court considered that the Applicant had not proved that the President of the Constitutional Court acted in a biased manner, prejudged or in any way imposed his opinions on other Judges of the Court and that, therefore, the Respondent State did not violate the obligation to safeguard the impartiality of tribunals prescribed under Article 7(1)(d) of the Charter.

ON THE ALLEGED VIOLATION OF THE RIGHT TO INFORMATION

The Applicant alleged that the constitutional amendment bill was not disclosed before its adoption. The Court held that it is the duty of the Respondent State to ensure the publication of debates in the National Assembly on a bill as required by its domestic legislation. The Court further observed that the Respondent State did not challenge the allegation that the amendment bill had not been disseminated among the population in order to enable them to form an opinion and participate in the debate on the proposed amendments. Consequently, the Court concluded that the Respondent State had violated the right to information protected by Article 9(1) of the Charter.

ON THE ALLEGED VIOLATION OF THE RIGHT TO PEACE AND SECURITY AND THE RIGHT TO ECONOMIC, SOCIAL AND CULTURAL DEVELOPMENT

The Applicant averred that the amendment threatened peace and security in Benin and consequently economic, social and cultural development, insofar as a large part of the people did not recognise it. The Court concluded that these rights protected by Articles 22(1) and 23(1) of the Charter had been violated, and the non-consensual amendment breached the social pact and posed an actual threat to peace in Benin.

REPARATIONS

On the pecuniary reparation measures, the Court ordered the Respondent State to pay the Applicant the sum of 1 symbolic CFA franc for the moral prejudice suffered.

On non-pecuniary measures, the Court ordered the Respondent State to:

(i) take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, particularly with regard to the process of renewing the term of Judges;

(ii) take all measures to repeal Amendment Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and to comply with the principle of national consensus laid down by Article 10(2) of the African Democracy Charter for all other constitutional amendments; and

(iii) take these measures before holding any election.

JEBRA KAMBOLE v. UNITED REPUBLIC OF TANZANIA

Judgment of 15 July 2020

FACTS OF THE CASE

Jebra Kambole (the Applicant) is a national of the United Republic of Tanzania (the Respondent State). He is an advocate by profession and also a member of the Tanganyika Law Society.

ALLEGED VIOLATIONS

The Applicant alleged that the Respondent State violated his rights under the African Charter on Human and Peoples' Rights (the Charter) by maintaining article 41(7) in its Constitution, which provision bars any court from inquiring into the election of a presidential candidate after the Electoral Commission has declared a winner. Specifically, the Applicant alleged that article 41(7) of the Respondent State Constitution violated his right to freedom from discrimination under Article 2 of the Charter. The Applicant further averred that the Respondent State had violated his right to equal protection of the law and the right to have his cause heard, especially the right to appeal to competent national organs against acts violating his fundamental rights as provided for in Articles 3(2) and 7(1)(a) of the Charter, respectively.

The Applicant also alleged that the Respondent State had failed to honour its obligation to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative and other measures to give effect to the Charter as stipulated under its Article 1. It was also the Applicant's averment that the Respondent State's conduct also violated article 13(6)(a) of its own Constitution.

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

This judgment further develops the Court's jurisprudence on equality and non-discrimination building on the earlier pronouncements in *African Commission on Human and Peoples' Rights v. Republic of Kenya* and *Actions pour la Protection des Droits de l'Homme (APDH) v. Republic of Côte d'Ivoire*.

ADMISSIBILITY – AN APPLICANT IS ONLY REQUIRED TO EXHAUST REMEDIES THAT ARE AVAILABLE, EFFECTIVE AND SUFFICIENT

The Respondent State argued that the Applicant never made an attempt to exhaust local remedies and as such did not provide it with an opportunity to address the alleged wrongful conduct. The Court recalled that for purposes of exhausting local remedies, an Applicant is only required to exhaust judicial remedies that are available, effective and sufficient. In this sense, a remedy is available if it can be utilised as a matter of fact without impediment; a remedy is effective if it offers a real prospect of success; and a remedy is sufficient if it

is capable of redressing the wrong complained against. However, the Court has always considered that there is an exception to this rule if local remedies are unavailable, ineffective or insufficient, or if the procedure for obtaining such remedies is abnormally prolonged.

In the present case, the Court noted that had the Applicant challenged article 41(7) of the Constitution before the Respondent State's courts, the application would have, inevitably, been dismissed on the basis that no court in the Respondent State has the power to nullify provisions of its Constitution. The Court then noted that a domestic remedy that has no prospect of success does not constitute an effective remedy within the context of Article 56(5) of the Charter. In the circumstances, therefore, the Court held that the Applicant did not have a remedy that was available for exhaustion before filing this Application.

ADMISSIBILITY – FILING WITHIN A REASONABLE PERIOD OF TIME

The Respondent State argued that the Application was inadmissible as the Applicant had delayed in filing his case. Apart from highlighting the fact that no time frame for filing actions is stipulated under Article 56 of the Charter, the Applicant also argued that the alleged violations were continuous in nature thus not subject to a time limit for filing.

The Court confirmed that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application should be filed before the Court. The Court also emphasized that the reasonableness of the period for seizure of the Court depends on the particular circumstances of each case and it must be determined on a case-by-case basis. In the present case, since the Court had found that there were no domestic judicial remedies available for the Applicant to exhaust, the question of a reasonable time, after the exhaustion of domestic remedies, within which the Applicant ought to have filed his Application with the Court did not arise.

As for the question of continuous violations, the Court held that the nature of such violations is that they renew themselves every day as long as the State fails to take steps to remedy them. In the present case, the result was that the violations alleged to have been perpetrated by article 41(7) of the Respondent State's Constitution automatically renewed themselves for as long as they were not remedied and the Court could thus have been seized of the case anytime for as long as the violations remained un-remedied. In light of the above, the Court dismissed the Respondent State's objections to the admissibility of the Application.

ALLEGED VIOLATION OF THE RIGHT TO NON-DISCRIMINATION

The Applicant argued that article 41(7) of the Respondent State's Constitution, by barring any court from inquiring into the election of any presidential candidate after the Electoral Commission has pronounced a winner, entails that any person aggrieved by the results of a presidential election cannot access a judicial remedy. This, the Applicant submitted, violated Article 2 of the Charter. The Respondent State contended that the right to non-discrimination, as provided for under Article 2 of the Charter,"is not absolute where there is a legitimate justified purpose or aim that is justifiable."

In respect of Article 2 of the Charter, the Court reiterated its position that this provision is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment. The Court noted, however, that while the Charter is unequivocal in its proscription of discrimination, not all forms of distinction or differentiation can be considered as discriminatory. A distinction or differential treatment becomes discrimination, contrary to Article 2, when it does not have any objective and reasonable justification and in circumstances where it is not necessary and proportional.

Specifically in relation to article 41(7) of the Respondent State's Constitution, the Court observed that this provision creates a differentiation between litigants in that while the Respondent State's courts are permitted to look into any allegation by any litigant, they are not given equal latitude when a litigant seeks to inquire into the election of a president. The result is that those seeking to inquire into the election of a president are, practically, treated differently from other litigants, especially by being denied access to judicial remedies while litigants with other claims are not similarly barred. The Court thus found that by outrightly barring courts from considering a complaint by anyone in relation to the results of a presidential election, in effect, article 41(7) of the Respondent State's Constitution treated citizens that may wish to judicially challenge the election of

a president differently and less favourably as compared to citizens with grievances other than those related to the election of a president.

The Court also emphasised that while it is for a particular State to determine the mechanisms or steps to be taken for purposes of implementing the Charter, it retains the jurisdiction to assess and review the steps taken for compliance with the Charter and other applicable human rights standards. In particular, the Court's duty is to assess if a fair balance has been struck between societal interests and the interests of the individual as protected under the Charter. The doctrine of margin of appreciation, therefore, while recognising legitimate leverage by States in the implementation of the Charter, cannot be used by States to oust the Court's supervisory jurisdiction.

In the absence of clear justification as to how the differentiation and distinction in article 41(7) of the Respondent State's Constitution is necessary and reasonable in a democratic society, the Court held that article 41(7) effects a distinction between litigants and that this distinction has no justification under the Charter. This distinction is such that individuals within the Respondent State are excluded from pursuing a remedy before the court simply because of the subject matter of their grievances while other individuals with grievances not related to the election of a president are not equally barred. In the circumstances, the Court found that article 41(7) of the Respondent State's Constitution violated the Applicant's right to be free from discrimination as guaranteed under Article 2 of the Charter.

ALLEGED VIOLATION OF THE RIGHT TO EQUAL PROTECTION

The Court noted that the principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law, does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations. In the present case, the Court noted that article 41(7) of the Respondent State's Constitution did not deny the Applicant equal protection of the laws in the Respondent State. The Applicant, like other citizens, has been guaranteed the same range of rights in respect of contesting the election of a president. Given these circumstances, the Court found that the Applicant had failed to prove a violation of Article 3(2) of the Charter.

ALLEGED VIOLATION OF THE APPLICANT'S RIGHT TO HAVE HIS CAUSE HEARD

The Applicant averred that by having article 41(7) as part of its Constitution, the Respondent State had violated his rights under Article 7(1)(a) of the Charter. The Respondent State disputed the Applicant's allegation and argued that as a sovereign State it enjoyed "exclusive, ultimate and comprehensive powers of law-making, under its fundamental legal framework. Since all powers arise from the people, the Respondent has the right to make provisions in the Constitution or any other written law." It was also the Respondent State's argument that article 41(7) of its Constitution is protected by the doctrine of margin of appreciation.

The Court observed that the right to have one's cause heard, as enshrined under Article 7(1)(a) of the Charter, bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights, and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts. The Court also noted that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place.

The Court further recalled that among the key elements of the right to a fair hearing, as guaranteed under Article 7 of the Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against any decision rendered in the process. As against this, the Court noted that article 41(7) of the Respondent State's Constitution had ousted the jurisdiction of courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner. This entailed that irrespective of the nature of the grievance or the merits thereof, as long as the same pertained to the declaration by the Electoral Commission of the winner of a presidential election, no remedy by way of a judicial challenge existed to any aggrieved person within the Respondent State.

In the circumstances, the Court held that article 41(7) of the Respondent State's Constitution, in so far as it ousts the jurisdiction of courts to consider challenges to a presidential election after the Electoral Commission has declared a winner, violated Article 7(1)(a) of the Charter.

REPARATIONS – ADOPTION OF CONSTITUTIONAL AND LEGISLATIVE MEASURES

The Court recalled that, in appropriate cases, it has ordered State Parties to amend their legislation in order to bring it in conformity with the Charter. The Court having found that article 41(7) of the Respondent State's Constitution violated Articles 1, 2, and 7(1)(a) of the Charter ordered the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of Articles 2 and 7(1)(a) of the Charter.

The Respondent State was also ordered to report to the Court, within twelve (12) months of the judgment, on the measures taken to implement the terms of the judgment.

OTHER FORMS OF REPARATIONS – *SUO MOTU* ORDER FOR PUBLICATION

The Court recalled that Article 27(1) of the Protocol gives it power to "make appropriate orders to remedy" violations. The Court thus reaffirmerd that it can, by way of reparations, order publication of its decisions *suo motu* where the circumstances of the case so require.

In the present case, the Court noted that the violations that it has established affect a significant section of the population in the Respondent State by reason of the fact that they relate to the exercise of several rights in the Charter, key among which is the right to political participation guaranteed under Article 13 of the Charter. In the circumstances, the Court deemed it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, ordered the Respondent State to publish the Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remained accessible for at least one (1) year after the date of publication.

EUROPEAN COURT OF HUMAN RIGHTS

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PRESENTATION

The year 2020 will be remembered as the anniversary year of the European Convention on Human Rights, opened for signature in Rome on 4 November 1950. Accordingly, and taking into account the restrictions imposed by the COVID-19 pandemic, a number of events were organised to mark this significant anniversary. One important conference – "The European Convention on Human Rights at 70 – Milestones and major achievements" – was organised in September in cooperation with the Greek chairmanship of the Committee of Ministers. Leading figures from the judicial world took part in the event in Strasbourg and also by videolink. The President of the Court also participated in a special 70th anniversary signing of the Convention in Athens.

The year 2020 also marked the end of the Interlaken reform process initiated ten years previously. This political process had introduced a cycle of structural reforms to the Convention system which considerably helped in reducing the Court's backlog of cases. Hence, while the number of pending cases before the Court was 160,000 in 2011, this figure was reduced to 61,500 by 2020.

In 2020 the European Court of Human Rights, like many courts around the world, was forced to adapt its working practices to respond to the global pandemic. Over the course of the year, more than 37,000 applications were decided by the Court, representing a decrease of only 3% compared with 2019. Moreover, the number of applications that ended in a judgment either by the Grand Chamber or a Chamber actually increased from 426 in 2019 to 519 in 2020. This was made possible by the dedication of the judges and staff of the Court, who showed exceptional commitment to the task in hand. The Court also deployed innovative technological solutions to enable all our various services to function. The most notable change was undoubtedly the holding of Grand Chamber hearings by video-conference which the outside world was able to follow online. Six such online hearings were held during the year.

However, the year 2020 was not only a matter of statistics. The following chapter summarises the most important developments in the Court's case-law during the year.

In particular in 2020 the Grand Chamber addressed many novel legal issues, such as trafficking and exploitation of women for the purposes of prostitution (*S.M. v. Croatia*); the principle of a tribunal established by law in connection with the irregularities in a judicial appointment (*Guðmundur Andri Ástráðsson v. Iceland*); the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border (*N.D. and N.T. v Spain*); and whether visa applications submitted to embassies and consulates bring the applicants under that country's "territorial" jurisdiction (*M.N. and Others v Belgium*).

Lastly, dialogue with national courts was maintained, and the Court's Superior Courts Network continued to grow in 2020.

I am delighted that the three regional human rights courts continue their cooperation with this second annual case-law review, which I am confident will be of the utmost use to legal scholars and practitioners alike.

Marialena Tsirli

Registrar of the European Court
of Human Rights

SUMMARY

In 2020 the Grand Chamber delivered ten judgments and two decisions and its second advisory opinion under Protocol No. 16 to the Convention. Under Article 1, the Grand Chamber looked at the case of foreign nationals who apply for a visa at an embassy or consulate abroad (*M.N. and Others v. Belgium*).

The Grand Chamber clarified its case-law concerning the notion of "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention (*Selahattin Demirtaş (no. 2)*).

In *S.M. v. Croatia* the Grand Chamber analysed for the first time the applicability of Article 4 specifically to the trafficking and exploitation of women for prostitution, and it ruled on the scope of the State's obligations in such matters.

In cases concerning Article 6 § 1, the Grand Chamber clarified in particular the scope and meaning of the "tribunal established by law" concept (*Guðmundur Andri Ástráðsson*) and of a "criminal charge" in accordance with the Engel criteria (*Gestur Jónsson and Ragnar Halldór Hall*); it also recognised the connection between the scope of "criminal" in Article 6 and that of the same adjective in Article 7 of the Convention (ibid.).

In its second advisory opinion under Protocol No. 16, this time in response to a request from the Armenian Constitutional Court, the Court clarified the significance of such opinions (*Advisory opinion*, request no. P16-2019-001).

In its *Magyar Kétfarkú Kutya Párt* judgment, the Grand Chamber examined under Article 10 the question of the foreseeability of a law on freedom of expression for political parties in the context of an election or referendum.

Under Article 3 of Protocol No. 1, it defined the scope of the "adequate and sufficient safeguards" required for the effective examination of electoral disputes (*Mugemangango*). It also clarified in that context the notion of national "authority" within the meaning of Article 13 of the Convention.

In *Selahattin Demirtaş (no. 2)* it ruled on the lifting of the immunity of an opposition member of parliament and his prolonged pre-trial detention related to his political speeches, under Articles 5, 10 and 18 of the Convention and Article 3 of Protocol No. 1.

N.D. and N.T. v. Spain concerned the immediate and forcible return of aliens from a land border, following an attempt by a large number of them to cross it in an unauthorised manner by taking advantage of their large numbers; the Grand Chamber found that their removal had been compatible with Article 4 of Protocol No. 4 taken separately and in conjunction with Article 13 of the Convention.

Under Article 1 of Protocol No. 7 it ruled on the expulsion of lawfully resident aliens on national-security grounds, based on classified information that had not been disclosed to them (*Muhammad and Muhammad*).

This year the Court has seen the further development of its case-law in other judgments, including on its jurisdiction to hear (and the admissibility of) complaints in the contexts of the transfer of a convicted prisoner from one member State to another to serve the rest of his sentence (*Makuchyan and Minasyan*).

Concerning the various Convention rights and freedoms, the Court has developed a number of new and important principles under Article 2 concerning the transfer of prisoners from one State to another (*Makuchyan and Minasyan*).

Under Article 3, the Court has addressed the conditions of access to drinking water in Roma camps (*Hudorovič and Others*), and the poor living conditions of adult asylum-seekers who were deprived of decent accommodation (*N.H. and Others v. France*). On the issue of domestic violence, the case-law has been extended to cyberbullying (*Buturugă*) and has established the State's obligations to protect children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*). In *M.K. and Others v. Poland*, the Court examined the situation of applicants who, having arrived at a border crossing, were not allowed to apply for asylum and were returned to the third State from which they had come, with a risk of chain *refoulement* to their country of origin; the Court also emphasised the obligations of the respondent State following the indication of an interim measure under Rule 39. For the first time the Court found that that an expulsion would carry a risk of a violation of Article 3 on account of ill-treatment on grounds of sexual orientation to which a homosexual applicant would be exposed in his country of origin (*B and C v. Switzerland*).

Under Article 5 § 1 (f), the Court ruled on the specific situation of an applicant who had been granted refugee status in one EU State, and had then been detained in a different State pending the examination of an extradition request from his country of origin (*Shiksaitov*).

Other cases of jurisprudential interest have been examined under Article 6 concerning the use of police entrapment in securing a criminal conviction (*Akbay and Others*). For the first time the Court examined the admission in evidence, in criminal proceedings, of statements that had been forcibly obtained from individuals by means of ill-treatment, without the participation or approval of State agents (*Ćwik*).

Regarding Article 8 of the Convention, it addressed, for the first time, the issue of cyberbullying as an aspect of violence against women (*Buturugă*) and access to drinking water in a Roma camp (*Hudorovič and Others*).

The Court ruled on the right to freedom of expression of a defendant in criminal proceedings (*Miljević*), and on the right to an effective remedy under Article 13 of the Convention (*M.K. and Others v. Poland*, *Beizaras and Levickas*, and *Association Innocence en Danger and Association Enfance et Partage*).

It also examined the failure by a State to enforce a prison sentence handed down in another State for a racially motivated hate crime (*Makuchyan and Minasyan*). It emphasised the need for a criminal-law response to verbal aggression and direct physical threats driven by homophobia (*Beizaras and Levickas*).

In *M.K. and Others v. Poland*, the Court ruled on Article 4 of Protocol No. 4 in relation to asylum-seekers.

The Court has also, in a number of cases, taken account of the interactions between the Convention and international law or international and European organisations (for example, *M.N. and Others v. Belgium*, *Mugemangango*) and in the contexts of human trafficking (*S.M. v. Croatia*), migrants and asylum-seekers (*N.D. and N.T. v. Spain*, *N.H. and Others v. France*), domestic violence (*Association Innocence en Danger and Association Enfance et Partage*), and the transfer of convicted prisoners to another State (*Makuchyan and Minasyan*[1]).

The Court has referred in particular to the work of the UNHCR (*B and C v. Switzerland*, *Shiksaitov*) and the International Labour Organization (*S.M. v. Croatia*), and the Grand Chamber has reiterated the principle of the harmonious interpretation of the Convention and other international law instruments (*S.M. v. Croatia*).

It is also noteworthy that this year the Court has developed its case-law on the positive obligations of member States under the Convention, especially in the area of violence against women (*Buturugă*), and incitement to hatred and violence (*Beizaras and Levickas*), the protection of children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*) and protection from ill-treatment at the hands of individuals (*Ćwik*), forced prostitution (*S.M. v. Croatia*) and access to drinking water (*Hudorovič and Others*).

Lastly, the Court once again ruled on the extent of the margin of appreciation to be afforded to States Parties to the Convention (*Mugemangango, Hudorovič and Others*, *Miljević*, *Association Innocence en Danger and Association Enfance et Partage*).

1. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) below.

JURISDICTION AND ADMISSIBILITY

JURISDICTION OF STATES (ARTICLE 1)

The *M.N. and Others v. Belgium*[1] decision concerned whether a State's ruling on a visa application and an applicant's challenge against that refusal in the State's courts can create a jurisdictional link.

The applicants, a Syrian couple and their two minor children, travelled to Beirut where they submitted short-term visa requests to the Belgian embassy in Beirut to allow them to travel to Belgium to apply for asylum because of the conflict in Aleppo. Their requests were processed and refused by the Aliens Office in Belgium and, after being notified by the Belgian embassy of those decisions, the applicants lodged unsuccessful appeals before the Belgian courts.

This Grand Chamber found that the respondent State was not exercising jurisdiction extraterritorially by processing the visa applications and that the applicants' appeals had not created a jurisdictional link.

(i) The first question to be examined was whether, in processing the visa applications, the State effectively exercised authority or control over the applicants, particularly through the acts or omissions of its diplomatic or consular agents posted abroad. The Court's analysis was informed by a number of factors: the applicants had never been within the national territory of Belgium; they had no pre-existing family or private-life ties with that State; and it had not been alleged before the Court that a jurisdictional link arose from any control exercised by the Belgian authorities in Syrian or Lebanese territories. In addition, the Court found it irrelevant who (whether the Belgian authorities in the national territory or diplomatic agents abroad) was responsible for taking the visa decisions and it thus attached no significance to the fact that the diplomatic agents in this case fulfilled merely a "letter box" role. It was, however, crucial that, when comparing the present case and the case-law of the European Commission on Human Rights on the acts and omissions of diplomatic agents (*X. v. Germany*[2]; *X. v. the United Kingdom*[3]; *S. v. Germany*[4]; and *M. v. Denmark*[5]), the Court found that none of the connecting links which characterised those cases was present in the present one. In particular, the applicants were not Belgian nationals seeking to benefit from the protection of their embassy. In addition, at no time had diplomatic agents exercised *de facto* control over the applicants, who had freely chosen to present themselves at the Belgian embassy in Beirut, rather than approaching any other embassy, to submit their visa applications. They had then been free to leave the premises of the Belgian embassy without any hindrance.

Furthermore, having regard to the Court's case-law concerning situations in which the officials of a State operating outside its territory, through control over buildings, aircraft or ships in which individuals were held,

1. *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020.

2. *X. v. Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158.

3. *X. v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, Decisions and Reports 12, p. 73.

4. *S. v. Germany*, no. 10686/83, Commission decision of 5 October 1984, Decisions and Reports 40, p. 291.

5. *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, Decisions and Reports 73, p. 193.

exercised power and physical control over those persons (*Issa and Others v. Turkey*[6]; *Al-Saadoon and Mufdhi v. the United Kingdom*[7]; *Medvedyev and Others v. France*[8]; *Hirsi Jamaa and Others v. Italy*[9]; and *Hassan v. the United Kingdom*[10]), the administrative control exercised by the Belgian State over the premises of its embassies was not sufficient to bring every person who entered those premises within its jurisdiction. Finally, the present context was considered to be fundamentally different from the numerous expulsion cases in which the applicants were, in theory, on the territory of the State concerned – or at its border – and thus clearly fell within its jurisdiction. No exercise of extraterritorial jurisdiction could therefore be established on this ground in the present case.

Secondly, the Court found that the applicants could not create, unilaterally, an extraterritorial jurisdictional link between them and Belgium merely by challenging the visa decisions before the Belgian courts. The Grand Chamber considered the applicants' submission to have no basis in the case-law of the Court.

Such an obligation would, however, be created were the State's ruling on an immigration application to be sufficient to bring the individual making the application under its jurisdiction: the individual could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist. Such an extension of the scope of the Convention would also have the effect of negating the well-established principle of public international law according to which the States Parties, subject to their treaty obligations, have the right to control the entry, residence and expulsion of aliens (*Ilias and Ahmed v. Hungary*[11]).

(ii) Finally, the Grand Chamber nevertheless clarified that the above conclusion did not prejudice the endeavours made by the States to facilitate access to asylum procedures through their embassies and/or consular representations (see, for example, *N.D. and N.T. v. Spain*[12], where the Court examined under Article 4 of Protocol No. 4 whether the possibility for the applicants in that case to claim international protection in Spanish embassies and consulates was genuinely and effectively accessible to them).

ADMISSIBILITY (ARTICLE 35)

MATTER ALREADY SUBMITTED TO ANOTHER INTERNATIONAL BODY (ARTICLE 35 § 2 (B))

The judgment in *Selahattin Demirtaş v. Turkey (no. 2)*[13] is noteworthy because the Court further developed the criteria for determining whether a procedure before a given international body is similar to the Convention mechanism within the meaning of Article 35 § 2 (b) of the Convention.

In particular, the Court rejected the Government's argument that a complaint lodged with a particular Committee on behalf of the applicant amounted to a procedure of international investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention. In so doing, the Court developed the criteria that an international body must satisfy in order to be regarded as "another procedure of international investigation or settlement" within the meaning of that provision. The requirement of judicial or quasi-judicial proceedings similar to the Convention mechanism means that the examination must be clearly defined in scope and limited to certain rights based on a legal instrument whereby the relevant body is authorised to determine the State's responsibility and to afford legal redress capable of putting an end to the alleged violation. It must also afford institutional and procedural safeguards, such as independence, impartiality and an adversarial procedure.

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6. *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004.
7. *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010.
8. *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010.
9. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.
10. *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.
11. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 125, 21 November 2019.
12. *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, § 222, 3 October 2017.
13. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 10 (Freedom of expression), Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) and Article 18 (Restrictions not prescribed by the Convention) below.

RIGHT TO LIFE (ARTICLE 2)

OBLIGATION TO PROTECT LIFE

Makuchyan and Minasyan v. Azerbaijan and Hungary[14] concerned the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States' duties in the context of the transfer of sentenced persons. It also concerned the discriminatory nature of the failure to enforce a prison sentence imposed abroad for an ethnically biased crime.

While taking part in a NATO-sponsored course in Budapest, an Azerbaijani officer (R.S.) murdered an Armenian officer (the second applicant's nephew) and threatened to kill another Armenian soldier, the first applicant. R.S. was sentenced to life imprisonment in Hungary. Having served eight years of his sentence there, he was transferred to Azerbaijan under the *Council of Europe Convention on the Transfer of Sentenced Persons*[15]. On his return to Azerbaijan he was released, pardoned and promoted at a public ceremony. He was also paid salary arrears for the time he had spent in prison, and given the use of a flat. Comments, approving of R.S.'s conduct and his pardon, were made by various high-ranking Azerbaijani officials.

The applicants complained under Article 2 of the Convention, taken alone and in conjunction with Article 14. The Court found that the manifest "approval" and "endorsement" by Azerbaijan of the crimes committed by a member of its armed forces in a private capacity did not engage that State's responsibility under the substantive limb of Article 2 of the Convention. However, Azerbaijan's unjustified failure to enforce the prison sentence imposed in Hungary, coupled with the "hero's welcome" and various benefits given to R.S. without any legal basis, was considered to be incompatible with its procedural obligation under Article 2 and, in addition, to constitute ethnically motivated discrimination within the meaning of Article 14 in conjunction with the procedural limb of Article 2. The Court found no violation of the procedural limb of Article 2 as regards Hungary, noting that it had followed the Transfer Convention procedure to the letter to ensure R.S. completed his sentence in Azerbaijan.

The Court has developed in this judgment certain novel and important principles concerning the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States' duties in the context of the transfer of sentenced persons.

(i) The first question the Court considered was whether Azerbaijan could be held responsible for the crimes in question and thus of a substantive violation of Article 2 of the Convention. The Court attached crucial importance to the fact that R.S. was not acting in the exercise of his official duties or on the orders of his superiors. It also rejected the applicants' argument based on Article 11 of the *UN Draft Articles on the Responsibility of States of*

14. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 14 in conjunction with Article 2 (Prohibition of discrimination) below.

15. Convention on the Transfer of Sentenced Persons, ETS 112.

Internationally Wrongful Acts[16] The Court noted that Article 11 set a very high threshold for State responsibility in this context, a threshold not limited to the mere "approval" and "endorsement" of the relevant act, but one which required that two cumulative conditions be fulfilled: clear and unequivocal "acknowledgement" and "adoption" of the act in issue as having been perpetrated by the State itself. Although the measures taken by the Azerbaijani government manifestly demonstrated its "approval" and "endorsement" of R.S.'s criminal acts, it had not been convincingly demonstrated (on the basis of the very stringent standards under international law) that the State of Azerbaijan had "clearly and unequivocally" "acknowledged" and "adopted" R.S.'s acts "as its own", thus directly and categorically assuming, as such, responsibility for the actual killing of one victim and the attempted murder of another. Those measures could rather be interpreted as having the purpose of publicly addressing and remedying R.S.'s adverse personal, professional and financial situation, which the authorities had perceived, unjustifiably in the Court's view, as being the consequence of the allegedly flawed criminal proceedings in Hungary.

(ii) The case also gave the Court the opportunity to apply its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) against a home State (Azerbaijan), where a convicted prisoner is transferred from a sentencing State to the home State with the aim of continuing his or her sentence in the home State. The Court emphasised that the enforcement of a sentence imposed in the context of the right to life had to be regarded as an integral part of a State's procedural obligation under Article 2. Regardless of where the crimes had been committed, and since Azerbaijan had agreed to and assumed the obligations under the Transfer Convention to continue the enforcement of R.S.'s prison sentence, it was bound to do so in compliance with its procedural obligations under Article 2. There were therefore "special features" that triggered the existence of Azerbaijan's jurisdictional link to the procedural obligation under Article 2 (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*[17], and *Güzelyurtlu and Others v. Cyprus and Turkey*[18]). The acts of Azerbaijan, which had in effect granted R.S. impunity for a very serious ethnically biased crime without any convincing reason, were not compatible with its obligation under Article 2 to effectively deter the commission of offences against the lives of individuals.

(iii) The judgment is also noteworthy for the manner in which the Court examined the question of whether the State's failure to enforce a prison sentence imposed abroad for an ethnic hate crime amounted to a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2 and, in particular, for the manner in which the Court distributed the burden of proof in this respect (*Nachova and Others v. Bulgaria*[19]). In view of the special features of the case (R.S.'s promotion, the award of several benefits without any legal basis, his glorification as a hero by a number of high-ranking officials, as well as the creation of a special page on the website of the President in appreciation of R.S.), the applicants were considered to have put forward sufficiently strong, clear and concordant inferences as to make a convincing prima facie case that the measures in issue had been racially motivated. Given the difficulty for the applicants to prove such bias beyond reasonable doubt, the Court, in the particular circumstances of the case, reversed the burden of proof so that it became incumbent on Azerbaijan to disprove the arguable allegation of discrimination, which it had failed to do.

16. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.

17. *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, 13 October 2016.

18. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

19. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII.

PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT AND PUNISHMENT (ARTICLE 3)

INHUMAN OR DEGRADING TREATMENT

Hudorovič and Others v. Slovenia[20] concerned the conditions of access to safe drinking water. The applicants belonged to Roma communities residing in two illegal and unserviced settlements. They complained that the authorities had not taken sufficient measures to provide them with access to safe drinking water and sanitation.

It is of interest that the Court stated that it did not exclude the applicability of Article 3 in such a context (*O'Rourke v. the United Kingdom*[21], and *Budina v. Russia*[22]). However, the positive measures undertaken by the domestic authorities had provided the applicants with the opportunity to access safe drinking water, and the way in which they had access and whether they had actually accessed it was irrelevant. Accordingly, even assuming that the alleged suffering had reached the minimum threshold and that Article 3 was applicable, the Court found no violation of this provision.

DEGRADING TREATMENT

N.H. and Others v. France[23] concerned the impossibility for adult asylum-seekers to benefit from reception conditions provided for by domestic and EU law.

The applicants, including four young adult men in good health, arrived in France independently of each other in 2013 and 2014 and sought asylum. Relying on Article 3, the applicants complained, *inter alia*, that they had been unable to benefit from the reception conditions foreseen by domestic law and that they had been forced to live on the street in inhuman and degrading conditions for several months.

The Court found a breach of Article 3 in respect of three of the applicants, considering that the situation of a fourth did not meet the threshold for the applicability of that provision.

The judgment is noteworthy as it is only the second time – after the judgment in *M.S.S. v. Belgium and Greece*[24], and later follow-up cases against Greece – that the Court has found a breach of Article 3 in respect of the living conditions of adult asylum-seekers with no specific vulnerabilities who were, because of the acts or omissions of the authorities, unable to access accommodation or decent living conditions or to provide for their essential needs. While noting that the events in the present case unfolded during a progressive increase in asylum applications in France, the Court observed that they had not taken place during a humanitarian emergency caused by a major migration crisis.

(i) The Court noted that those seeking asylum are considered to be a "particularly underprivileged and vulnerable population group in need of special protection", there being a broad consensus in that regard at an international and European level (ibid., § 251). The question was therefore whether, given the inherent vulnerability of asylum-seekers, the situation of the present applicants (young, single, in good health and without children) could be considered one of "extreme material poverty" raising an issue under Article 3 of the Convention.

(ii) In this respect, the Court noted that the applicants were not allowed to work during the asylum procedure and were fully dependent on the authorities for accommodation and material living conditions. They had been forced to live on the streets for months, with no resources or access to sanitary facilities, without any means of providing for their essential needs, in fear of assault from third parties and of expulsion (prior to obtaining a document certifying their status as asylum-seekers, as far as their fear of expulsion was concerned). The applicants, who had on rare occasions benefited from emergency accommodation, could not be reproached for not soliciting the emergency accommodation shelters more often: given the insufficient capacities of those shelters and the applicants' profile they would have been refused, priority being given to asylum-seekers

20. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 8 (Positive obligations) below.

21. *O'Rourke v. the United Kingdom* (dec.), no. 39022/97, 26 June 2001.

22. *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009.

23. *N.H. and Others v. France*, nos. 28820/13 and 2 others, 2 July 2020.

24. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 235-64, ECHR 2011.

who had a particular vulnerability (such as age, health or family situation). Accordingly, the Court found that three of the applicants had been placed in a situation contrary to Article 3 given the living conditions they had experienced, combined with the absence of an adequate response by the authorities whom they had repeatedly alerted to their situation, and since the domestic courts had systematically denied them the means at the disposal of the competent authorities because they were single adult men in good health. No violation of Article 3 was found as regards a fourth applicant: even though he had also lived in a tent for months, he had received documents certifying his asylum-seeker status and financial assistance within a comparatively shorter period of time.

POSITIVE OBLIGATIONS

Buturugă v. Romania[25] is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women. It held in this connection that the State had failed to comply with its positive obligations under Articles 3 and 8 of the Convention.

The *Association Innocence en Danger and Association Enfance et Partage v. France*[26] judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

An eight-year-old child, M., was subjected to repeated barbaric acts by her parents, leading to her death in August 2009. Following her death it transpired that the parents' domination over the child had been such as to prevent the reality of the abuse from being revealed. The authorities had nevertheless already been warned in June 2008, in a report from a head teacher, that teachers had noticed wounds on M.'s body and face. Following a police investigation, the public prosecutor's office had discontinued the case in October 2008. The applicants, two child-protection associations, brought civil proceedings against the State for a series of failings and negligence. Their case was dismissed.

In the Convention proceedings, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse.

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents.

(i) The interest of the judgment lies, firstly, in the Court's characterisation of the facts of the case as falling under Article 3 and Article 13 in conjunction with Article 3, even though the victim died from her treatment. The Court took the view that the subject matter of the dispute lay in the question whether the domestic authorities should have been aware of the ill-treatment and should have protected her from the abuse which led to her death.

(ii) Secondly, the Court reiterated its case-law on the State's positive obligation under Article 3 to take specific measures in order to protect children or other vulnerable persons from criminal abuse perpetrated by third parties. It emphasised in this connection the need to secure rights that were practical and effective, and the need for the authorities' response to be adapted to the situation in order to fulfil that obligation, as explained in *Opuz v. Turkey*[27].

In the present case, while recognising the difficulties faced by the domestic authorities, the Court pointed out the following, in particular: while the public prosecutor's office had reacted immediately (on the very day of the report), the case had only been entrusted to a police investigator thirteen days later; no inquiries had been conducted with the specific aim of shedding light on M.'s family environment (especially in view of the family's frequent relocations) and the teachers who had reported their suspicions had not been interviewed; and, while not mandatory, the participation of a psychologist when M. was examined would have been appropriate. The Court further found that the combination of the total discontinuance of the case (in 2008) and the lack of any mechanism to centralise information had seriously reduced the chances of special

25. *Buturugă v. Romania*, no. 56867/15, 11 February 2020.

26. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 13 (Right to an effective remedy) below.

27. *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

monitoring of the child and prevented any useful exchange of information between the justice system and the social services. Moreover, while those services had certainly taken some steps (home visits), they had not engaged in any really meaningful action to establish the child's actual condition.

EXPULSION

M.K. and Others v. Poland[28] concerned the refusal of border guards to lodge the applicants' asylum applications, the summary removal of the applicants to a third country, and the risk of *refoulement* to their country of origin.

The applicants were Russian nationals of Chechen origin. In 2017 they went to checkpoints on the Polish-Belarusian border on numerous occasions. They alleged that on each occasion they expressed their wish to lodge asylum applications, claiming to be at risk of ill-treatment in the Russian Federation and indicating to the border guards that they could not remain in Belarus as their visas had expired and that it was in practice impossible for them to obtain international protection there. On each occasion, the applicants were issued with administrative decisions refusing them entry and turned away on the grounds that they were not in possession of documents allowing them entry into Poland and had neither expressed a wish to apply for asylum nor claimed a risk of ill-treatment. The Court granted interim measures under Rule 39 of the Rules of Court, indicating to the Government that the applicants' asylum applications should be lodged and that the authorities should refrain from removing them to Belarus pending their examination. However, the applicants were returned to Belarus. They were also turned away from border checkpoints on later occasions. Eventually, the asylum applications of some of them were lodged by the Polish authorities and they were placed in a reception centre.

The applicants complained under Article 3 of the Convention and Article 4 of Protocol No. 4 (each alone and in conjunction with Article 13), as well as Article 34 of the Convention.

The Court found, *inter alia*, a violation of Article 3 on account of the applicants having been denied access to the asylum procedure and removed to Belarus, a violation of Article 4 of Protocol No. 4, and a violation of Article 13 in conjunction with the aforementioned Articles owing to the absence of a remedy with automatic suspensive effect. It also found that the respondent State had failed to discharge its obligations under Article 34: it had either not complied with the interim measures indicated by the Court at all, or had complied with a significant delay. While the judgment does not develop the Court's case-law, it is noteworthy as it comprehensively examines complaints under several Convention provisions typically arising when individuals, with an arguable claim under Articles 2 or 3 to be at risk if returned to their country of origin, present themselves at a border crossing point to apply for asylum, but are denied that opportunity and removed to the third country from which they arrived, with a risk of *refoulement* to their country of origin.

B and C v. Switzerland[29] concerned the impossibility of requiring a homosexual person to conceal his sexual orientation to avoid ill-treatment upon removal to his country of origin, and the distribution of the burden of proof.

The first applicant, a Gambian national, arrived in Switzerland in 2008 and unsuccessfully applied for asylum. In 2014 he and the second applicant, a Swiss national, registered their same-sex partnership. They lived together until the second applicant's death in 2019. On 12 August 2014 the second applicant lodged a request for family reunification, namely for a residence permit to be granted to the first applicant in view of their registered partnership. That request was denied by the competent authority and the first applicant was ordered to leave the country and to await from abroad the outcome of the appeal proceedings he had initiated. On 2 August 2016 the Court granted his request for interim measures under Rule 39 of the Rules of Court, indicating that the first applicant was not to be deported for the duration of the proceedings before it. The domestic courts then rejected the appeal, finding that the first applicant was not entitled to a residence permit in view of, *inter alia*, his criminal record and the fact that he had not integrated well. As to the alleged risk of ill-treatment contrary to Article 3 in the Gambia, they considered that the first applicant had not shown substantial grounds for believing that he faced such a real risk.

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28. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See also under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens) below.

29. *B and C v. Switzerland*, nos. 889/19 and 43987/16, 17 November 2020.

The Court found that the domestic courts did not sufficiently assess either the risks of ill-treatment for the first applicant as a homosexual person in the Gambia or the availability of State protection against any ill-treatment by non-State actors. The first applicant's deportation to the Gambia, without a fresh assessment of those aspects, would give rise to a violation of Article 3 of the Convention.

(i) The judgment is noteworthy as it is the first time that the Court has found that a deportation would breach Article 3 of the Convention in view of the risk of ill-treatment in the country of origin on the basis of sexual orientation, even if the present violation is of a procedural nature. The Court

(a) reiterated that a person's sexual orientation formed a fundamental part of his or her identity so that no one could be obliged to conceal his or her sexual orientation in order to avoid persecution (confirming the approach taken in *I.K. v. Switzerland*[30], and in line with the case-law of the Court of Justice of the European Union (CJEU) and the position of the UNHCR);

(b) considered, disagreeing with the domestic authorities' finding to the contrary, that the first applicant's sexual orientation – the veracity of which was not disputed – could be discovered subsequently in the Gambia if he were removed there;

(c) took the view, in line with the approach it took in *I.I.N. v. the Netherlands*[31], that the mere existence of laws criminalising homosexual acts in the country of destination did not render an individual's removal to that country contrary to Article 3 of the Convention: what was decisive was whether there was a real risk that these laws would be applied in practice, which according to the information available was not the case in the Gambia at present; and

(d) observed that the first applicant claimed that he would also face a real risk of ill-treatment at the hands of non-State actors; that recent country information indicated widespread homophobia and discrimination against LGBTI persons; that the Gambian authorities were generally unwilling to provide protection to LGBTI persons; and that the UNHCR was of the view that laws criminalising same-sex relations were normally a sign that State protection of LGBTI individuals was not available.

(ii) The judgment also applied the principles, set out in *J.K. and Others v. Sweden*[32], concerning the distribution of the burden of proof in Article 3 removal cases where the risk of ill-treatment emanates from non-State actors. In such cases, the burden of proof lies with the applicant in respect of his or her personal circumstances (in the present case, his sexual orientation), but it is for the authorities to establish *proprio motu* the general situation in the country of origin, including the availability of State protection against ill-treatment emanating from non-State actors.

PROHIBITION OF SLAVERY AND FORCED LABOUR (ARTICLE 4)

S.M. v. Croatia[33] concerned trafficking and exploitation for the purposes of prostitution.

The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution. The criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring to which he had recruited the applicant, it had not been established that he had forced her into prostitution. The criminal court found that, since he had only been indicted on charges of forcing others to prostitute themselves, that is, the aggravated offence of organising prostitution, he could not be convicted of the more minor version of the same offence.

The Grand Chamber, noting that the applicant's complaint raised issues of impunity and was essentially of a procedural nature, focused on the domestic authorities' compliance with their procedural obligations and found a breach of Article 4 in this respect.

30. *I.K. v. Switzerland* (dec.), no. 21417/17, § 24, 19 December 2017.

31. *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004.

32. *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 91-98, 23 August 2016.

33. *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2020.

The issue of human trafficking has already been addressed in several judgments of the Court (for example, *Rantsev v. Cyprus and Russia*[34], and *Chowdury and Others v. Greece*[35]). In the instant case, the Grand Chamber had the opportunity, for the first time, to consider the applicability of Article 4 specifically to the trafficking and exploitation of women for the purposes of prostitution. The judgment is noteworthy because the Court clarified how the concepts of "trafficking in human beings" and "exploitation of prostitution" were incorporated within the material scope of Article 4 and how these two concepts were related to each other. The Court also clarified whether the principles regarding the States' positive, and in particular procedural, obligations in the field of human trafficking were applicable to instances of forced prostitution.

(i) In *Rantsev* (cited above, § 282), the Court had considered it unnecessary to identify whether the impugned treatment amounted to "slavery", "servitude" or "forced or compulsory labour", concluding instead that the *trafficking* itself, within the meaning of the relevant international instruments, fell within the scope of Article 4 of the Convention. On this basis and in keeping with the principle of the harmonious interpretation of the Convention and other instruments of international law, the Grand Chamber clarified in the present judgment that conduct or a situation will only give rise to an issue of human trafficking under Article 4 of the Convention if all three constituent elements of the international definition of human trafficking, as defined in the *Anti-Trafficking Convention*[36] and the *Palermo Protocol*[37], are present:

(1) an action (the recruitment, transportation, transfer, harbouring or receipt of persons);

(2) the means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person);

(3) an exploitative purpose (including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

As there is a difference between the Palermo Protocol and the Anti-Trafficking Convention as regards the scope of their application, the Grand Chamber followed the approach under the Anti-Trafficking Convention and further clarified that, from the perspective of Article 4, the concept of human trafficking related to all forms of trafficking in human beings, whether national or transnational, and irrespective of whether it was connected with organised crime or not. Lastly, while human trafficking fell within the scope of Article 4, this did not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct related to human trafficking might raise an issue under another provision of the Convention.

(ii) Regarding the "*exploitation of prostitution*", it follows from the Grand Chamber judgment that this concept is not subsumed under that of human trafficking. Having analysed the relevant case-law, the Grand Chamber concluded that the notion of "forced or compulsory labour" under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human-trafficking context. Any such conduct could have elements qualifying it as "slavery" or "servitude" under Article 4, or could raise an issue under another provision of the Convention. In that context, "force" could encompass the subtle forms of coercive conduct identified in the Court's case-law on Article 4, as well as by the International Labour Organization and in other international materials (for instance, the concept of "a penalty" which "may go as far as physical violence or restraint, but [which] can also take subtler forms, of a psychological nature"). The question whether a particular situation involved all the constituent elements of "human trafficking" and/or gave rise to a separate issue of forced prostitution was, in the Grand Chamber's view, a factual question to be examined in the light of all the relevant circumstances of a case.

(iii) Considering the *scope of the States' positive obligations* in this domain, the Grand Chamber clarified that, given the conceptual proximity of the two phenomena, the relevant principles relating to human trafficking

34. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).

35. *Chowdury and Others v. Greece*, no. 21884/15, 30 March 2017.

36. Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197.

37. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

were applicable in cases concerning forced prostitution. Turning to the scope of the procedural obligation in particular, the Grand Chamber found no reason to revisit the Court's approach, well established ever since the judgment in *Siliadin v. France* [38], according to which the converging principles of the procedural obligation under Articles 2 and 3 of the Convention informed the specific content of the procedural obligation under Article 4 of the Convention. It further held that those principles were applicable also to instances of forced prostitution. When assessing the State's compliance with its procedural obligation in this context, the Grand Chamber confirmed that it was not concerned with allegations of errors or isolated omissions but only with significant shortcomings, namely those that were capable of undermining the investigation's capability of establishing the circumstances of the case or the person responsible.

Examining the facts of the case against the three constituent elements of human trafficking, the Court pinpointed the applicant's "recruitment" via Facebook, the use of force against her and possible harbouring and debt bondage. Moreover, T.M., a former policeman, had been in a position to abuse her vulnerability. The Court thus found that the applicant had made an arguable claim supported by prima facie evidence that she had been subjected to human trafficking and/or forced prostitution. The Court considered that the domestic procedural response to that claim had suffered from significant flaws, such as the failure to follow obvious lines of inquiry capable of elucidating the true nature of the relationship between both parties and the heavy reliance on the applicant's testimony without taking account of the possible impact of psychological trauma on her ability to consistently and clearly relate the circumstances of her exploitation.

RIGHT TO LIBERTY AND SECURITY (ARTICLE 5) [39]

EXTRADITION/EXPULSION (ARTICLE 5 § 1 (f))

Shiksaitov v. Slovakia [40] concerned the detention in an EU member State of the applicant, who had already been recognised as a refugee in another EU member State, in order to examine the admissibility of his extradition to his country of origin.

The applicant, a Russian national of Chechen origin, was granted asylum (and permanent leave to remain) in Sweden in 2011 on account of his political opinions. In January 2015 he was arrested in Slovakia on the basis of an international arrest warrant which had been issued against him in 2007 by a court in the Chechen Republic on charges of terrorism allegedly committed in Grozny. The Slovak courts examined the admissibility of the request for his extradition to the Russian Federation and he was detained to ensure his presence in those proceedings. On 2 November 2016 the Supreme Court found his extradition to be inadmissible and ordered his immediate release: the applicant had been granted refugee status in Sweden and therefore enjoyed protection as a refugee on Slovak territory.

In the Convention proceedings the applicant complained that his detention in Slovakia had been unlawful because his refugee status precluded his extradition to the Russian Federation. The Court found a violation of, *inter alia*, Article 5 § 1 because the grounds for the applicant's detention had not remained valid for the entire period of detention and because the authorities had failed to conduct the proceedings with due diligence.

The judgment concerns a novel factual matrix – the applicant, who had been recognised as a refugee in one EU member State, was detained in another EU member State in order to examine the admissibility of his extradition to his country of origin, where he claimed to face persecution – and thus the issue of the extraterritorial effect of the granting of asylum. In particular:

(i) The case concerned the extraterritorial effects in Slovakia, from where his extradition was requested, of refugee status granted to the applicant in Sweden. Emphasising the importance of the relevant rules of international law, with which the Convention should in so far as possible be interpreted in harmony, the Court

38. *Siliadin v. France*, no. 73316/01, ECHR 2005-VII.

39. See also, under Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people), *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

40. *Shiksaitov v. Slovakia*, nos. 56751/16 and 33762/17, 10 December 2020.

relied on *Conclusion No. 12 (XXIX) of the UNHCR's Executive Committee*[41] and considered that the refugee status awarded to the applicant in Sweden could be called into question by Slovakia only in exceptional circumstances, notably if information came to light showing that he fell within the terms of an exclusion provision and was thus not entitled to refugee status. Observing that the Swedish authorities had neither checked Interpol's database during the asylum proceedings nor examined the nature of the criminal charge brought against the applicant in the Russian Federation, the applicability of an exclusion clause had not been examined in the asylum proceedings in Sweden. The Slovak authorities could not therefore be blamed for examining the extradition request, despite the applicant's refugee status in Sweden. Consequently, his detention had not therefore been, *ab initio*, contrary to domestic law or to Article 5 § 1 (f) of the Convention.

The present factual scenario can therefore be contrasted with that in *Eminbeyli v. Russia*[42], where the Court found that the applicant's detention for the purposes of extradition had been arbitrary *from the outset* owing to his refugee status in the country from which extradition had been requested, since domestic law prohibited the extradition of a refugee.

(ii) The applicant's detention had not, however, remained justified under Article 5 § 1 (f) throughout its entire duration (more than one year and nine months). In particular, information about the applicant's refugee status (which constituted the main reason for the Supreme Court's judgment of 2 November 2016), as well as documents relating to his criminal prosecution in Russia (which allowed for an assessment as to the political nature of the alleged crimes) had been available to the Slovak authorities since February 2015. It had not therefore been established that the Slovak authorities had proceeded in an active and diligent manner as required by Article 5 § 1 (f) of the Convention.

41. Conclusion No. 12 (XXIX) Extraterritorial Effect of the Determination of Refugee Status, Executive Committee 29th session, 17 October 1978, UN Doc. A/33/12/Add.1.

42. *Eminbeyli v. Russia*, no. 42443/02, 26 February 2009.

RIGHT TO A FAIR HEARING IN CRIMINAL PROCEEDINGS (ARTICLE 6 § 1)

APPLICABILITY

In its judgment in *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*[43], the Grand Chamber ruled on the applicability of the criminal limb of Article 6 § 1 to a fine, with no statutory upper limit, for the non-attendance of defence counsel at a hearing.

The applicants are lawyers. Despite the District Court rejecting their request to revoke their appointment as defence counsel for defendants in a criminal trial, they decided not to attend the trial and were later convicted, in their absence, of contempt of court and of delaying the proceedings. They were each fined approximately 6,200 euros (EUR). The Supreme Court upheld the fines: the impugned fines were "by nature" a penalty, having regard to the absence in relevant law provisions of an express upper limit on such fines and to the size of the fines imposed in the instant case.

In the Convention proceedings the applicants complained that their trial *in absentia* and the penalty imposed had breached Articles 6 and 7 of the Convention. In October 2018 a Chamber of the Court, attaching weight to the above reasoning of the Supreme Court, found that Article 6 was applicable under its criminal limb but that there had been no violation of either Article 6 or of Article 7 of the Convention. The Grand Chamber disagreed with the Chamber on the question of the applicability of Article 6, considering that the proceedings in issue did not involve the determination of a "criminal charge" within its autonomous meaning and thus rejected the applicants' complaints under Articles 6 and 7 as incompatible *ratione materiae* with the provisions of the Convention.

This judgment is noteworthy in three respects. In the first place, it reviews the application of the *Engel and Others v. the Netherlands*[44] criteria to determine whether contempt-of-court proceedings or proceedings concerning misconduct of legal professionals could be considered "criminal". Secondly, and as to the third Engel criterion (the nature and degree of severity of the penalty the applicants risked incurring), the judgment clarifies that the absence of an upper statutory limit on the amount of the fine is not of itself dispositive of the question of the applicability of Article 6 under its criminal limb and that the Court will have regard to certain other factors (described below). Thirdly, in finding Article 7 inapplicable simply because of the inapplicability of Article 6, the Grand Chamber acknowledged the link between the notion of "criminal" in Article 6 and Article 7 of the Convention.

(i) On the facts, the Court found that the first and second Engel criteria had not been met: it had not been demonstrated that the offence had been classified as "criminal" under domestic law; nor was it clear, despite the seriousness of the breach of professional duties in question, whether the applicants' offence was to be considered criminal or disciplinary in nature.

43. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020.

44. *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

(ii) The third Engel criterion was therefore of key importance for the determination of the applicability of Article 6 of the Convention. When examining the nature and degree of the severity of the penalty, the Court did not consider itself bound by the finding of the Icelandic Supreme Court in this respect, noting, however, that it was open to the Contracting States to adopt a broader interpretation entailing a stronger protection of the rights and freedoms in question. The Court proceeded to distinguish the instant case from the other relevant cases, before finding that Article 6 was not applicable under its criminal limb.

In the first place, in contrast to previous contempt-of-court cases in which Article 6 was found to apply, notably on account of the third criterion (*Kyprianou v. Cyprus*[45], and *Zaicevs v. Latvia*[46]), the kind of misconduct for which the applicants had been held liable was not punishable by imprisonment.

Secondly, the fines in issue could not be converted into a deprivation of liberty in the event of non-payment, unlike in other relevant cases. For example, in *Ravnsborg v. Sweden*[47] and *Putz v. Austria*[48], the existence of such a possibility, subject to certain fair-hearing guarantees, was an important consideration even if not sufficient in those circumstances to attract the application of Article 6 under its criminal head. In *T. v. Austria*[49], it was the punitive nature and the high amount of the penalty at stake (the fine imposed amounting to around EUR 2,000 and the maximum fine being around EUR 30,000), together with the possibility of converting it into a prison term without the guarantee of a hearing, that warranted considering the matter as "criminal".

Thirdly, the fines had not been entered on the applicants' criminal record, as in other cases where Article 6 under its criminal limb was not found to apply (*Ravnsborg* and *Putz*, both cited above, and *Žugić v. Croatia*[50]).

Fourthly, the Court compared the amount of the penalty at stake in the instant case with those in issue in other relevant cases, before concluding that the size of the present fines (EUR 6,200) and the absence of an upper statutory limit on their amount did not suffice for the Court to deem the severity and nature of the sanction as "criminal" within the autonomous sense of Article 6 of the Convention.

(ii) Finally, having noted that the proceedings in question did not involve the determination of a "criminal charge" within the meaning of Article 6, the Grand Chamber went on, for "reasons of consistency in the interpretation of the Convention taken as a whole", to find that the impugned fines could not be considered a "penalty" within the meaning of Article 7 of the Convention either (citing *Kafkaris v. Cyprus*[51]; *Del Río Prada v. Spain*[52]; and *Ilnseher v. Germany*[53]). The complaint under Article 7 was consequently also found to be incompatible *ratione materiae* with the Convention provisions.

FAIRNESS OF THE PROCEEDINGS

The *Akbay and Others v. Germany* [54] judgment concerned persons convicted as a result of incitement by the police to commit offences.

N.A. (the first applicant's husband) and the second and third applicants were convicted of drug offences in the context of a smuggling operation. The domestic courts found that N.A., and indirectly through him the second but not the third applicant, had been incited by State authorities to commit the offences. They therefore considerably reduced N.A.'s and the second applicant's sentences, and also took the State's influence into account as a general mitigating factor when imposing a sentence on the third applicant.

In the Convention proceedings the applicants claimed, in particular, that their right to a fair trial under Article 6 § 1 had been violated as N.A. and the second and third applicants had been convicted of offences following

45. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

46. *Zaicevs v. Latvia*, no. 65022/01, 31 July 2007.

47. *Ravnsborg v. Sweden*, 23 March 1994, Series A no. 283-B.

48. *Putz v. Austria*, 22 February 1996, *Reports of Judgments and Decisions* 1996-I.

49. *T. v. Austria*, no. 27783/95, ECHR 2000-XI.

50. *Žugić v. Croatia*, no. 3699/08, 31 May 2011.

51. *Kafkaris v. Cyprus* [GC], no. 21906/04, §§ 137-42, ECHR 2008.

52. *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013.

53. *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018.

54. *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, 15 October 2020.

entrapment by the police. The Court found a violation of Article 6 § 1 with respect to the first and second applicants' complaints and no violation of that provision in respect of the third applicant.

The judgment is noteworthy because the Court, *inter alia*, set out the Convention test to be applied with respect to indirect police incitement and reaffirmed its methodology for examining entrapment cases. With respect to the issue of indirect entrapment – namely a situation where a person was not directly in contact with the police officers working undercover, but was involved in the offence by an accomplice (in the present case, N.A.) who had been directly incited to commit an offence by the police – on the basis of a detailed analysis of its earlier case-law, the Court set out the following test for its assessment:

(a) whether it was foreseeable for the police that the person directly incited to commit the offence was likely to contact other persons to participate in the offence;

(b) whether that person's activities were also determined by the conduct of the police officers; and

(c) whether the persons involved were considered as accomplices in the offence by the domestic courts (§ 117 of the judgment).

Finally the Court reaffirmed and applied its methodology for the examination of entrapment cases (*Bannikova v. Russia*[55] and *Matanović v. Croatia*[56]). Accordingly, and when faced with a plea of entrapment, the Court will attempt to establish, as a first step, whether there has been such incitement or entrapment (substantive test of incitement). Where, under the substantive test of incitement, on the basis of the available information, the Court can find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that would normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings in respect of the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention. If the Court's findings under the substantive test are inconclusive (owing to a lack of information in the file or to the lack of disclosure or contradictions in the parties' interpretations of events) or confirm that the applicant was subjected to incitement, then it will be necessary to proceed, as a second step, to the procedural test of incitement, that is to say, the Court will assess whether the domestic courts have drawn the relevant inferences in accordance with the Convention. This includes, as already found in *Furcht v. Germany*,[57] excluding all evidence obtained as a result of entrapment or applying a procedure with similar consequences (§§ 111-24 of the judgment).

Applying this methodology to the first and second applicants' complaints, the Court agreed with the domestic courts that N.A. (directly) and the second applicant (indirectly) had been subjected to police incitement to commit the offences of which they were later convicted. However, merely reducing sentences – without excluding all the evidence obtained as a result of entrapment or applying a procedure with similar consequences – did not satisfy the requirements of the entrapment test and the Court concluded that there had been a violation of Article 6 § 1 of the Convention. By contrast, on the basis of the evidence available to it, the Court agreed with the domestic courts that the third applicant had not been subjected to entrapment, and there had therefore been no violation of Article 6 § 1 in respect of him.

The admission of statements obtained through ill-treatment by private individuals was the subject of the judgment in *Ćwik v. Poland*[58].

The applicant and K.G. were part of a criminal group involved in drug trafficking. K.G. was abducted and tortured by a rival gang to obtain information and his statements were recorded. The police freed K.G. and seized the recording. Some years later, the applicant was convicted of drug-trafficking offences. The trial court relied, *inter alia*, on the recording of the statements made by K.G. during his ill-treatment at the hands of the gang members.

In the Convention proceedings the applicant complained, under Article 6 § 1, that his trial had been unfair. The Court found a violation of this provision.

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55. *Bannikova v. Russia*, no. 18757/06, §§ 37-65, 4 November 2010.

56. *Matanović v. Croatia*, no. 2742/12, §§ 131-35, 4 April 2017.

57. *Furcht v. Germany*, no. 54648/09, § 64, 23 October 2014.

58. *Ćwik v. Poland*, no. 31454/10, 5 November 2020.

The judgment is noteworthy because the Court examined, for the first time, the admission in evidence in criminal proceedings of statements obtained through ill-treatment inflicted by private individuals, without the involvement or acquiescence of State agents.

The Court's consistent case-law indicates that the use in criminal proceedings of statements obtained from the accused or a witness by any form of treatment in breach of Article 3 automatically renders the criminal proceedings unfair as a whole (see, among many other authorities, *Gäfgen v. Germany*[59]). This is irrespective of whether that treatment is classified as torture or inhuman or degrading treatment, and irrespective of the probative value of the statements and of whether their use was decisive in securing the defendant's conviction (the admissibility of real evidence was not in issue in the present case; see, in that regard, *Gäfgen*, cited above, § 178).

These principles, developed in cases where State agents were involved in obtaining the statements in question, were found by the Court in the present case to be equally applicable to the admission of statements obtained as a result of ill-treatment inflicted by private individuals.

In applying those principles, the Court determined, on the basis of the available material, that the treatment inflicted on K.G. by private individuals had attained the threshold of severity necessary to fall within the scope of Article 3 and to trigger the State's positive obligation under this provision to protect persons from ill-treatment by private individuals. The Court did not find it necessary to determine whether that ill-treatment might be qualified as torture. Having ascertained that the domestic courts had indeed relied on statements made by K.G. during this ill-treatment, the Court found that the admission of the statements in evidence rendered the criminal proceedings as a whole unfair and violated Article 6 § 1 of the Convention.

TRIBUNAL ESTABLISHED BY LAW

Guðmundur Andri Ástráðsson v. Iceland[60] concerned the participation of a judge whose appointment had been vitiated by undue executive discretion, and compliance with the "established by law" requirement.

The Court of Appeal rejected the applicant's appeal against his criminal conviction. He complained that one of the judges on the bench of that court had been appointed in breach of domestic procedures. The Supreme Court acknowledged that the judge's appointment had been irregular in two respects. In the first place, the Minister of Justice had replaced four of the candidates (from the fifteen considered by the Evaluation Committee to be the best qualified) with four others (including the impugned judge who had not made it into the top fifteen) without carrying out an independent evaluation or providing adequate reasons for her decision. Secondly, Parliament had not held a separate vote on each individual candidate, as required by domestic law, but instead voted in favour of the Minister's list *en bloc*. The Supreme Court held, nevertheless, that these irregularities could not be considered to have nullified the appointment and that the applicant had received a fair trial. The Grand Chamber found that there had been a violation of the right to a tribunal "established by law".

This Grand Chamber judgment is noteworthy in two respects. In the first place, it clarified the scope of, and the meaning to be given to, the concept of a "tribunal established by law" and it analysed its relationship with other "institutional requirements" (notably, independence and impartiality). Secondly, it developed a three-step threshold test.

(i) The Grand Chamber analysed how each of the three individual components of the concept of a "tribunal established by law" should be interpreted so as to best reflect its purpose and to ensure that the protection it offers is truly effective. As to a "*tribunal*", in addition to the judicial function and the applicable requirements of independence, impartiality, and so on, it is inherent in its very notion that it be composed of judges selected on the basis of merit through a rigorous process to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed: the higher the tribunal in the judicial hierarchy, the more demanding the applicable selection criteria should be. As to "*established*", the Grand Chamber noted its purpose which was to protect the judiciary against unlawful external influence, from the executive in particular. In this light, the process of appointing judges necessarily constituted an inherent element of the

59. *Gäfgen v. Germany* [GC], no. 22978/05, §§ 165-66, ECHR 2010.

60. *Guðmundur Andri* Ástráðsson *v. Iceland* [GC], no. 26374/18, 1 December 2020.

requirement that a tribunal be "established by law", with the result that breaches of the law regulating this process may render the participation of the relevant judge in the examination of a case "irregular". The Grand Chamber further clarified that the third component – "*by law*" – also meant "*in accordance with the law*", so that provisions on judicial appointments should be couched in unequivocal terms, to the extent possible, to prevent arbitrary interferences, including by the executive. At the same time, the mere fact that the executive has decisive influence on appointments may not as such be considered problematic. Finally, in view of a very close interrelationship and common purpose shared by the requirements of independence/impartiality and a "tribunal established by law", an examination under the latter must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the fundamental principles of the rule of law and the separation of powers, and to compromise the independence of the court in question.

(ii) On the basis of the above, the Grand Chamber developed the following three cumulative criteria to be applied to assess whether there has been a breach of the right to a "tribunal established by law", in the light of the object and purpose of this concept (namely, to ensure the ability of the judiciary to perform its duties free of undue interference). In the first place, there must, in principle, be a *manifest* breach of domestic law in the sense that it must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation, since a procedure that is seemingly in compliance with the rules may nevertheless produce results that are incompatible with the above object and purpose. Secondly, only those breaches that relate to the *fundamental rules* of the procedure for appointing judges (that is, breaches that affect the essence of the right in question) are likely to result in a violation: for example, the appointment of a person as judge who did not fulfil the relevant eligibility criteria or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement. Accordingly, breaches of a purely technical nature fall below the relevant threshold. Thirdly, *the review by domestic courts*, of the legal consequences of a breach of a domestic rule on judicial appointments, must be carried out on the basis of the relevant Convention standards. In particular, a fair and proportionate balance has to be struck to determine whether there was a pressing need, of a substantial and compelling character, justifying the departure from competing principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. With the passage of time, the preservation of legal certainty would carry increasing weight in the balancing exercise.

(iii) On the facts of the case, the Grand Chamber found that the very essence of the applicant's right to a "tribunal established by law" had been impaired on account of the participation in his trial of a judge whose appointment procedure had been vitiated by a manifest and grave breach of a fundamental domestic rule intended to limit the influence of the executive and strengthen the independence of the judiciary. The first and second criteria were thereby satisfied. In particular in this regard, the Minister of Justice had failed to explain why she had picked one candidate over another. Given the alleged political connections between her and the husband of the impugned judge, her actions were of such a nature as to prompt objectively justified concerns that she had acted out of political motives. Moreover, the Minister was a member of one of the political parties composing the majority in the coalition government, by whose votes alone her proposal had been adopted in Parliament. As to the procedure before Parliament, not only had it failed to demand that the Minister provide objective reasons for her proposals, but Parliament had not complied with the special voting rules, which had undermined its supervisory role as a check against the exercise of undue executive discretion. The applicant's belief that Parliament's decision had been driven primarily by party political considerations might not therefore be considered to be unwarranted. This was sufficient to taint the legitimacy and transparency of the whole appointment procedure. As to the third criterion, the Supreme Court had in turn failed to carry out a Convention-compliant assessment and to strike the right balance between the relevant competing principles, although the impugned irregularities had been established even before the judges at issue had taken office. Nor had it responded to any of the applicant's highly pertinent arguments. The restraint displayed by the Supreme Court in examining the applicant's case had undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers. However, the finding of a violation in the present case could not, as such, be taken to impose on the respondent State an obligation to reopen all similar cases that had since become *res judicata*.

OTHER RIGHTS AND FREEDOMS

RIGHT TO RESPECT FOR ONE'S PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE (ARTICLE 8)

POSITIVE OBLIGATIONS

Hudorovič and Others v. Slovenia[61] sets out the criteria for determining the existence of a State's positive obligation under Article 8 to provide access to safe drinking water.

The applicants belonged to Roma communities residing in illegal and unserviced settlements. They complained that they had not been provided with access to basic public utilities, in particular, to safe drinking water and sanitation. The municipal authorities had taken some steps to provide the applicants with the opportunity to access safe drinking water. In one settlement, at least one water tank co-financed by the municipality had been installed and filled with drinking water. In another settlement, the municipality had installed and financed a public water point to which individual connections could be installed. The applicants considered these measures insufficient. The Court found that, even assuming they were applicable, there had been no violation of Articles 8 and 3 of the Convention, taken alone and in conjunction with Article 14.

The judgment is noteworthy in that the Court, for the first time, clarified the conditions which could trigger the applicability of Article 8 with regard to the provision by the State of basic public utilities, in particular, safe drinking water. The Court also developed criteria for determining the existence of a State's positive obligation under this provision and its eventual content.

(i) Relying on the consequence-based approach outlined in *Denisov v. Ukraine*[62], the Court defined as follows the threshold of severity which could bring Article 8 into play in this context: a "persistent and long-standing lack of access to safe drinking water" with "adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home".

(ii) The existence of any positive obligation in this respect and its eventual content are to be determined by the specific circumstances of the persons affected, by the legal framework, and by the economic and social situation of the State in question. In the Court's view, States must be accorded a wide discretion in such matters, including as regards the concrete steps to ensure everyone has adequate access to water.

– As to the economic and social position in Slovenia, the Court noted that a non-negligible proportion of the Slovenian population living in remote areas did not have access to the public water supply and sewerage systems;

61. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 3 (Inhuman or degrading treatment) above.

62. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

- As to the comprehensive regulatory framework in place, the Court considered it reasonable that the State or its local authorities assumed responsibility for the provision of that service while it was left to the owners to install individual house connections at their own expense. Likewise, it appeared reasonable that alternative solutions such as the installation of individual water tanks or systems for harvesting rainwater were proposed in those areas not yet covered by a public water supply system;
- As regards the applicants' specific circumstances, the key consideration for the Court was the fact that they belonged to a socially disadvantaged group which faced greater obstacles than the majority in accessing basic utilities.

In the first place, the Court took note of all the affirmative action measures already taken by the domestic authorities with a view to improving the living conditions of the Roma community, including concrete actions to provide the applicants with the opportunity to access safe drinking water. While not an ideal or permanent solution, these positive steps demonstrated that the authorities had acknowledged the disadvantages suffered by the applicants as members of a vulnerable community and had shown a degree of active engagement with their specific needs.

Secondly, the applicants, who remained in their respective settlements by choice, were not living in a state of extreme poverty. They received social benefits which could have been used towards improving their living conditions by, for instance, installing private water and septic tanks, systems for collecting rainwater or other alternative solutions. In sum, the Court took the view that, while it fell upon the State to address the inequalities in the provision of access to safe drinking water which disadvantaged Roma settlements, this could not be interpreted as including an obligation to bear the entire burden of providing running water to the applicants' homes.

Thirdly, the applicants had not convincingly demonstrated that the State's alleged failure to provide them with access to safe drinking water had resulted in adverse consequences for their health and human dignity, effectively eroding their core rights under Article 8. Even assuming that Article 8 was applicable, and having regard to the State's wide margin of appreciation in such matters, the Court found that the measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants had taken account of their vulnerable position and satisfied the requirements of Article 8 of the Convention.

FREEDOM OF EXPRESSION (ARTICLE 10)

FREEDOM OF EXPRESSION

Magyar Kétfarkú Kutya Párt v. Hungary[63] concerned the foreseeability of restrictions on the freedom of expression of political parties in the context of an election or a referendum.

In 2016 a referendum concerning the European Union was held in Hungary. Immediately prior thereto the applicant political party had made available to voters a mobile-phone application which they could use to anonymously upload and share photographs of their ballot papers. Following complaints by a private individual to the National Election Commission (NEC), the applicant party was fined for infringing principles concerning the fairness and secrecy of elections as well as the principle of the "exercise of rights in accordance with their purpose". The *Kúria* upheld the finding of the NEC as regards the latter principle but dismissed its conclusions regarding voting secrecy and the fairness of the referendum. The applicant party's constitutional complaint was declared inadmissible.

The Grand Chamber examined the case from the standpoint of the lawfulness of the measure under Article 10. It found that the legislation setting out the principle concerning the "exercise of rights in accordance with their purpose" was not formulated with sufficient precision to rule out any arbitrariness and enable the applicant party to regulate its conduct accordingly and found a breach of Article 10.

The judgment is noteworthy in that it clarified the extent of the Court's scrutiny of restrictions on the freedom of expression of political parties in an electoral context and, in particular, the level of foreseeability required of the legal basis for such a restriction.

63. *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, 20 January 2020.

(i) Restrictions on the freedom of expression of political parties in an electoral context must be subjected to rigorous supervision. The same applies, *mutatis mutandis*, in the context of a referendum aimed at identifying the will of the electorate on matters of public concern.

(ii) Such rigorous supervision naturally extends to the assessment of whether the legal basis, relied upon by the authorities to restrict the freedom of expression of a political party, was sufficiently foreseeable to rule out any arbitrariness in its application. As well as protecting democratic political parties from arbitrary interferences by the authorities, rigorous supervision serves to protect democracy itself, since any restriction on freedom of expression in this context without sufficiently foreseeable regulations could harm open political debate, the legitimacy of the voting process, its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law.

In the present case, the Court noted that the applicant party had been seeking not only to provide a forum for voters to express an opinion, but also to convey a political message on the referendum (the name of the application was "Cast an invalid ballot"). There had therefore been an interference with its freedom of expression in relation to both of these aspects: providing a forum for third-party content and imparting information and ideas.

The salient issue was whether the applicant party – in the absence of a binding provision of domestic legislation explicitly regulating the taking of photographs of ballot papers and the uploading of those photographs in an anonymous manner to a mobile-phone application for dissemination while voting was ongoing – knew or ought to have known, if need be after taking appropriate legal advice, that its conduct would breach the existing electoral procedure law.

The Court observed that the vagueness of the principle of the "exercise of rights in accordance with their purpose" relied on by the authorities had been noted by the Constitutional Court. The relevant legislation did not define what constituted a breach of that principle, it did not establish any criteria for determining which situation constituted a breach and it did not provide any examples. The relevant domestic regulatory framework allowed the restriction of voting-related expressive conduct on a case-by-case basis and therefore conferred a very wide discretion on the electoral bodies and on the domestic courts called upon to interpret and apply it. While the Constitutional Court had restricted the reach of the said principle to voting-related conduct that entailed "negative consequences", it had not been established how the restriction in issue "related to, and addressed, a concrete 'negative consequence', whether potential or actual", particularly since the applicant party had not been found to have infringed the fairness of the referendum or the secrecy of the ballot.

Having regard to the particular importance of the foreseeability of law when it came to restricting the freedom of expression of a political party in the context of an election or a referendum, the Court concluded that the considerable uncertainty about the potential effects of the legal provisions in issue had exceeded what was acceptable under Article 10 § 2 of the Convention.

In *Selahattin Demirtaş v. Turkey (no. 2)*[64], the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The applicant was an elected MP and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform had its origin in clashes in Syria between Daesh and forces with links to the PKK as well as in the serious violence in Turkey in 2014 and 2015 following the breakdown of negotiations aimed at resolving the "Kurdish question". The applicant, who was actively involved through his speeches and statements on these issues, was one of 154 MPs (including 55 HDP members) affected by the constitutional amendment. In November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and of inciting others to commit a criminal offence. Further to an additional investigation (concerning the aforenoted violence), the applicant remains in detention awaiting trial. His parliamentary mandate expired in June 2018.

The Grand Chamber found a violation of Article 10.

64. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) above and Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people).

This judgment is noteworthy in that it considered the compatibility of the impugned constitutional amendment with the foreseeability requirement of Article 10 and articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1.

In particular:

(i) When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts' task is to determine whether this speech is covered by the principle of "non-liability" of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

(ii) The Court fully subscribed to the finding of the Venice Commission that the impugned unprecedented and one-off constitutional amendment had been aimed expressly at specific statements of MPs, particularly those of the opposition, and that it was thus a "misuse of the constitutional amendment procedure". MPs could not reasonably have expected that such a procedure would be introduced during their term of office. The interference with the freedom of expression had not therefore been foreseeable, in violation of Article 10 of the Convention.

(iii) The Court stressed that the importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1.

In *Miljević v. Croatia* [65] the Court examined a conviction for defamation on account of statements made while defending criminal proceedings, about someone not participating in those proceedings.

During his trial for war crimes, the applicant made statements in his defence, accusing I.P. (who was not participating in the proceedings) of instigating his prosecution, witness tampering and leading a criminal enterprise aiming to have him convicted. The applicant was acquitted of war crimes, but later convicted in criminal defamation proceedings brought against him by I.P. on account of the impugned statements. The Court found a violation of Article 10 of the Convention.

(i) The judgment is noteworthy because it gave the Court the opportunity, for the first time, to balance the right to freedom of expression of an accused in criminal proceedings (Article 10) against the right to respect for reputation (Article 8), in a novel context where the offending statements were made against a third party not having any formal role in the relevant proceedings (compare with previous cases concerning either a lay accused making disparaging statements against judges or prosecutors (for example, *Lešník v. Slovakia* [66], and *Skałka v. Poland* [67]) or a defence lawyer making such statements against judges, prosecutors, witnesses or police officers (for example, *Nikula v. Finland* [68], and *Kyprianou v. Cyprus* [69])).

(ii) The Court observed that Articles 8 and 10 normally enjoy equal protection, so that the outcome of the application should not, in principle, vary according to whether it has been lodged under Article 8 by the person who was the subject of the offending statement or under Article 10 by the author of the statement in question. However, in cases where the right to freedom of expression is to be read in the light of an accused's right to a fair trial under Article 6, the margin of appreciation afforded to the domestic authorities under Article 10 ought to be narrower. Importantly, the Court set out the following principles for balancing the relevant competing rights at stake in this context:

> "In particular, in the Court's view, having regard to an accused's right to freedom of expression and the public interest involved in the proper administration of criminal justice, priority should be given to allowing the accused to speak freely without the fear of being sued in defamation whenever his or her speech concerns the statements

65. *Miljević v. Croatia*, no. 68317/13, 25 June 2020.

66. *Lešník v. Slovakia*, no. 35640/97, ECHR 2003-IV.

67. *Skałka v. Poland*, no. 43425/98, 27 May 2003.

68. *Nikula v. Finland*, no. 31611/96, 21 March 2002.

69. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

> and arguments made in connection with his or her defence. On the other hand, the more an accused's statements are extraneous to the case and his or her defence, and include irrelevant or gratuitous attacks on a participant in the proceedings or any third party, the more it becomes legitimate to limit his or her freedom of expression by having regard to the third party's rights under Article 8 of the Convention.
>
> The Court emphasises that an accused's statements and arguments are protected in so far as they do not amount to malicious accusations against a participant in the proceedings or any third party. As it follows from the Court's case-law, the defendant's freedom of expression exists to the extent that he or she does not make statements that intentionally give rise to false suspicions of punishable behaviour concerning a participant to the proceedings or any third party … In practice, when making this assessment, the Court finds it important to examine in particular the seriousness or gravity of the consequences for the person concerned by those statements … The more severe the consequences are, the more solid the factual basis for the statements made must be …

(iii) Applying these principles to the present case, the Court found that the domestic authorities had failed to strike a fair balance between the competing rights at stake for the following reasons.

Considering, in the first place, the *nature and context* of the impugned statements, the Court found that they had had a sufficiently relevant bearing on the applicant's defence during the criminal trial and had therefore deserved a heightened level of protection under the Convention. If the applicant had succeeded in convincing the trial court of his arguments, this would have seriously called into question the credibility and reliability of the witness evidence and the overall nature and background of the prosecution's case. As a matter of principle, the defendant had to have the opportunity to speak freely about his impression concerning possible witness tampering and the improper motivation of the prosecution without the fear of subsequently being sued for defamation. Furthermore, I.P., who was a well-known public figure and activist as regards the prosecution of crimes committed during the war, had entered the public arena on the subject and had therefore in principle been required to display a higher level of tolerance of acceptable criticism than another private individual.

Secondly, the Court was unable to find that the applicant's allegations against I.P. lacked any *factual basis*. I.P. had attended the public hearings in the applicant's case and admitted to having met some of the witnesses, including the witness who had lodged a criminal complaint against the applicant on charges of war crimes. Moreover, I.P. had advised the editors of a television show in their preparation of several reports on the war in Croatia without, however, being involved in the broadcast concerning the applicant. The domestic courts had failed to take these factual elements into account.

Thirdly, the Court examined the *consequences* of the impugned statements for I.P. and found them to be limited. Although the applicant had accused I.P. of witness tampering, which was punishable under domestic law, the competent authorities had never investigated I.P. for that offence. Though excessive, the statements in issue were not malicious accusations. Moreover, there was no conclusive evidence that I.P. had suffered, or could have objectively suffered, any profound or long-lasting health or other consequences.

Fourthly, regarding the *severity of the sanction* imposed, the Court observed that, although the applicant had been ordered to pay the minimum fine possible under domestic law, that sanction had nevertheless amounted to a criminal conviction which, in such a context, could only in exceptional circumstances be accepted as necessary in a democratic society.

RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 13)[70]

In *Beizaras and Levickas v. Lithuania*[71] the Court decided to examine separately the applicants' complaint under Article 13 after finding a violation of Article 14 of the Convention taken in conjunction with Article 8.

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70. See also, under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens), *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020, and, under Article 3 of Protocol No. 1 (Right to free elections – Stand for election), *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

71. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 35 § 1 (Exhaustion of domestic remedies) above, and Article 14 taken in conjunction with Article 8 below.

The issue to be considered was whether a complaint under Article 13, based on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law, gave rise to a separate issue to that already examined under Article 14 of the Convention and which had already given rise to a violation under that Article. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had not usually considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*[72]). However, considering the nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted, mainly on the following grounds:

- it did not appear that the Supreme Court had had an opportunity to provide greater clarity on the standards to be applied in cases of hate speech of comparable gravity: the manner in which its case-law had been applied did not provide for an effective domestic remedy for complaints about homophobic discrimination;
- the growing level of intolerance against sexual minorities had remained largely unchecked;
- the failure by law-enforcement institutions to acknowledge bias as a motive for such crimes and to adopt an approach adequate to the seriousness of the situation; and
- the authorities' lack of a comprehensive strategy to tackle the issue of homophobic hate speech.

The *Association Innocence en Danger and Association Enfance et Partage v. France*[73] judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

In the Convention proceedings, the applicant associations complained under Article 13 that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

It found that there had been no violation.

The judgment is of interest with regard to the assessment of the margin of appreciation to be afforded to States in fulfilling their obligation under Article 13 (*De Souza Ribeiro v. France*[74], citing *Jabari v. Turkey*[75]), in the light of Article 3. The Court found that the interpretation by the national courts of the minimum threshold of "gross negligence", within the meaning of Article L. 141-1 of the Code of Judicial Organisation, since it could be constituted by a series of more minor acts of negligence resulting in deficiencies in the justice system, thus fell within their margin of appreciation. The Court found that the fact that the applicant associations had not met the conditions laid down by Article L. 141-1 of that Code did not suffice for it to be concluded that the remedy, taken as a whole, was ineffective. The requirement to establish "gross negligence" had not negated the effectiveness of this remedy, which had been available to the applicant associations.

PROHIBITION OF DISCRIMINATION (ARTICLE 14)

ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 2

The judgment in *Makuchyan and Minasyan v. Azerbaijan and Hungary*[76] is interesting for the way in which the Court examined the question whether the failure of the State to enforce a prison sentence imposed abroad for an ethnically biased crime could be considered a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2.

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72. *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009.
73. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 3 (Positive obligations) above.
74. *De Souza Ribeiro v. France* [GC], no. 22689/07, §§ 77-78, ECHR 2012.
75. *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII.
76. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) above.

ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8

In *Beizaras and Levickas v. Lithuania*[77] the Court emphasised the necessity of a criminal-law response to direct verbal assaults and physical threats based on homophobic attitudes.

The applicants, two young men, posted a photograph of themselves kissing on Facebook. The photograph received hundreds of serious homophobic comments (for example, calls for the applicants to be "castrated", "killed" and "burned"). On the applicants' request, a non-governmental organisation (NGO), of which they were members and which protected the interests of homosexual persons, requested a prosecutor to begin criminal proceedings for incitement to hatred and violence against homosexuals (under Article 170 of the Criminal Code, which established criminal liability for incitement of discrimination on the basis, *inter alia*, of sexual orientation). The prosecutor and the courts refused to prosecute, finding that the applicants' behaviour had been "eccentric" and did not correspond to "traditional family values" in Lithuania and that the comments in issue had not reached a threshold which could be considered criminal. The Court found it established that the applicants had suffered discrimination on the ground of their sexual orientation, in breach of Article 14 taken in conjunction with Article 8. The Court also found a violation of Article 13 since the applicants had been denied an effective domestic remedy in respect of their complaint concerning the breach of their right to their private life, on account of their having been discriminated against because of their sexual orientation.

The judgment is noteworthy in that it clarified whether criminal-law measures are required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (*R.B. v. Hungary*[78]; *Király and Dömötör v. Hungary*[79]; and *Alković v. Montenegro*[80]).

The Court stressed that criminal sanctions, including against individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure. This applied equally to hate speech concerning a person's sexual orientation and sexual life. However, the instant case concerned undisguised calls for an attack on the applicants' physical and mental integrity, which required protection by the criminal law. While the Lithuanian Criminal Code did indeed provide for such protection, it had not been granted to the applicants, owing to the authorities' discriminatory attitude which was at the core of their failure to discharge their positive obligation to investigate in an effective manner whether the comments in issue constituted incitement to hatred and violence. The Court rejected the Government's claim that the applicants could have had recourse to other (civil law) remedies when the domestic courts refused to qualify the comments as criminal, considering that, in the circumstances, it would have been manifestly unreasonable to require the applicants to exhaust any other remedies and would have downplayed the seriousness of the comments.

RIGHT TO FREE ELECTIONS (ARTICLE 3 OF PROTOCOL No. 1)

FREE EXPRESSION OF THE OPINION OF THE PEOPLE

In *Selahattin Demirtaş v. Turkey (no. 2)*[81], the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The Grand Chamber followed the Chamber's finding of no violation of Article 5 § 4 and of a breach of Article 3 of Protocol No. 1. However, it examined separately the complaint under Article 10, finding a violation of this provision, and it held that there had been violations of Article 5 §§ 1 and 3 on account of the lack of a reasonable suspicion that the applicant had committed an offence. It also considered that the applicant's pre-trial detention had pursued an ulterior motive, that of stifling pluralism and limiting freedom of political

77. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 13 (Right to an effective remedy) above.

78. *R.B. v. Hungary*, no. 64602/12, §§ 80 and 84-85, 12 April 2016.

79. *Király and Dömötör v. Hungary*, no. 10851/13, § 76, 17 January 2017.

80. *Alković v. Montenegro*, no. 66895/10, §§ 8, 11, 65 and 69, 5 December 2017.

81. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) and Article 10 (Freedom of expression) above.

debate, in breach of Article 18 of the Convention in conjunction with Article 5. Finally, the Court indicated under Article 46 that Turkey must take all necessary measures to secure the applicant's immediate release.

This Grand Chamber judgment is noteworthy in, *inter alia*, the following respects:

(i) by emphasising the link between parliamentary immunity (and the need for elevated protection of parliamentary speech, especially of the opposition) and the guarantee to sit as an MP once elected, the Court identified a procedural obligation on domestic courts examining charges against MPs;

(ii) the Court considered the compatibility of the impugned constitutional amendment with the foreseeability requirement of Article 10;

(iii) the Court has, for the first time, ruled on a complaint under Article 3 of Protocol No. 1 about the effects of the pre-trial detention of elected MPs on their performance of parliamentary duties. The Court defined the scope of a procedural obligation on domestic courts when ordering an MP's initial and/or continued pre-trial detention and, where such detention is linked to an MP's political speech, the Court articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1.

When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts' task is to determine whether this speech is covered by the principle of "non-liability" of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

The Court stressed that the imposition of a measure depriving an MP/candidate in parliamentary elections of liberty does not automatically constitute a violation of Article 3 of Protocol No. 1. However, the procedural obligation under this provision requires the domestic courts to show that, in ordering an MP's initial and/or continued pre-trial detention, they have weighed up all the relevant interests, in particular those safeguarded by this provision. As part of this balancing exercise, they must protect the expression of political opinions by the MP concerned. The importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1. Another important element is whether the charges are directly linked to an MP's political activity. Moreover, a remedy must be offered by which an MP can effectively challenge his or her detention and have his or her complaints examined on the merits. Furthermore, the duration of an MP's pre-trial detention must be as short as possible and the domestic courts should genuinely consider alternative measures to detention and provide reasons if less severe measures are considered insufficient. In this context, whether there was a reasonable suspicion that the applicant had committed an offence, as required by Article 5 § 1, is equally relevant for the purposes of Article 3 of Protocol No. 1. The domestic courts failed to duly consider all of these elements and to effectively take into account the fact that the applicant was not only an MP but also a leader of the opposition, the performance of whose parliamentary duties called for a high level of protection. Although the applicant retained his seat throughout his term of office, it was effectively impossible for him to take part in the activities of the National Assembly. His unjustified pre-trial detention was therefore incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament.

STAND FOR ELECTION

The scope of the procedural safeguards for the effective examination of electoral disputes and the impartiality of the decision-making body were examined in *Mugemangango v. Belgium*[82].

Under Belgian electoral law, the legislative assemblies alone are competent to verify any irregularities that may have taken place during elections to the exclusion of the jurisdiction of any external court or body. The applicant stood for election to the parliament of the Walloon Region in 2014 and lost the seat by fourteen votes. He did not ask for the election to be declared void or for fresh elections, but for a re-examination of the ballot papers that had been declared blank, spoilt or disputed (of which there were over 20,000) and for a recount of the votes validly cast in his constituency. Although the Committee on the Examination of

82. *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

Credentials (of the Walloon Parliament) found his complaint well founded and proposed a recount of the votes, Parliament (which had not yet been constituted at the material time) decided, by a simple majority, not to follow that conclusion and approved all the elected representatives' credentials. The members elected in the applicant's constituency, whose election could have been called into question as a result of the examination of his complaint, also voted on the applicant's complaint. The applicant complained under Article 3 of Protocol No. 1, both alone and in conjunction with Article 13, about the procedure for the examination of his complaint.

The Grand Chamber found violations of both provisions. It was satisfied that the applicant had put forward sufficiently serious and arguable allegations that could have led to a change in the distribution of seats. It found that his grievances had not been dealt with in a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure their effective examination in accordance with the requirements of Article 3 of Protocol No. 1. For the same reasons, the remedy before the Walloon Parliament could not be deemed "effective" within the meaning of Article 13.

The judgment is noteworthy because it clarifies the scope of the procedural safeguards for the effective examination of electoral disputes, particularly as regards the impartiality of a body charged with this task and the necessity of access to a judicial remedy. Moreover, the specific context of the present case, that of a regional parliament having exclusive jurisdiction to rule on the validity of electoral processes, gave the Court an opportunity to clarify the relationship between the above safeguards and the principle of parliamentary autonomy (*Karácsony and Others v. Hungary*[83]).

(i) The Court emphasised that parliamentary autonomy can only be validly exercised in accordance with the rule of law. Procedural safeguards for the effective examination of electoral disputes serve to ensure the observance of the rule of law in this field, and hence the integrity of the election, so that the electorate's confidence and the legitimacy of parliament are guaranteed. In that respect, these safeguards ensure the proper functioning of an effective political democracy and thus represent a preliminary step for any parliamentary autonomy. As to the weight to be attached to parliamentary autonomy in the context of the present case, involving a challenge to the result of the elections, the Court took into account the fact that the Walloon Parliament had examined and rejected the applicant's complaint before its members had been sworn in and their credentials approved. The newly elected parliament had yet to be constituted and, in that regard, the present case differed from disputes that may arise in respect of a full member of parliament after the composition of the legislature has been approved.

(ii) The Court defined the scope of the adequate and sufficient procedural safeguards to prevent arbitrariness required by Article 3 of Protocol No. 1 in order to ensure the effective examination of electoral disputes (*Podkolzina v. Latvia*[84]; *Kovach v. Ukraine*[85]; *Kerimova v. Azerbaijan*[86]; *Davydov and Others v. Russia*[87]; and *Riza and Others v. Bulgaria*[88]). In the first place, the Court clarified the scope of the requirement to provide sufficient guarantees of impartiality of a decision-making body and the importance of appearances in this respect. Such guarantees are intended to ensure that the decision taken is based solely on factual and legal considerations, and not political ones. The examination of a complaint about the result of an election must not become a forum for political struggle between different parties. Given that members of parliament cannot, by definition, be "politically neutral" , in a system where parliament is the sole judge of the election of its members, particular attention must be paid to the guarantees of impartiality laid down in domestic law as regards the procedure for examining challenges to election results. Secondly, the discretion enjoyed by the body concerned must not be excessive: it must be circumscribed with sufficient precision by the provisions of domestic law. Thirdly, the electoral-disputes procedure must guarantee a fair, objective and sufficiently reasoned decision. Complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing. In this way, their right to an adversarial procedure is safeguarded. In addition, it must be clear from the public

83. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016.

84. *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II.

85. *Kovach v. Ukraine*, no. 39424/02, ECHR 2008.

86. *Kerimova v. Azerbaijan*, nos. 17170/04 and 5 others, 3 May 2011.

87. *Davydov and Others v. Russia*, no. 75947/11, 30 May 2017.

88. *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, 13 October 2015.

statement of reasons by the relevant decision-making body that the complainants' arguments have been given a proper assessment and an appropriate response.

On the facts of the present case, and having regard to the standards and recommendations of European and international bodies, the Court found that the Walloon Parliament had not provided sufficient guarantees of impartiality. Domestic law did not provide for the withdrawal of members of parliament who had been elected in the constituency concerned by an electoral complaint and, indeed, in the applicant's case, his direct opponents had taken part in the voting on his complaint, together with all the newly elected members, whose credentials had not yet been approved. Moreover, the rule on voting by simple majority, which had been applied without any adjustment, had failed to avert the risk of a political decision and to protect the applicant – a candidate from a party not represented in the parliament prior to the elections in issue – from a partisan decision. Furthermore, the discretion enjoyed by that body had not been sufficiently circumscribed, given its exclusive jurisdiction in such matters and the lack of domestic provisions on the procedure and criteria for the examination of electoral complaints and the effects of decisions to be taken thereupon. Finally, the applicant had been afforded certain procedural safeguards on an *ad hoc* discretionary basis: however, in the absence of a procedure laid down in domestic law, they were neither accessible nor foreseeable. Moreover, while Parliament had given reasons for its decision, it had not explained why it had not followed the view of its Committee on the Examination of Credentials, which had found the applicant's complaint to be well founded. The Court thus found a breach of Article 3 of Protocol No. 1.

(iii) Under Article 13 of the Convention, the Court indicated that the "authority" referred to in that Article did not necessarily have to be a judicial one in the strict sense: that question fell within the wide margin of appreciation afforded to Contracting States. The Court clarified, however, that a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, would, in principle, satisfy the above-noted procedural requirements of Article 3 of Protocol No. 1.

PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS (ARTICLE 4 OF PROTOCOL No. 4)

The immediate and forcible return of aliens from a land border, following an attempt by migrants to cross in an unauthorised manner and by taking advantage of the fact that there was a large number of them, was examined in *N.D. and N.T. v. Spain*[89].

In August 2014 a group of several hundred sub-Saharan migrants, including the applicants, attempted to enter Spain by scaling the barriers surrounding the town of Melilla, a Spanish enclave on the North African coast. Having climbed the fences, they were arrested by members of the Civil Guard (*Guardia Civil*), who handcuffed them and returned them to the other side of the border without conducting an identification procedure or providing them with the opportunity to explain their personal situation. The Grand Chamber found no violation of Article 4 of Protocol No. 4 or Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

The judgment is noteworthy in two respects. In the first place, it addressed, for the first time, the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border. Secondly, it established a two-tier test to assess the extent of protection to be afforded under this provision to persons who cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and using force.

(i) The Grand Chamber took the view that the protection of the Convention, particularly Article 3, which embraces the prohibition of *refoulement* as defined in the 1951 Refugee Convention[90], cannot be denied or rendered ineffective on the basis of purely formal considerations, for instance on the ground that the relevant persons could not make a valid claim for such protection as they had not crossed the State's border lawfully. It therefore confirmed the interpretation of the term "expulsion" in the generic meaning in current use ("to drive

89. *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.

90. 1951 Geneva Convention relating to the Status of Refugees.

away from a place"; see *Khlaifia and Others v. Italy*[91], and *Hirsi Jamaa and Others v. Italy*[92]). It further specified that this term refers to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or asylum-seeker or his or her conduct when crossing the border. It is also of interest that the Grand Chamber confirmed the relevance of the recent judgments in *Hirsi Jamaa and Others* (cited above), *Sharifi and Others v. Italy and Greece*[93] and *Khlaifia and Others* (cited above), concerning applicants who had attempted to enter a State's territory by sea, to the circumstances of the instant case, refusing to adopt a different interpretation of the term "expulsion" in the context of an attempt to cross a national border by land as in the present case. It follows from this case-law that Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions. The Grand Chamber concluded that the applicants, who were within Spain's jurisdiction when forcibly removed from its territory by members of the Civil Guard, had been subjected to an "expulsion" within the meaning of Article 4 of Protocol No. 4, which provision was therefore applicable.

(ii) The Grand Chamber then turned to the extent of the protection to be afforded under Article 4 of Protocol No. 4 to applicants, such as those in the present case, whose conduct created "a clearly disruptive situation which is difficult to control and endangers public safety". It decided to apply the principle drawn from the Court's well-established case-law according to which there is no violation of this provision if the lack of an individual expulsion decision can be attributed to the applicant's own conduct (see *Khlaifia and Others*, cited above, § 240; *Hirsi Jamaa and Others*, cited above, § 184; *M.A. v. Cyprus*[94]; *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*[95]; and *Dritsas and Others v. Italy*[96]). It also developed a two-tier test for the assessment of complaints in this particular context. In the first place, the Court considered it important to take account of whether the respondent State in a particular case has provided genuine and effective access to a means of legal entry, in particular border procedures. Such means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3, under conditions which ensure that the application is processed in a manner consistent with international norms, including the Convention. Secondly, where the respondent State has provided such access but an applicant has not made use of it, the Court will consider, in the context of the case and without prejudice to the application of Articles 2 and 3, whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible. Only the absence of such cogent reasons preventing the use of these procedures could lead to this being regarded as the consequence of the applicants' own conduct, justifying the lack of individual identification.

Significantly, the Grand Chamber emphasised that where appropriate arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons (as specified above), to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in the present case, by taking advantage of the fact that there was a large number of them and using force in the context of an operation that had been planned in advance.

In the instant case, the Grand Chamber was satisfied that Spanish law afforded the applicants several possible means of seeking admission to the national territory, in particular at the Beni Enzar border crossing point. On the facts, it was not persuaded that the applicants had demonstrated the required cogent reasons for not using it, which was sufficient of itself to conclude that there had been no breach of Article 4 of Protocol No. 4.

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91. *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 243, 15 December 2016.

92. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 174, ECHR 2012.

93. *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014.

94. *M.A. v. Cyprus*, no. 41872/10, § 247, ECHR 2013.

95. *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, ECHR 2005-VIII.

96. *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011.

The Grand Chamber also took note of the applicants' unexplained failure to apply to Spanish embassies or consulates in their countries of origin or transit, or in Morocco.

M.K. and Others v. Poland[97] may usefully be compared to that in *N.D. and N.T. v. Spain*[98]. In the present case, the applicants, who had an arguable claim under Article 3, presented themselves at the border checkpoints and tried to enter the respondent State in a legal manner by making use of the procedure to submit an asylum application that should have been available to them under domestic law. Even though they were interviewed individually by the border guards and received individual decisions refusing them entry into Poland, the Court considered that their statements concerning their wish to apply for asylum had been disregarded and that the decisions they were issued did not properly reflect the reasons given by the applicants to justify their fear of persecution. Moreover, the applicants were not allowed to consult lawyers and were even denied access to lawyers who were present at the border checkpoint. The Court concluded that the decisions refusing the present applicants entry to Poland had not been taken with proper regard to their individual situations and were part of a wider policy of refusing to lodge asylum applications from persons presenting themselves at the Polish-Belarusian border and of returning those persons to Belarus.

PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS (ARTICLE 1 OF PROTOCOL No. 7)

The judgment in *Muhammad and Muhammad v. Romania*[99] concerned an expulsion on national-security grounds which was based on classified information that was not disclosed to the applicants.

The applicants, who were Pakistani nationals living in Romania on student visas, were deported on national-security grounds. They did not have access to the classified documents on which that decision was based and neither were they provided with any specific information as to the underlying facts and grounds for deportation.

The Grand Chamber found a breach of Article 1 of Protocol No. 7, concluding that the applicants had suffered a significant limitation of their right to be informed of the factual elements submitted in support of their expulsion and of the content of the relevant documents, a limitation which had not been counterbalanced in the domestic proceedings.

The judgment is noteworthy in three respects. In the first place, it clarifies whether and to what extent the right to be informed of the reasons for expulsion and the right to have access to documents in the case file are protected by Article 1 of Protocol No. 7. Secondly, it clarifies the extent to which limitations of these rights are permissible. Thirdly, the judgment outlines the methodology to be followed in assessing such limitations.

(i) As to the right to be informed of the reasons for expulsion, while the Court had not addressed the necessity of the disclosure of such reasons in previous cases, it had always found fault with a failure to provide any information in this respect to the alien concerned (*Lupsa v. Romania*[100]; *Kaushal and Others v. Bulgaria*[101]; *Baltaji v. Bulgaria*[102]; and *Ljatifi v. the former Yugoslav Republic of Macedonia*[103]). In the present case, the Court clarified that the provision of such information is limited to that which is essential to ensure the effective exercise by the alien of the right, enshrined in Article 1 § 1 (a) of Protocol No. 7, to submit reasons against his or her expulsion, that is, to the *relevant factual elements* which have led the domestic authorities to believe that the alien represents a threat to national security. As to a right of access to documents in the case file (not enshrined as such in the case-law to date), the Court delimited the scope of any such right by requiring that the alien concerned be informed, preferably in writing and in any event in a manner allowing an effective defence, of the *content of the documents and the information in the case file* relied upon by the competent authority when

97. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See under Article 3 (Prohibition of torture and inhuman or degrading treatment and punishment – Expulsion) above.

98. *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.

99. *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.

100. *Lupsa v. Romania*, no. 10337/04, ECHR 2006-VII.

101. *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010.

102. *Baltaji v. Bulgaria*, no. 12919/04, 12 July 2011.

103. *Ljatifi v. the former Yugoslav Republic of Macedonia*, no. 19017/16, 17 May 2018.

deciding on his or her expulsion, without prejudice to the possibility of imposing duly justified limitations on such information if necessary.

(ii) The above procedural rights of the alien not being absolute, the Court set a threshold not to be exceeded by any limitations: such restrictions must not negate the procedural protection guaranteed by Article 1 of Protocol No. 7 by impairing the very essence of the safeguards enshrined in it, such as the right of the alien to submit reasons against his or her expulsion and the protection against any arbitrariness.

(iii) While the scope of the alien's procedural rights is of a more limited nature compared to that of the corresponding safeguards under Articles 5 and 6 (*Regner v. the Czech Republic*[104]; *Jasper v. the United Kingdom*[105]; *Schatschaschwili v. Germany*[106]; and *Ibrahim and Others v. the United Kingdom*[107]), the Court drew inspiration from that case-law to develop its methodology for assessing whether limitations of the procedural rights are compatible with Article 1 § 1 of Protocol No. 7. The Court will therefore apply a two-prong test to establish, in the first place, whether the impugned limitations have been found to be duly justified by the competent independent authority in the light of the particular circumstances of the case; and, secondly, whether the resulting difficulties for the alien have been sufficiently compensated for by counterbalancing factors, including by procedural safeguards. Accordingly, the lack of an examination, or an insufficient examination, of the need for the impugned limitations will not automatically entail a violation of Article 1 of Protocol No. 7, but will call for a stricter scrutiny of the counterbalancing factors by the Court: the more cursory the domestic examination, the stricter the Court's scrutiny. Two further guiding principles are relevant: the more the information available to the alien is limited, the more the safeguards will be important; and when the circumstances of a case reveal particularly significant repercussions for the alien's situation, the counterbalancing safeguards must be strengthened accordingly.

(a) As to the first part of the above two-prong test, the Court set out the requirements the domestic assessment of whether the limitation was imposed for "*duly justified reasons*" must satisfy (compare, for example, with the "compelling reasons" required in *Ibrahim and Others*, cited above, and *Beuze v. Belgium*[108], and the "good reasons" required in *Schatschaschwili*, cited above). In the first place, such an assessment should weigh up the relevant competing interests and be surrounded by safeguards against arbitrariness, including the need for the relevant decision to be duly reasoned and for a procedure allowing such reasons to be properly scrutinised, particularly if not disclosed to the alien concerned. Secondly, it should be entrusted to an authority, judicial or not, which is independent from the executive body seeking to impose the limitation. In this regard, weight is to be attached to the scope of the remit of that authority as well as to the powers vested in it: in this latter respect, it should be ascertained whether that authority would be entitled to declassify the relevant documents itself or to ask the competent body to do so.

(b) As to the second part of the above two-prong test, the Court provided a non-exhaustive list of counterbalancing factors:

(i) *relevance of the information disclosed to the alien* – in particular, whether an independent authority, judicial or otherwise, determined what factual information could be disclosed; whether it was provided at a stage of the proceedings when it was still possible to challenge it; and whether it concerned the substance of the accusations (a mere enumeration of the numbers of legal provisions cannot suffice in this respect, not even *a minima*);

(ii) *information as to the conduct of the proceedings and the domestic counterbalancing mechanisms* – whether the required information was provided at least at key stages in the proceedings, especially if aliens are not represented and domestic rules impose a certain expedition;

(iii) *access to representation in the course of the proceedings*, and whether the representative had access to classified documents and was able to communicate with the alien after consulting them;

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104. *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017.

105. *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000.

106. *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015.

107. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016.

108. *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018.

(iv) *involvement of an independent authority in the proceedings to adopt or review the expulsion measure* – in particular, whether it had access to the classified documents; whether it had the power, and duly exercised it, to verify the authenticity, credibility and veracity of those documents and, if need be, to annul or amend the expulsion decision; whether the nature and the degree of the scrutiny applied are apparent, at least summarily, in the reasoning of its decision; whether the applicant was able to effectively challenge before it the allegations against him or her, it being understood that judicial scrutiny, especially by superior courts, will in principle have a greater counterbalancing effect than an administrative one. Article 1 of Protocol No. 7 does not necessarily require that all of these questions be answered cumulatively in the affirmative.

ARTICLE 1 OF PROTOCOL No. 16

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16[109] to the Convention, the Court delivered its advisory opinion[110] on 29 May 2020. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions. The Court further developed some aspects of its case-law relating to Article 7 of the Convention.

In this its second advisory opinion under Protocol No. 16, the Court, prompted by two specific features of the present request, has further defined the scope of its opinions.

In the first place, since the Court considered the questions to be at least in part broad and general, it reiterated that its opinions must be confined to issues directly connected to the pending domestic proceedings, inferring therefrom the power to reformulate and combine the submitted questions having regard to the specific factual and legal circumstances in issue in the domestic proceedings. It also clarified that the panel's decision to accept the request as a whole could neither deprive the Court of the possibility of employing the full range of the powers conferred upon it, including in relation to the Court's jurisdiction, nor preclude the Court itself from assessing (on the basis of the request, the observations received and all the other material before it) whether each of the submitted questions fulfilled the requirements of Article 1 of Protocol No. 16.

Secondly, a particular feature of the present request was the preliminary nature of the proceedings before the Constitutional Court, so that the relevant facts had not yet been the subject of domestic judicial determination. In accordance with the principle of subsidiarity, the Grand Chamber proceeded on the basis of the facts provided by the Constitutional Court and indicated that its opinion should inform the Constitutional Court's interpretation of domestic law in the light of the Convention; this interpretation should then be applied by the first-instance court to the concrete facts of the case.

109. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

110. Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020.

OTHER CONVENTION PROVISIONS

INTER-STATE CASES (ARTICLE 33)

Slovenia v. Croatia[111] concerned the Court's jurisdiction to examine an inter-State application alleging a violation of Convention rights of a legal entity which did not qualify as "non-governmental" for the purposes of Article 34 of the Convention.

The Slovenian Government lodged an inter-State application (Article 33 of the Convention) against the Croatian Government, alleging a series of violations of the Convention rights of Ljubljana Bank, a legal entity nationalised by the Slovenian State after its declaration of independence from the former Yugoslavia and currently controlled by the Succession Fund, a Slovenian government agency. The Grand Chamber decided that Article 33 does not empower the Court to examine inter-State applications aimed at protecting the rights of entities which cannot be regarded as "non-governmental". The Court lacked therefore jurisdiction to take cognisance of the application.

It did so for essentially three reasons. In the first place, the Grand Chamber applied the general principle according to which the Convention must be read as a whole and construed in such a way as to promote internal consistency between its provisions – including the jurisdictional and procedural provisions such as Articles 33 and 34 of the Convention. This implied that the meaning and scope of "non-governmental organisation" had to be the same for the purposes of both of these provisions. Secondly, the Grand Chamber took into account the specific nature of the Convention as a human rights treaty, universally recognised in international law. It observed that even in an inter-State case, it is always the individual who is directly or indirectly harmed and primarily "injured" by a violation of the Convention. In other words, only individuals, groups of individuals and legal entities which qualified as "non-governmental organisations" could be bearers of rights under the Convention, but not a Contracting State or any legal entity belonging to it. Thirdly, the Grand Chamber drew a logical conclusion from the principle defined in the just satisfaction judgment in *Cyprus v. Turkey*[112] according to which any just satisfaction afforded in an inter- State case must always be for the benefit of individual victims and not for the benefit of the State. If therefore the Court found a violation in an inter-State case brought on behalf of a "governmental" organisation, then the eventual beneficiary of any sum awarded under Article 41 would be the applicant State only. In the present case, the Grand Chamber saw no reason to depart from the findings of the Chamber in the decision in *Ljubljanska banka d.d.*[113], according to which the bank did not constitute a "non-governmental organisation" for the purposes of Article 34 of the Convention. Consequently, the applicant Government were not entitled to lodge an inter-State application with a view to protecting its interests.

111. *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, 18 November 2020. See also under Articles 33 and 34 (Applicability – Victim status) above.

112. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

113 *Ljubljanska banka d.d. v. Croatia* (dec.), no. 29003/07, 12 May 2015.

INTER-AMERICAN COURT OF HUMAN RIGHTS

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PRESENTATION

This 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.

Pablo Saavedra Alessandri

Registrar of the Inter-American
Court of Human Rights

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"[1]. 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"[2].

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"[3].

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[4].

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[5].

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[6]. 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"[7]. 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[8].

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[9].

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[10].

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[11].

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[12].

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"[13].

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[14].

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"[15].

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.[16]

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"[17].

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[18].

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[19].

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[20].

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[21].

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

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[23].

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[24].

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[25].

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[26].

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[27].

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[28].

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[29].

In the case of *Olivares 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[30]. 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[31].

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)[32].

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.[33]

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[34].

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[35].

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[36].

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[37]. In addition, not all cases of sexual violence or rape cause physical injuries or diseases that can be verified by a medical examination[38].

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[39]. In this specific case, the Court found that the intentionality and the severity of the suffering had been proved[40]. 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[41].

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[42]

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[43].

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[44].

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."[45]

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[46]. 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.[47]

DEPRIVATION OF LIBERTY FOR DISCRIMINATORY REASONS RELATED TO RACIAL PROFILING

In the case of *Acosta Martinez* 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[48].

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.[49]

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 discretional 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."[50]

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.[51]

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.[52]

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.[53]

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.[54]

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.[55]

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.[56]

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.[57]

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.[58]

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.[59]

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.[60]

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[61].

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[62].

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[63].

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"[64].

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[65].

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[66].

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[67].

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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[68].

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[69].

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[70].

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[71].

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[72].

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[73].

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[74].

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"[75], 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"[76].

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[77].

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[78].

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[79].

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[80].

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[81]:

> 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[82].

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[83]. 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[84].

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[85].

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[86].

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[87].

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[88].

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[89].

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)[90].

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*[91].

91. Ibid., para. 89.

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[92].

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[93].

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 Sawhoyamaxa 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[94].

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."[95] 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[96].

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[97].

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[98].

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"[99].

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[100].

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"[101]. 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]"[102]. 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"[103].

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[104].

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"[105].

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[106]. 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[107].

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[108].

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[109].

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[110]:

> 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[111].

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"[112].

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[113].

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[114]. 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)[115].

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[116]. 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[117].

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[118].

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[119].

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[120].

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"[121]. 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"[122].

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[123].

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[124].

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[125].

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[126].

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[127].

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"[128].

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"[129].

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[130].

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[131].

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[132].

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" [133].

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[134].

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[135]. 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[136].

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[137].

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[138].

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[139].

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[140].

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[141].

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[142].

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[143].

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[144].

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.

COVID-19 AND MIGRANTS

In its order on provisional measures in the case of *Vélez Loor 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[145].

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[146].

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 Loor 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[147].

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[148].

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[149].

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[150].

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[151].

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[152]. 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[153].

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[154].

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[155];

(2) definitive denunciation of the American Convention produces no retroactive effects[156];

(3) the validity of the obligations established through ratification of other inter-American human rights treaties remains in place[157];

(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[158];

(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[159], 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[160].

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*[161].

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 [162].

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 [163].

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[164].

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[165].

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[166].

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"[167].

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[168].

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[169].

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[170].

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[171].

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"[172].

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[173].

173. Ibid., para. 172.

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