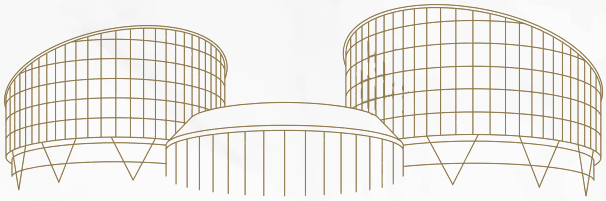
AFRICAN COURT
ON HUMAN AND PEOPLES' RIGHTS

JOINT LAW REPORT



EUROPEAN COURT
OF HUMAN RIGHTS

INTER-AMERICAN COURT
OF HUMAN RIGHTS

2021

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

COUNCIL OF EUROPE
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2021 JOINT LAW REPORT

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EUROPEAN COURT OF HUMAN RIGHTS

INTER-AMERICAN COURT OF HUMAN RIGHTS

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Foreword

In 2021, the COVID-19 global pandemic had far-reaching implications for the protection of human rights. Despite the medical inventions and efforts driven by states to deal with its effects on the most vulnerable populations, it continued throughout that year largely unabated. In that context, the three International Courts on Human Rights faced diverse challenges with a huge responsibility: to be a lighthouse for those people who require protection of their rights and freedoms.

Given these extraordinary circumstances, it became more important than ever for our three Courts to uphold their regular cooperation and dialogue, as envisioned in the San José and Kampala Declarations from 2018 and 2019, respectively. Consequently, on June 20, 2022, the Secretariats of the Inter-American Court of Human Rights and of the African Court of Human and Peoples' Rights, as well as the Department for the Execution of Judgments of the European Court of Human Rights and the Department for Complaints and Urgent Appeals of the Office of the United Nations High Commissioner for Human Rights held a virtual working meeting. During this meeting, they discussed the monitoring of compliance with the Decisions of International Human Rights Courts and Organs. Moreover, on May 18-19th 2023, the Third Edition of the International Human Rights Forum took place, where the three regional courts demonstrated that even though they have different geographical mandates and particularities, they share the same goal of the effective protection of human rights.

The three courts are pleased to present the Third Joint Law Report for the year 2021. This Report follows the same format as the previous ones, divided into three chapters, one for each Court. Each chapter highlights major cases that represent new standards or innovative case-law developments during the year, 2021.

The purpose of this Joint Law Report is to highlight the points of convergence between the three international courts as well as certain points of divergence, so that an open dialogue can be maintained between them. Once again, in accordance with the principle of progressive realization of human rights, it is clear that the values of human rights, democracy and the rule of law, safeguarded by the three regional human rights courts, are as, if not more, important than ever before.

Judge Imani Daud Aboud

President of the African Court of Human and Peoples' Rights

Judge Síofra O'Leary

President of the European Court of Human Rights

Judge Ricardo E. Pérez Manrique

President of the Inter-American Court of Human Rights

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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Presentation

2021 was an eventful year for the African Court on Human and Peoples' Rights (African Court). It elected its second female President, Honourable Lady Justice Imani D. Aboud. It also adopted a new Strategic Plan (2021-2025) which seeks to leverage technological advancements and procedural innovations, to guide its operations and increase its efficiency for the next five (5) years. Furthermore, the African Court held its first International Conference on the Implementation and Impact of Decisions of the Court.

As regards its judicial activities, the African Court delivered sixty-four (64) decisions which include nineteen (19) decisions on merits and reparations and five (5) judgments on reparations only.

The African Court's contribution to the Third Edition of the Tri-Courts Law Report features three (3) cases, relating to: non-implementation of a previous judgment; personal jurisdiction and exhaustion of local remedies.

On the non-implementation of a previous judgment of the African Court, in the Matter of *Ajavon v. Republic of Benin,* (Judgment of 29 March 2021), the Court decided that, the applicant had *locus standi* to seize the Court, and also that its prior Order on provisional measures and Judgment of 29 March 2109 had not been implemented. Therefore, it found a violation of Article 30 of the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which obligates States Parties' to the Protocol to comply with the judgment of the Court in cases which they are parties.

On exhaustion of local remedies, the African Court held in *Ghaby Khodeih v. Republic of Benin,* (Ruling of 30 September 2021), that the applicant had not exhausted local remedies because he filed his application before the African Court while his appeals were pending both at the national court and at the Common Court of Justice and Arbitration (CCJA). In this regard, the Court held that applicants from countries which are parties to the Treaty on the Harmonization of Business Law in Africa (OHADA Treaty) are obligated to appeal to the CCJA as a Court of final resort before seizing the Court as required by the OHADA Treaty.

Lastly, on personal jurisdiction, the African Court decided in the case of *Confédération Syndicale des Travailleurs du Mali v. Mali,* (Ruling of 25 June 2021), that it did not have personal jurisdiction to consider applications filed by trade unions. The African Court noted that trade unions are not recognized under the Protocol and do not fall in the category of non-governmental organizations which are recognized under Article 5(3) of the Protocol.

With these three cases, the African Court clarified important principles relating to implementation of its decisions, the requirement of exhaustion of the remedy of appeal to the CCJA and on the standing of trade unions before the Court.

Dr Robert W Eno
Registrar, African Court on Human and Peoples' Rights

Case of Confédération Syndicale des Travailleurs du Mali (CSTM) v. Republic of Mali – Application No. 003/2017

(JUDGMENT OF JUNE 25, 2021)

FACTS OF THE MATTER

On 6 April 2017, the Confédération syndicale des travailleurs du Mali (CSTM) (hereinafter, the Applicant) filed an Application before the African Court against the Republic of Mali (hereinafter, Respondent State).

The Applicant which is a group of affiliated trade unions averred that since it was founded in 1998, it had been excluded from the Economic, Cultural and Social Council (ECSC) of Mali; even though according to the Constitution of the Respondent State, the said ECSC must be composed of representatives of state entities as well as trade unions.

The Applicant stated that in order to assert its rights, it brought a case against the President of the Republic of Mali before the Supreme Court of the Respondent State for abuse of power through its exclusion by Decree from the membership of the ECSC. It further argued that the Supreme Court vacated the said Decree by judgment No. 76 of 15 August 2002.

The Applicant submitted that subsequent to this decision, Decree No. 04-415/PRM of 23 September 2004 established a list of members of the ECSC and, once again, excluded it, thereby compelling it to file an appeal before the Supreme Court for abuse of power. By judgment No. 135 of 16 August 2007, the Supreme Court upheld the appeal.

ALLEGED VIOLATION

The Applicant alleged a violation of Article 7 of the African Charter on Human and Peoples' Rights.

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

The Applicant prayed the Court to:

- Declare that it has jurisdiction;
- Declare the application admissible;
- Find a violation of Article 7 of the Charter;
- Find and rule that it should be included as a member of the ECSC;
- Order the Respondent State to pay him the sum of One Billion (1,000,000,000) CFA francs as reparation for its exclusion from joint and tripartite bodies, namely the National Employment Agency (NEA), the National Health Insurance Fund (NHIF), the National Social Welfare Institute (NSWI) and the Vocational Training Support Fund (VTSF);
- Order the Respondent State to pay the sum of six hundred and forty-eight Million (648,000,000) CFA francs as arrears in respect of subvention of the joint bodies; and
- Order the Respondent State to make it member of the said bodies.

The Respondent State on its part prayed the Court to:

- Declare that it lacks jurisdiction ratione personae insofar as the Applicant is not an NGO with observer status before the Commission;
- Declare the Application inadmissible; and
- Dismiss the Applicant's prayers as unfounded.

With regard to the objection to its jurisdiction *ratione personae*, the Court recalled the provision of Article 5(3) of the Protocol, under which individuals and NGOs with observer status before the Commission may submit an application to it against a State Party which has deposited the Declaration of acceptance of jurisdiction.

The Court noted that the Applicant itself acknowledged that it is not an NGO with observer status before the Commission. It further noted that the request to confer on the Applicant the identity of natural persons cannot be granted since the rights alleged in the Application are inherent to nature of the Applicant as a trade union and not those of natural persons.

Consequently, the Court declared that it had no jurisdiction.

Case of Sébastien Germain Marie Aïkoué AJAVON v. Republic of Benin - Application No. 065/2019

(JUDGMENT OF MARCH 29, 2021)

FACTS OF THE MATTER

On 29 November 2022, Sébastien Germain Marie Aïkoué AJAVON (the Applicant) filed an Application before the African Court on Human and Peoples' Rights (the Court) against the Republic of Benin (the Respondent State).

The Applicant submitted that the African Court had issued a Ruling on provisional measures on 7 December 2018, a Judgment on the merits on 29 March 2019 and a Judgment on reparations on 28 November 2019 in his favour in a case between him and the Respondent State, He claimed that the Respondent State had failed to implement the decisions and that the failure to implement resulted in several violations of his human rights.

ALLEGED VIOLATIONS

The Applicant alleged the violation of the following rights and obligations:

- The right to non-discrimination and equal protection of the law, protected by Article 2 and 3 (2) of the Charter;
- The right to a fair trial, protected by Article 7 of the Charter;
- The right to property, protected by Article 14 of the Charter;
- The right to participate freely in the conduct of the public affairs of one's country and to hold public office, protected by Article 13 (1) and (2) of the Charter;
- The obligation to abide by the decisions of this Court, provided for in Article 30 of the Protocol;
- The obligation to ensure that the constitutional amendment process is based on national consensus including, if necessary, recourse to a referendum, as provided for in Article 10(2) of the African Charter on Democracy, Elections and Governance ("ACDEG"); and
- The obligation to adopt legislative or other measures for the implementation of the rights, duties and freedoms set out in the Charter, as provided for in Article 1 of the Charter.

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

The Applicant prayed the Court to:

- Declare that it has jurisdiction;
- Declare the application admissible;
- Find that the decisions of the African Court of 7 December 2018 and 29 March 2019 have not been enforced;

- Find a violation of the Applicant's right to non-discrimination and equal protection of the law;
- Find a violation of the Applicant's right to a fair trial;
- Find a violation of the Applicant's right to property;
- Find a violation of the Applicant's right to participate freely in the conduct of public affairs and to hold public office in his country;
- Find a violation by the State of Benin of its obligation to guarantee the effective realization of the rights enumerated in the Charter;
- Accordingly, find that the Applicant's fundamental rights were violated;
- Find that the Applicant's fundamental rights were violated;
- Find that the violations committed against the Applicant caused him immeasurable harm deserving reparation;
- Award him the sum of Three Hundred Billion (300,000,000,000) CFA francs as reparation;
- Order the Respondent State to remove impediments to the implementation of the decisions of the African Court;
- Order the State of Benin to bear the costs;
- Order an expert appraisal by a reputable firm of the prejudice suffered by the Applicant as a result of the non-implementation of the Provisional Measures Order of 7 December 2018 and the judgment on the merits of 29 March 2019 delivered by the African Court at the Respondent State's expense.

The Respondent State on its part prayed the Court to:

- Find that the African Court is not the judge of the implementation of its own decisions;
- Find, that it lacks jurisdiction to consider whether a State Party has complied with its obligations under one of its judgments;
- Accordingly, declare that it has no jurisdiction;
- Find that between the date of the decision and the request for implementation, a period of six (6) months had not elapsed;
- Consequently, declare the application inadmissible for being filed prematurely;
- Find that the Applicant seeks a condemnation of the State of Benin in respect of the facts which are the subject of Application No. 013/2017 dismissed by this Court;
- Find that the Court's judgments on the merits of 29 March and 28 November 2019 are final;
- Consequently, declare the Application inadmissible;
- Hold that the Applicant has filed multiple applications as part of political propaganda;
- Declare the Application inadmissible for abuse of process;
- Find that the Applicant is not a victim within the meaning of the Rules of Court and the Charter;
- Find that the Applicant brings an action for breach of contract;
- Declare the application inadmissible;

In the alternative, the Respondent State requested the Court to:

- Find that the Applicant does not challenge a violation;
- Find that the Application is ill-founded;
- Find that the State did not commit any fault causing damage to the Applicant;
- Find that the Applicant does not prove the alleged material injury caused by the State;
- Find that the State did not commit any fault warranting reparation;
- Find that there are no grounds for reparations;
- Find that the Applicant has brought an abusive and vexatious action;
- Find that the Applicant could not have been unaware of the res judicata effect of the present proceedings;
- Find that the Applicant has exposed the State to a risk of conviction; and
- Order, in the alternative, the Applicant to pay the State the sum of One Billion (1,000,000,000) CFA francs for damages.

With regard to the objection to jurisdiction *ratione materiae* based on the fact that the dispute relates to the interpretation or application of Article 30 of the Protocol, under which States undertake to comply with the

decisions of the Court, the Court recalled that its jurisdiction derived from Article 3 of the Protocol, which empowers it to apply and interpret the provisions of the Protocol, including Article 30 thereof. It thus rejected the objection to jurisdiction. It further noted that the other aspects of its jurisdiction were established.

Accordingly, the Court held that it had jurisdiction to determine the Appication.

On the other hand, the Court rejected the objections to admissibility based on the premature nature of the action, the Applicant's lack of standing as a victim, the abuse of process and the lack of interest in bringing the action.

Regarding the objection on the need for victimhood, the Court emphasised that neither the Charter, the Protocol nor the Rules of Court, required the Applicant to be the victim of the violations alleged. As regards abuse of process, the Court noted that this could only be established after examination of the case on the merits. With regard to the lack of interest to file the case, the Court emphasised that the Respondent State based its claim on the provisions applicable before the ECOWAS Court of Justice and not before the African Court. It further considered that in any event, the failure to implement the Ruling of 7 December 2018 and the Judgment of 29 March 2019 constitute sufficient grounds for the Applicant's interest to act. Finally, with regard to the objection to admissibility based on *res judicata*, the Court recalled that it has consistently held that this principle presupposes that three requirements have been met, namely, identical parties, identical claims and the existence of a first decision on the merits. The Court noted that the claims in this case were not identical to the claims in the decisions that it had delivered, which made it unnecessary to examine the other requirements.

The Court then examined the other admissibility requirements and found that they were met.

On the merits, the Court examined the alleged violations of the right to non-discrimination and equal protection of the law, the right to a fair trial, as well as the right to participate freely in the public affairs of one's country and the right of access to public service. The Court underscored that all these allegations related in one way or another to the alleged violation of Article 30 of the Protocol, which enshrines the binding nature of the Court's decisions. This alleged violation was submitted to the Court for the first time.

Having recalled the content of the text, the Court noted that the terms "decisions" in the French version of the Protocol and "judgment" in the English version of the Protocol were to be understood as referring to any act of a judicial nature, which included orders on provisional measures and judgments.

The Court noted, in relation to the decisions between the same parties, namely, the provisional measures Ruling of 7 December 2018 and the judgment of 29 March 2019, that the Respondent State did not submit any report, neither did it dispute that it did not execute them. The Court inferred that the Respondent State violated Article 30 of the Protocol.

In addition, the Court declared moot the alleged violation of Article 10(2) of the African Charter on Democracy and Governance which requires that any constitutional review be done on the basis of national consensus. The Court adopted the same position in the judgment of 4 December 2020 in Application No. 003/2020 Houngue Eric Noudehouenou v. Republic of Benin.

Moreover, the Court found a violation of Article 1 of the Charter by reason of the violation of Article 30 of the Protocol, since the latter supplements the Charter.

On the issue of reparations, the Court rejected the request for an expert opinion, noting that the Applicant failed to demonstrate that the matter was so technical as to warrant an expert opinion.

The Court also rejected the claims for pecuniary reparation on the ground that there was no causal link

between the alleged harm and the violation of Article 30 of the Protocol. As regards non-pecuniary damage, it awarded the Applicant the symbolic franc. The Court considered that this provision alone was sufficient for the Respondent State to remove all impediments to the enforcement of its decisions.

Finally, the Court dismissed the request for payment of the sum of One Billion (1,000,000,000) CFA francs as a counterclaim, noting that the Applicant did not abuse the right to bring proceedings, as some of his claims were favourably received.

Ghaby Kodeih V. Republic of Benin

JUDGMENT OF 30 SEPTEMBER 2021

FACTS OF THE MATTER

On 14 February 2020, Mr. Ghaby Kodeih (the Applicant) filed an application with the African Court on Human and Peoples' Rights (the Court) against the State of Benin (the Respondent State) for violation of rights in connection with legal proceedings initiated against *Société d'Hôtellerie, de Restauration et de Loisirs* (SHRL), of which he is the sole shareholder and General manager.

The Applicant averred that he founded SHRL for the purpose of constructing a five (5)-star hotel. The hotel was to be financed by a consortium of African banks including *Société Générale de Banque au Bénin* (SGB). He averred that by notarial deed of 13 November and 16 December 2014, the banking consortium concluded a credit agreement with SHRL for a total amount of Eleven Billion, Nine Hundred Million CFA Francs (11,900,000,000), with an additional clause dated 27 and 28 February 2017 which provided for collateral for the facility in the form of a Land Title No. 14140 of the Lands Register of Cotonou, property of the borrowing company.

He averred that, subsequently, SGB unilaterally terminated the agreement and demanded from the latter the payment of the sum of Fourteen Billion Seven Hundred Forty-Nine Million Four Hundred Twenty-Five Thousand and Eight (14 749 425 008) CFA Francs. Furthermore, SGB initiated legal proceedings for the sale of the collateral building, before the Commercial Court of Cotonou (Benin).

The Applicant stated that on 19 December 2019, the Commercial Court rendered, in first and last instance, Judgement No. 14/19/CSI/TTC ordering the said building be sold on 30 January 2020, on which date the building was sold to SGB for the sum of Seven Billion (7,000,000,000) CFA Francs.

ALLEGED VIOLATIONS

The Applicant alleged that the Respondent State violated:

- The right to a fair trial, provided for in Article 7(1)(a)(d) of the Charter,
- The right to property, provided for in Article 14 of the Charter.

SUBMISSIONS OF THE PARTIES AND THE POSITION OF THE COURT

This judgment develops the Court's jurisprudence with regard to the exhaustion of local remedies. It recognised, for the first time, that remedies established under conventions and before some supranational jurisdictions can be considered as local remedies. Thus, although it is a supranational remedy in itself, the remedy before the OHADA Court of Justice and Arbitration must be considered as an ordinary and effective local remedy within the meaning of the Charter, insofar as the States concerned have ceded cassation jurisdiction to the said regional jurisdiction.

ADMISSIBILITY: THE APPLICANT MUST EXHAUST TREATY REMEDIES AND REMEDIES BEFORE SUPRANATIONAL COURTS

The Respondent State raised an objection to the admissibility of the Application based on non-exhaustion of local remedies. It argued that the Applicant did not exhaust available local remedies insofar as he seized the African Court on 14 February 2020, that is, before the Court of Appeal had ruled on his appeal of 31 December 2019 against the judgement of 19 December 2019. The Respondent State further averred that the Applicant also appealed against the same judgement to the Common Court of Justice and Arbitration (CCJA) on 26 February 2020, that is, after seizing this Court.

In reply, the Applicant argued that he was not required to exhaust the remedies insofar as the appeal before the CCJA is not a domestic, ordinary and effective remedy. It therefore considered that the objection raised should be dismissed.

On the local nature of the Appeal

The Court noted that the expression "local remedies" applies to all the judicial means provided for in the internal legal order of the State that allows for the full examination of a case. It is therefore a question of implementing, in a comprehensive manner, all the judicial avenues provided for by domestic legislation.

The Court noted in the present case that no specific procedure is required in order to incorporate the provisions of the Treaty on the Harmonization of Business Law in Africa (OHADA Treaty) into the domestic law of States. The rules contained therein apply as common rules. The Court further observed that Article 14 of the OHADA Treaty establishes the CCJA, a jurisdiction common to seventeen (17) States, as the Court of cassation to hear all decisions rendered by the Courts of Appeal of the State Parties in all cases raising issues relating to the application of business law but also non-appealable decisions rendered by any court of the States Parties.

The Court noted that the CCJA has exclusive jurisdiction over the interpretation and application of matters governed by the OHADA treaty and replaces not only national supreme courts with regard to cassation appeals in matters governed by the OHADA treaty, but also decisions of national substantive courts by virtue of its original jurisdiction.

The Court therefore concluded that the CCJA is incorporated in the judicial order of the Respondent State and that, consequently, the cassation appeal before the CCJA constituted a local remedy.

On the ordinary nature of the appeal

The Court observed that the cassation appeal before the CCJA is the only remedy available against decisions on appeal and non-appealable judgments rendered in matters governed by the OHADA treaty. In addition, the Rules of Procedure before the CCJA provide for limited extraordinary remedies, namely, third-party opposition and review, which excludes the right of appeal. The Court concludes that the cassation appeal before the CCJA is an ordinary appeal.

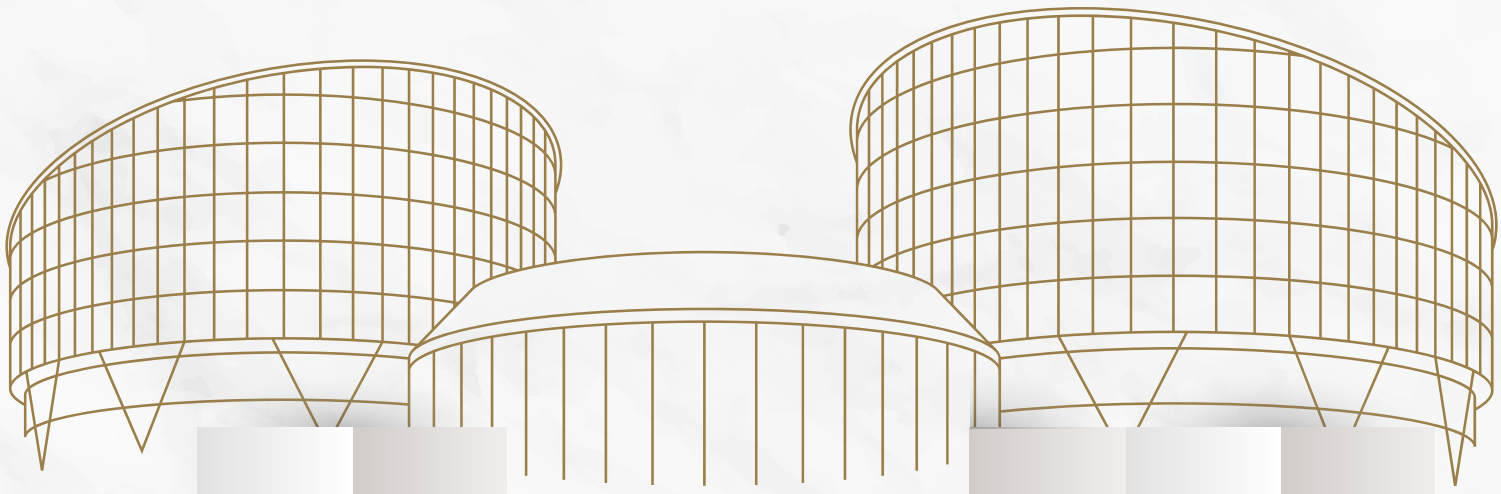
The Court recalled that the requirement of exhaustion of local remedies is assessed, in principle, at the date of filing an application before it. The Court further stated that compliance with this requirement presupposes that the Applicant not only initiates local remedies but also awaits their outcome before filing his Application with the Court.

On the effectiveness of the remedy

The Court noted that, in accordance with Article 14 (3) and (5) of the OHADA Treaty, the CCJA rules on decisions in all cases raising issues relating to the OHADA treaty. This original jurisdiction of the CCJA

attests, if need be, that the cassation appeal is an effective remedy since it can lead to reversal of the contested decision. In the present case, there was no doubt *a priori* as to the ultimate capacity of the CCJA to bring about a change in the situation of the Applicant on the merits of the case, should it have found violations of the law in the manner the case was handled by the court whose judgment is being challenged. The Court concluded thus, that the cassation appeal before the CCJA is an ordinary appeal. Accordingly, the Court declared the Application inadmissible for non-exhaustion of local remedies.

EUROPEAN COURT OF HUMAN RIGHTS



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Presentation

The year 2021 was an eventful one for the European Court of Human Rights. It followed the close in 2020 of the Interlaken Process reforming the Convention system and enhancing its performance. As a result of the reforms, the volume of cases pending before the Court was reduced from 160,000 in 2011 to 70,000 at the end of 2021. However, 2021 also saw the arrival of a new paradigm. Building on and strengthening the priority policy which it had adopted in 2009 and amended in 2017, the Court decided to put in place a new, more targeted case-processing strategy aimed at dealing with potentially well-founded "impact" cases, namely cases which did not fit into the "priority cases" category but which raised very important issues of relevance for the State in question and/or the Convention system as a whole and therefore justified more expeditious case-processing. To date, approximately 650 cases have been so identified on the basis of flexible guiding criteria as well as a list of examples. The criteria have been defined as follows: the conclusion of the case might lead to a change or clarification of international or domestic legislation or practice; the case touches upon moral or social issues; the case deals with an emerging or otherwise significant human rights issue. If any of these criteria are met, the Court may take into account whether the case has had significant media coverage domestically and/or is politically sensitive.

There were also many other major reforms in 2021. Firstly, Protocol No. 15 came into force, incorporating an explicit reference to the principles of subsidiarity and the margin of appreciation into the Preamble to the Convention. Secondly, it was decided that, for a two-year trial period, three-judge Committee drafts would be much more concise. This new short format for judgments and decisions is aimed at reducing the Court's backlog and complements the Court's strategy concerning "impact" case strategy. There was also an update, which came into force on 1 September 2021, to the Court's 2008 resolution on judicial ethics. The new text modernises the original resolution by addressing more contemporary issues such as judicial expression on social media. It sets out a series of principles regarding integrity, independence and impartiality, together with diligence and competence, discretion and confidentiality.

The following chapter summarises the most important developments in the Court's case-law during the year.

In 2021 the Grand Chamber addressed many novel legal issues, such as extraterritorial jurisdiction in a situation of international armed conflict (*Georgia v. Russia (II)*); the positive obligations that have to be fulfilled by member States under the Convention in the contexts of threat to life (*Kurt v. Austria*), human trafficking (*X and Others v. Bulgaria*) and sexual assault (*V.C.L. and A.N. v. the United Kingdom*); the margin of appreciation afforded to States in imposing mandatory vaccination requirements to protect school children against common infectious diseases (*Vavřička and Others v. the Czech Republic*); and the safeguards to be put in place to protect against abuse in the bulk interception and collection of communications data (*Centrum för rättvisa v. Sweden*, and *Big Brother Watch and Others v. the United Kingdom*).

I am delighted that the three regional human rights courts are continuing their cooperation with this third annual case-law report, which I am confident will be of the utmost benefit to legal scholars and practitioners alike.

Marialena Tsirli
Registrar of the European Court of Human Rights

Summary

In 2021 the Grand Chamber delivered twelve judgments, one of which in an inter-State case, and a decision concerning an inter-State case. It also ruled, for the first time, on a request for an advisory opinion under the Council of Europe Convention on Human Rights and Biomedecine (the Oviedo Convention); the Grand Chamber panel also delivered its first decision to refuse a request for an opinion under Protocol No. 16 to the European Convention on Human Rights (the Convention).

Under Article 1 the Grand Chamber clarified its case-law on extraterritorial jurisdiction, in respect of an attacking State in an international armed conflict, for acts committed in the State that was attacked and then invaded (*Georgia v. Russia (II)*). In connection with a military operation led by the United Nations, in *Hanan v. Germany* the Court examined whether the respondent State had a procedural obligation to carry out an effective investigation after a member of its armed forces had ordered a fatal air-strike on foreign soil (Articles 1 and 2). In *Kurt v. Austria* the Court consolidated, both generally and in the specific context of domestic violence (Article 2), the positive obligation of States to preventively take operational measures to protect an individual whose life is threatened by the criminal acts of others, in a case concerning a child killed by his father. As to minors taken into public care, in *X and Others v. Bulgaria* it set out the State's positive obligations in response to allegations of sexual assault. In *Savran v. Denmark* the Court clarified its case-law on the expulsion of an alien suffering from a severe mental illness (Article 3). Under Article 5, in *Denis and Irvine v. Belgium* the Court addressed the confinement of criminals with mental illnesses who have been found to lack criminal responsibility for their acts. In the fields of private life, beliefs and health, the judgment in *Vavřička and Others v. the Czech Republic* addressed the statutory duty to vaccinate schoolchildren against common infectious diseases (Articles 8 and 9), emphasising in particular the obligation of States to place the best interests of children, as a group, at the centre of all decisions affecting their health and development. Addressing the present-day means of surveillance of cross-border communications, the Grand Chamber set out fundamental safeguards against abuse in the bulk interception and collection of communications data and in the reception by a member State of data from foreign intelligence services (*Centrum för rättvisa v. Sweden*, and *Big Brother Watch and Others v. the United Kingdom*, Articles 8 and 10). In the field of immigration control, the Court ruled on the imposition of a waiting time for the access of aliens to family reunion (*M.A. v. Denmark*). Under Article 8, read in the light of Article 9, the Court ruled on a child's adoption by a foster family practising a different religion from that of the biological mother, who wanted her son to be raised in line with her own religious beliefs (*Abdi Ibrahim v. Norway*). The Court also ruled on the novel question of the COVID-19 "health pass" and vaccination (*Zambrano v. France*).

In response to two requests for an advisory opinion, one under Protocol No. 16 to the Convention, the other under the Oviedo Convention, the Court had occasion to clarify the nature, scope and limits of its advisory jurisdiction. It emphasised that the purpose of the Protocol No. 16 procedure was to reinforce the implementation of the Convention in respect of cases pending before national courts, in accordance with the principle of subsidiarity.

The Court emphasised the positive obligation of States to protect victims of human trafficking when criminal proceedings are brought against them (*V.C.L. and A.N. v. the United Kingdom*, Articles 4 and 6). In the context of the COVID-19 pandemic, it examined for the first time whether a national general lockdown measure on grounds of health protection constituted a "deprivation of liberty" within the meaning of Article 5 § 1 (*Terheş v. Romania*). It also ruled on the foreseeability, under Article 7, of the conviction of a prison officer who had given information about the prison to a journalist in exchange for money (*Norman v. the United Kingdom*).

Furthermore, the Court looked into the conformity of autopsies in public hospitals and the extraction of

internal organs with the right to respect for the private life and religious beliefs of the deceased's close relatives (*Polat v. Austria*). As to freedom of expression (Article 10), new jurisprudential developments covered, in the past year, included access by intelligence services engaged in bulk data interception to confidential information about the activity of journalists (*Big Brother Watch and Others v. the United Kingdom*), and the scope of the concept of a journalist's "source" as regards comments posted on a news website (*Standard Verlagsgesellschaft mbH v. Austria (no. 3)*).

Under Article 11 the Court ruled for the first time on the possibility for working prisoners to form or join a trade union (*Yakut Republican Trade-Union Federation v. Russia*). As regards the prohibition of discrimination, the Court clarified the response required of the domestic authorities under Articles 3 and 14 to homophobic violence (*Sabalić v. Croatia*).

In its case-law, the Court considered the interactions between the Convention, on the one hand, and European Union law and the case-law of the Court of Justice of the European Union (CJEU), on the other, in cases concerning, among other things, conditions of family reunion (*M.A. v. Denmark*), and the European arrest warrant and the presumption of "equivalent protection" in the European legal order as established in the *Bosphorus v Ireland* judgment (*Bivolaru and Moldovan v. France*).

In various cases the Court also noted the interactions between the Convention and international/European law (for example, in *Ukraine v. Russia (re Crimea)*, *Vavřička and Others*), in areas including international humanitarian law (*Georgia v. Russia (II)*, *Hanan*), domestic violence (*Kurt*), journalists (*Standard Verlagsgesellschaft mbH*), the United Nations Convention on the Rights of the Child (*Abdi Ibrahim*), the Council of Europe Conventions on the protection of children against sexual exploitation and abuse (*X and Others v. Bulgaria*), the prevention of human trafficking (*V.C.L. and A.N. v. the United Kingdom*), or human rights and biomedicine (request for advisory opinion). The Court also provided clarification on the methodology to be used in cases where there seems, at first sight, to be a conflict between Convention law and international humanitarian law (*Georgia v. Russia (II)*).

It should also be noted that once again this year in many areas the Court developed its case-law on the positive obligations that have to be fulfilled by member States under the Convention.

Lastly, in a year marked by the entry into force of Protocol No. 15 to the Convention, introducing in particular a reference to the margin of appreciation doctrine into the Convention's Preamble, the Court ruled on the breadth of the margin that should be afforded to States Parties to the Convention, for example in the area of health (*Vavřička and Others*), bulk surveillance of cross-border communications (*Big Brother Watch and Others*, *Centrum för rättvisa*), access to family reunion for aliens (*M.A. v. Denmark*), and the rights of working prisoners (*Yakut Republican Trade-Union Federation*). In this connection, in leading judgments the Court examined whether or not there was a consensus in the Council of Europe States as to the question raised by the application (for example, *Vavřička and Others*, *M.A. v. Denmark*, *Abdi Ibrahim*, *Yakut Republican Trade-Union Federation*).

Jurisdiction and admissibility

JURISDICTION OF STATES (ARTICLE 1)

The judgment in *Georgia v. Russia (II)*[1] concerned the jurisdiction of the attacking or invading State during the active combat phase of hostilities. In this inter-State application (Article 33), the Georgian Government made a series of complaints concerning the armed conflict between Russia and Georgia in August 2008. The Court examined two phases of the impugned events separately, namely before and after the ceasefire agreement of 12 August 2008. It held that the events which occurred during the active phase of the hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, whereas the events which occurred after the ceasefire and the cessation of the hostilities did fall within its jurisdiction. This Grand Chamber judgment is novel in that it clarifies the issue of jurisdiction in the context of an armed conflict: for the purposes of Article 1 of the Convention, military personnel and the civilian population of a country cannot be considered as falling within the "jurisdiction" of an attacking or invading State during the active combat phase of the hostilities (as distinct from the later phase of "military occupation").

(i) This is the first case, since the decision in *Banković and Others v. Belgium and Others*[2], in which the Court has examined the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict. The Grand Chamber did so in the light of two existing lines of case-law: on the one hand, the exceptional recognition of extraterritorial jurisdiction based on "effective control" by the State of an area and/or on "State agent authority and control" over the direct victim of the alleged violation (*Al-Skeini and Others v. the United Kingdom*[3]); and, on the other hand, the general principle of *Banković and Others*, cited above, according to which the provisions of Article 1 do not admit of a mere "cause and effect" notion of "jurisdiction" so that a State's responsibility cannot be engaged by an "instantaneous extraterritorial act" (explicitly restated in *Medvedyev and Others v. France*[4]; see also *M.N. and Others v. Belgium*[5]). It also found that neither of the two conditions of extraterritorial jurisdiction (State agent authority and control over individuals or effective control over an area) are met in the case of military operations carried out during an international armed conflict. The reality of fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no actual "control" either over that area or over the individuals therein. This interpretation is confirmed by the practice of the member States in not derogating under Article 15 in situations where they have engaged in an international armed conflict outside their own territory. Having regard to the fact that such situations are predominantly regulated by legal norms other than those of the Convention (namely, international humanitarian law) and that the Contracting Parties have not endowed the Court with the necessary legal basis for assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, the Grand Chamber concluded that it could not develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date. Accordingly, the events of the active phase of hostilities fell outside the "jurisdiction" of the respondent State for the purposes of Article 1 of the Convention.

(ii) Nevertheless, the Grand Chamber held that the respondent State had to be deemed to have had "jurisdiction" in respect of the complaint under the procedural limb of Article 2 of the Convention, even in respect of deaths which took place during the active phase of the military conflict. The Grand Chamber followed

1 Georgia v. Russia (II) [GC], no. 38263/08, 21 January 2021.
2 Banković and Others v. Belgium and Others (dec.) [GC], no. 52207/99, ECHR 2001-XII.
3 Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, §§ 133-40, ECHR 2011.
4 Medvedyev and Others v. France [GC], no. 3394/03, § 64, ECHR 2010.
5 M.N. and Others v. Belgium (dec.) [GC], no. 3599/18, § 112, 5 May 2020.

the case-law set out in *Güzelyurtlu and Others v. Cyprus and Turkey*[6], according to which a jurisdictional link to the obligation to investigate under Article 2 may be established if the respondent State has begun an investigation or proceedings in accordance with its domestic law in respect of a death which has occurred outside its jurisdiction or if there were "special features" in a given case. In the present situation, both of these conditions had been met: the fact that the Russian Federation had an obligation to investigate the events in issue in accordance with the relevant rules of international humanitarian law, that it had established "effective control" over the territories in question shortly after the hostilities and that Georgia had been prevented from carrying out an adequate and effective investigation into the allegations all constituted "special features" sufficient to establish Russia's jurisdiction in respect of this specific complaint.

(iii) In accordance with the Court's case-law (for example, *AlSkeini and Others*, cited above, §§ 138 and 142, with further references), from the time when a State exercises "effective control" over a foreign territory, it is also responsible for the actions of separatist forces (which, in the present case, included irregular militias) and internationally unrecognised authorities supported by it in those territories, without it being necessary to provide proof of "detailed control" of each of those actions.

ADMISSIBILITY (ARTICLE 35)

Abuse of the right of application (Article 35 § 3 (a))

The decision in *Zambrano v. France*[7] is noteworthy in that the Court was dealing with an unprecedented situation: a purely activist petition lodged by an individual who had caused a massive influx of identical applications through an Internet campaign, with the declared intention of "paralysing" the Court's operations. While the Court found that this application represented an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention, it also considered it essential, in the specific circumstances of this case, to examine other grounds of inadmissibility. In finding an abuse of the right of individual application in this unprecedented situation, the Court noted that the objective pursued by the applicant, expressed in unambiguous terms, was not to win his case in the context of the normal exercise of this right, but to deliberately seek to undermine the Convention system and the functioning of the Court. His approach, in attempting to artificially create mass litigation, was manifestly contrary to the purpose of the right of individual application and, more generally, to the spirit of the Convention and the objectives pursued by it. The Court thus drew a clear dividing line between a massive influx of applications such as those pursuing the objective set by the applicant and the mass litigation which it has already been dealing with for nearly two decades, arising out of different structural or systemic problems in the Contracting States. The Court emphasised in this connection that, in spite of the constant pressure created by the latter type of litigation, it sought to ensure the long-term effectiveness of the human rights protection system set up by the Convention, while maintaining the right of individual application, the cornerstone of this system, and access to justice.

In this connection, the Court referred to Article 17, the provisions of which were also intended to protect the Convention mechanism (see *Lawless v. Ireland (no. 3)*[8]). The Court's conclusions in the present case, seen in the light of the applicant's approach, were therefore driven by a concern to maintain its ability to fulfil its mission under Article 19 in relation to other applications, lodged by other applicants, which met the criteria for allocation to judicial formations and, prima facie, the admissibility conditions, including that of not abusing the right of application.

6 Güzelyurtlu and Others v. Cyprus and Turkey [GC], no. 36925/07, §§ 188-90, 29 January 2019.
7 Zambrano v. France (dec.), no. 41994/21, 21 September 2021.
8 Lawless v. Ireland (no. 3), 1 July 1961, pp. 45-46, § 7, Series A no. 3.

"Core" rights

RIGHT TO LIFE (ARTICLE 2)

Obligation to protect life

The judgment in *Kurt v. Austria*[9] concerned the scope and content of the Osman positive operational (substantive) obligation in the context of domestic violence. In 2011 the applicant's husband was convicted of causing her bodily harm: a barring order was made against him, with which he complied.

In 2012 the applicant filed for divorce and reported her husband to the police for rape, domestic violence (including slapping their children) and dangerous threats. On the same day, criminal proceedings were opened against him and a new fourteen-day barring order was made against him that prohibited him from returning to their home and the surrounding areas. His keys were seized. Three days later, he shot their son at school and committed suicide. The applicant unsuccessfully brought official liability proceedings, claiming that her husband should have been held in pre-trial detention.

The Grand Chamber found no violation of Article 2. The Grand Chamber judgment is noteworthy in that it clarifies the scope, and develops the content, of the Osman positive obligation (to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, *Osman v. the United Kingdom*[10]) both generally and in the specific context of domestic violence.

(i) Regarding the content of the Osman positive obligation taken generally, the Court for the first time specified that the assessment of the nature and level of risk constituted an integral part of the duty to take preventive operational measures. It followed that an examination of the State's compliance with Article 2 under the Osman test had to comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggering the duty to act was or ought to have been identified, the adequacy of the preventive measures taken. As to the scope of the Osman positive obligation, the Court clarified that it was an obligation of means, not of result. Thus, in circumstances where the competent authorities have responded to the identified real and immediate risk by taking appropriate measures within their powers, the fact that such measures may nonetheless fail to achieve the desired result is not in itself capable of justifying the finding of a violation of the State's preventive operational obligation under Article 2. Furthermore, a given case in which a real and immediate risk materialised had to be assessed from the point of view of what was known to the competent authorities at the relevant time.

(ii) The Court then proceeded to clarify what this meant for the application of the Osman test, taking account of the specific context and dynamics of domestic violence. Regarding the first limb of this test (risk), the Court reiterated that the authorities' response to any such allegations must be immediate and marked by special diligence. Relying on the submissions of GREVIO (the independent expert body responsible for monitoring the implementation of the Istanbul Convention), the Court went on to outline some requirements for the risk assessment in this context, notably an autonomous and practical approach, comprehensiveness, basic documenting of the conduct of the risk assessment, providing information to the victims on the outcome of the risk assessment and available legal and operational protective measures, and taking due account of the particular context of domestic violence cases, their special features and the ways in which they differ from Osman-type incident-based situations.

As to the second limb of the Osman test (measures), the Court developed some requirements relating to

9 Kurt v. Austria [GC], no. 62903/15, 15 June 2021.
10 Osman v. the United Kingdom, 28 October 1998, § 115, Reports of Judgments and Decisions 1998-VIII.

preventive operational measures, namely that such measures must be adequate and proportionate to the level of the risk assessed, that there needs to be coordination among multiple authorities, and that there also needs to be a careful weighing of the competing rights at stake and other relevant constraints at both general policy and individual level.

On the facts of the instant case, the Court found no issue with the domestic assessment, which had identified no real and immediate lethal risk to the children, but only a certain level of non-lethal risk in the context of the domestic violence primarily targeting their mother. The measures ordered were considered to have been adequate to contain that risk, and no obligation arose to take further measures, whether in private or public spaces, such as issuing a barring order for their school.

Effective investigation

Hanan v. Germany[11] concerned the existence of a "jurisdictional link" and the procedural obligation under Article 2 to investigate an airstrike (UN Security Council multinational military operation), and any impact of international humanitarian law (IHL) on the requirements of an effective investigation of deaths during extraterritorial active hostilities.

On 4 September 2009 a German Colonel K. (acting in an International Security Assistance Force (ISAF) under a mandate given under Chapter VII of the UN Charter), ordered an airstrike against two fuel tankers which had been hijacked by Taliban insurgents in Afghanistan, killing and injuring both insurgents and civilians. A German prosecutor began and then discontinued an investigation on the basis of a lack of grounds for the criminal liability of Colonel K. (or the Staff Sergeant assisting): liability under the Code of Crimes against International Law was excluded because Colonel K. did not have the necessary intent; and liability under the Criminal Code was excluded because the lawfulness of the airstrike under international law served as an exculpatory defence. The applicant complained under Article 2 about a lack of an effective investigation into the airstrike that killed, *inter alios*, his two sons and that he had not had an effective remedy to challenge the decision to discontinue the investigation. The Grand Chamber found that there were "special features" triggering the existence of a "jurisdictional link" in relation to the procedural obligation to investigate under Article 2 and, on the merits, found no violation of Article 2 since the investigation had complied with the requirements of that Article.

The Grand Chamber judgment is noteworthy in two respects. It develops the "jurisdictional link" case-law as regards the obligation to investigate under Article 2 as regards deaths occurring during active hostilities in an extraterritorial armed conflict. In addition, it clarifies the requirements of such an investigation where the Government invoke IHL as the *lex specialis* before the Court.

(i) The Grand Chamber first examined the existence of a "jurisdictional link", in relation to the Article 2 obligation to investigate, for the purposes of Article 1 on the basis of the principles set out in *Güzelyurtlu and Others*, cited above, §§ 188-90.

(ii) Since there was no substantive normative conflict in respect of the requirements of an effective investigation under the applicable rules of IHL and under Article 2 of the Convention (see also *Georgia v. Russia (II)*, cited above, § 325), the Grand Chamber did not have to address whether the requirements, allowing it to take account of the context and rules of IHL when interpreting and applying the Convention in the absence of a formal derogation under Article 15, were met and it confined itself to an analysis of compliance with its case-law under Article 2. In this regard, the Grand Chamber considered that the challenges for and constraints on the investigation authorities, given that the deaths occurred during active hostilities in an (extraterritorial) armed conflict, affected the investigation as a whole so that the standards to be applied to

11 Hanan v. Germany [GC], no. 4871/16, 16 February 2021.

the investigation conducted by the civilian prosecution authorities in Germany should be guided by those established in respect of investigations into deaths in an extraterritorial armed conflict (*Al-Skeini and Others*, cited above, §§ 163-67, and *Jaloud v. the Netherlands*[12]). On the facts of the case, the Grand Chamber found that the investigation by the German authorities complied with these requirements. The cause of death of the applicant's sons and the person(s) responsible for it were known and the facts surrounding the airstrike, including the decision-making and target verification process, had been established in a thorough and reliable manner to determine the legality of the use of force. The Federal Prosecutor General's assessment of Colonel K.'s potential criminal liability was primarily based on Colonel K.'s subjective assessment at the time of ordering the airstrike and his account (he had operated on the assumption that no civilians were present) was credible and corroborated by evidence that had been immediately secured and could not be tampered with (audio recordings of the relevant radio traffic and thermal images from infrared cameras). Lastly, since the Federal Constitutional Court, which had expressly found that the Federal Prosecutor General's investigation had complied with the standards of Article 2, would have been able to set aside the discontinuation decision, the Grand Chamber considered that the applicant had at his disposal a remedy to challenge the effectiveness of the investigation.

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

Inhuman or degrading treatment

Bivolaru and Moldovan v. France[13] concerned the surrender of the applicants under European arrest warrants (EAWs), the Bosphorus presumption of equivalent protection and a systemic problem of conditions of detention in the State which issued the arrest warrants.

The Romanian authorities issued EAWs in respect of each of the applicants, who were in France at the material time, so that they would serve their custodial sentences in Romania. The applicants unsuccessfully argued before the French courts that their surrender would breach Article 3 of the Convention. They were subsequently surrendered to Romania. The Court found a violation of Article 3 in respect of one applicant (Mr Moldovan), finding that the French authorities had had sufficient evidence before them that there was a real risk that he would be exposed to inhuman and degrading treatment because of the detention conditions he would face in Romania, and no violation of Article 3 in respect of the other applicant.

The judgment is noteworthy for two reasons. In the first place, the Court found that the presumption of equivalent protection in the legal system of the European Union applied to the surrender of the applicants in execution of EAWs (developing thereby its case-law on the margin of manoeuvre open to States), and it also found for the first time that presumption to have been rebutted because the protection of Convention rights was considered to have been manifestly deficient in the particular circumstances of one of the applicants' case. Secondly, the case is interesting in that it addresses how an executing judicial authority is to approach the assessment of an individualised real risk of treatment contrary to Article 3 in the case of a systemic problem (conditions of detention) in the State issuing the EAW as well as the corresponding obligation on an applicant to substantiate such risk.

(i) The Court first examined whether the presumption of equivalent protection in the legal system of the European Union (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[14], and *Avotiņš v. Latvia*[15]) applied in this context. The application of that presumption is subject to two conditions: the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of

12 Jaloud v. the Netherlands [GC], no. 47708/08, § 186, ECHR 2014.
13 Bivolaru and Moldovan v. France, nos. 40324/16 and 12623/17, 25 March 2021.
14 Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, ECHR 2005-VI.
15 Avotiņš v. Latvia [GC], no. 17502/07, 23 May 2016.

the supervisory mechanism provided for by European Union law. In respect of the first condition, the Court noted that the case-law of the CJEU on the execution of EAWs (see *Aranyosi and Căldăraru*[16]) authorised the executing judicial authority, in exceptional circumstances, to derogate from the principles of mutual trust and mutual recognition and to postpone or even refuse the execution of an EAW. The Court also noted the convergence – as regards the establishment by the executing judicial authority of a real and individual risk – of the requirements laid down by the CJEU and by its own case-law on Article 3. While the French courts therefore had a power of appreciation (to refuse to execute the EAW in the event of their finding such a real and individual risk of treatment contrary to Article 3), this power was exercised within the framework strictly defined by CJEU case-law to ensure the execution of a legal obligation in full compliance with European Union law. In these circumstances, the Court found that the executing judicial authority could not be regarded as having had an autonomous margin of manoeuvre, which could lead to the non-application of the presumption of equivalent protection. Since the second condition was also satisfied (there was no serious difficulty which could have made necessary a request to the CJEU for a preliminary ruling), the presumption of equivalent protection applied in the present case.

(ii) As to whether that presumption had been rebutted because the protection of Convention rights was manifestly deficient in the particular circumstances of the case, the Court examined whether the executing judicial authority had had sufficient factual information before it to find that the execution of the EAW would entail a real and individual risk that the applicants would be exposed to treatment contrary to Article 3 in view of the conditions of their detention in Romania.

The Court considered that the executing judicial authority had had sufficient factual information to recognise the existence of a real risk that the applicant would be exposed to inhuman and degrading treatment because of the conditions of his detention in Romania. In the first place, the Court found that the information provided by the Romanian authorities had not been sufficiently considered in the light of this Court's case-law concerning the endemic overcrowding of, and insufficient personal space in, Gherla Prison (for example, *Axinte v. Romania*[17], delivered prior to the applicants' surrender, and the pilot judgment in *Rezmiveş and Others v. Romania*[18], delivered after). The executing judicial authority had had information relating to the personal space reserved for the applicant that gave rise to a strong presumption of a violation of Article 3. Secondly, the Romanian authorities' commitments in relation to other aspects of the conditions in Gherla Prison (which would have been capable of excluding a real risk of an Article 3 violation) had been formulated in a stereotypical manner and these commitments had not been taken into account in the risk assessment. Thirdly, the recommendation by the executing judicial authority that he be detained in a prison offering identical or better conditions (the Romanian authorities had not ruled out that the applicant would be detained in a prison other than Gherla), was not sufficient to rule out a real risk of inhuman and degrading treatment: it did not allow for a risk assessment in respect of a specific prison and the evidence attested to systemic deficiencies as regards the conditions of detention in prisons in the receiving State. The Court therefore found that the presumption of equivalent protection had been rebutted in Mr Moldovan's case because the protection of Convention rights was manifestly deficient in the particular circumstances of his case. It concluded that there had been a violation of Article 3 in respect of him.

(b) By contrast, the Court found that Mr Bivolaru had not made sufficiently detailed and substantiated submissions before the executing judicial authority about the detention conditions he would face in Romania in the event of his surrender. In such circumstances, it was not incumbent on the executing judicial authority to request supplementary information from the Romanian authorities in order to identify whether he would have faced a relevant real and individual risk of treatment contrary to Article 3 because of the conditions of his detention. The Court concluded that the executing judicial authority did not have a solid factual basis to

16 Judgment of the Court of Justice of the European Union of 5 April 2016 in Aranyosi and Căldăraru, C-404/15 and C-659/15, EU:C:2016:198.
17 Axinte v. Romania, no. 24044/12, 22 April 2014.
18 Rezmiveş and Others v. Romania, nos. 61467/12 and 3 others, 25 April 2017.

determine that there was a real risk of a violation of Article 3 as regards Mr Bivolaru or, therefore, to refuse to execute the warrant on that basis. There had, therefore, been no violation of Article 3 in relation to this applicant.

Positive obligations

X and Others v. Bulgaria[19] concerned the States' positive obligations as regards allegations of sexual abuse of minors in public care, and their procedural obligations which are to be interpreted in the light of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the "Lanzarote Convention").

The applicants, three siblings born in Bulgaria, were adopted by an Italian couple. Shortly thereafter the children gave accounts to their adoptive parents of their sexual abuse while in an orphanage in Bulgaria. The parents lodged complaints with the Italian authorities who transmitted them to the Bulgarian authorities. They also contacted an Italian investigative journalist, who published an article alleging large-scale sexual abuse of children in the orphanage which received media attention in Bulgaria. Investigations were opened in Bulgaria: all were discontinued for lack of evidence that a criminal offence had been committed. The Grand Chamber considered that the complaints should be examined under Article 3 of the Convention only and it went on to find no violation of the substantive limb of this provision and a violation of its procedural (investigation) limb. This Grand Chamber judgment is noteworthy because it clarifies the content of the positive obligations on a State in the context of sexual abuse of minors in public care. (i) As to the positive obligations under the substantive limb of Article 3, the Grand Chamber, relying on *O'Keeffe v. Ireland*[20] and *Nencheva and Others v. Bulgaria*[21] (an Article 2 case), reiterated that States had a heightened duty of protection towards children placed in public care, as they were in a particularly vulnerable situation. In this respect, the judgment makes a clear distinction between, on the one hand, an obligation to put in place a legislative and regulatory framework of protection and, on the other, an obligation to take operational measures to protect specific individuals, in certain well-defined circumstances, against a risk of ill-treatment. In the instant case:

The manner in which the *regulatory framework* (including relevant criminal-law provisions, as well as reporting and detection mechanisms) had been implemented did not give rise to a violation of Article 3. In particular, and importantly, no systemic issue concerning the sexual abuse of young children in residential facilities had been established, such as to require more stringent measures on the part of the authorities.

Since the applicants had been placed in the sole charge of the public authorities, the obligation on the latter to take preventive operational measures was heightened and required them to exercise particular vigilance. However, having applied the test set out in *Osman*, cited above, § 115, the Grand Chamber found that its first limb was not established: there was insufficient information to find that the Bulgarian authorities had known, or ought to have known, of a real and immediate risk to the applicants of being subjected to ill-treatment, such as to give rise to the above obligation to protect them against such a risk.

(ii) As regards the procedural obligation under Article 3 to carry out an effective investigation into arguable allegations of child sexual abuse, the Grand Chamber made two key clarifications concerning its scope and content:

- In the first place, such a procedural obligation must be interpreted in the light of obligations arising from applicable international instruments and, more specifically, the Lanzarote Convention.
- Secondly, by analogy with its case-law under Article 2 (Güzelyurtlu and Others, cited above), and

19 X and Others v. Bulgaria [GC], no. 22457/16, 2 February 2021.
20 O'Keeffe v. Ireland [GC], no. 35810/09, ECHR 2014 (extracts).
21 Nencheva and Others v. Bulgaria, no. 48609/06, 18 June 2013.

> referring to the Lanzarote Convention, the Grand Chamber considered the duty to cooperate with the authorities of another State to be a component of the procedural obligation under Article 3 in abuse cases with a transnational context such as the present one.

From this standpoint, the Grand Chamber considered that the Bulgarian investigating authorities – who had not made use of the available investigation and international cooperation mechanisms – had not taken all reasonable measures to shed light on the facts and had not undertaken a full and careful analysis of the evidence before them. In particular, they had not attempted to contact the applicants' (adoptive) parents in order to provide them with the necessary information and support in good time, so as to enable them to take an active part in the various proceedings. The Bulgarian authorities had also failed to assess the need to request interviews with the applicants and their parents, had not requested that the applicants undergo a medical examination, and had failed to consider a progressive and proportionate implementation of investigative measures of a more covert nature.

In sum, the omissions observed were sufficiently serious for the Grand Chamber to consider that the investigation had not been effective for the purposes of Article 3, interpreted in the light of other applicable international instruments and, in particular, the Lanzarote Convention.

Expulsion

Savran v. Denmark[22] concerned the expulsion of a seriously ill alien and the need to apply the threshold test set out in Paposhvili v. Belgium[23] to ascertain the applicability of Article 3.

The applicant, a Turkish national diagnosed with paranoid schizophrenia, entered Denmark in 1991 (when he was six years old). Although he was convicted of an offence in 2008, the competent court exempted him from punishment because of his mental illness, committed him to forensic psychiatric care and issued an expulsion order (with a permanent ban on re-entry). In 2014 the City Court of Copenhagen held that, regardless of the nature and gravity of the crime committed, the applicant's health made it conclusively inappropriate to enforce the expulsion order. In 2015 that decision was reversed by the High Court and he was deported to Turkey.

The applicant complained about his expulsion under Articles 3 and 8 of the Convention. The Grand Chamber applied the Paposhvili criteria and found no violation of Article 3 since the treatment did not reach the high threshold required for it to fall within the scope of that Article. It found a violation of Article 8.

The Grand Chamber judgment is noteworthy in that the Court reaffirmed the standard and principles concerning Article 3, with regard to the expulsion of seriously ill aliens, as established in *Paposhvili* (cited above), clarifying thereby a number of issues: in the first place, the scope of the application of this standard; secondly, whether it is possible to assess the returning State's compliance with its obligations in this context without first ascertaining, with the help of the threshold test, the applicability of Article 3; thirdly, the relevance of the threshold test in the context of the removal of mentally ill aliens; fourthly, the manner in which this test is to be applied; and, lastly, the nature of the States' obligations in this domain.

(i) Noting that there had been no further development in the relevant case-law since the judgment in *Paposhvili*, the Court confirmed that it offered a comprehensive standard taking account of all the considerations that were relevant for the purposes of Article 3 of the Convention in this context.

(ii) The Court further clarified that the Paposhvili high threshold test should be applied systematically to ascertain whether the circumstances of the alien to be expelled fell within the scope of Article 3 of the Convention.

22 Savran v. Denmark [GC], no. 57467/15, 7 December 2021.
23 Paposhvili v. Belgium [GC], no. 41738/10, 13 December 2016.

(iii) The Court went on to confirm the relevance of the threshold test in the context of the removal of mentally ill aliens. Indeed, while referring to a "seriously ill person", the standard does not specify, and thus is not limited to, any specific category of illness and it may extend to any category, including mental illnesses, provided that the situation of the ill person is covered by the Paposhvili criteria taken as a whole. In so far as the test broadly refers to a wider concept of the "irreversibility" of the "decline in [a person's] state of health", it is capable of encompassing a multitude of factors, including the direct effects of an illness as well as its more remote consequences. More generally, in the Court's view, the standard is sufficiently flexible to be applied in all situations involving the removal of a seriously ill person which would constitute treatment proscribed by Article 3, irrespective of the nature of the illness.

(iv) The Court further proceeded to clarify the manner in which the threshold test is to be applied. In particular, the situation of the relevant ill person should be assessed on the basis of all the elements of the test taken together and viewed as a whole. It would indeed be wrong to dissociate its various fragments from each other: a "decline in health" is linked to "intense suffering".

(v) The Court also emphasised the procedural nature of a State's obligations in cases involving the expulsion of seriously ill aliens. The Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. It is therefore incumbent on the national authorities to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3 of the Convention.

On the facts of the case, the Court found that the applicant's removal to Turkey had not exposed him to a risk reaching the high threshold required for Article 3 to be applicable. Schizophrenia, though a serious mental illness, could not in itself be regarded as sufficient in this regard. While the worsening of his psychotic symptoms was likely to result in "aggressive behaviour" and "a significantly higher risk of offences against the person of others", those effects could not be described as "resulting in intense suffering" for the applicant himself. In particular, no risk had been shown of the applicant harming himself.

PROHIBITION OF SLAVERY AND FORCED LABOUR (ARTICLE 4)

V.C.L. and A.N. v. the United Kingdom[24] concerned the positive obligation to protect victims of trafficking (Article 4) and the impact on the fair trial of such victims (Article 6 § 1).

The applications were lodged by two Vietnamese men who, while still minors, were charged with – and subsequently pleaded guilty to – drug-related offences after they were discovered working as gardeners in cannabis factories in the United Kingdom. Following their convictions, they were recognised as victims of trafficking by the designated competent authority responsible for making decisions on whether a person has been trafficked for the purpose of exploitation: this authority identifies potential victims of modern slavery and ensures they receive the appropriate support. Although the prosecution service subsequently reviewed its decision to prosecute as a result of the authority's decision, it concluded that they were not victims of trafficking. The Court of Appeal subsequently considered whether the decision to prosecute was an abuse of process but found on the facts that the decision to prosecute had been justified. The applicants complained about their convictions under Articles 4 and 6 of the Convention and the Court found violations of both provisions.

The judgment is noteworthy because the Court for the first time (i) elaborated on the question whether, and in what circumstances, the prosecution of a victim, or potential victim, of trafficking raises an issue from the perspective of the States' positive obligations under Article 4 of the Convention, and (ii) whether, in this

24 V.C.L. and A.N. v. the United Kingdom, nos. 77587/12 and 74603/12, 16 February 2021. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Fairness of the proceedings) below.

context, a breach of the State's positive obligation under Article 4 could amount to the denial of a fair trial within the meaning of Article 6 § 1 of the Convention.

As to the State's positive obligation under Article 4 of the Convention, the Court reiterated that this obligation must be construed in the light of the Council of Europe Convention on Action against Trafficking in Human Beings ("the Anti-Trafficking Convention") and the manner in which it has been interpreted by the Group of Experts on Action against Trafficking in Human Beings (GRETA). In this connection, the Court had regard, in particular, to Article 26 of the Anti-Trafficking Convention, which requires Contracting States to provide for the possibility of not imposing penalties on victims of trafficking for their involvement in unlawful activities to the extent that they have been compelled to act as they did.

Against this background, the Court held that the prosecution of victims, or potential victims, of trafficking might, in certain circumstances, be at odds with the State's duty under Article 4 to take operational measures to protect them. The Court therefore stressed that the early identification of victims or potential victims of human trafficking was of paramount importance. In particular, as soon as the authorities are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence may have been trafficked or exploited, he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking. That assessment should be based on the criteria identified in the United Nations Palermo Protocol and the Anti-Trafficking Convention.

The Court also stressed that, given that an individual's status as a victim of trafficking might affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – in so far as possible – only be taken once a trafficking assessment has been carried out by a qualified person. Any subsequent prosecutorial decision would have to take that assessment into account. While the Court accepted that the prosecutor might not be bound by the findings made in the course of such a trafficking assessment (see *S.M. v. Croatia*[25], concerning the distinction between an administrative and criminal justice recognition of such victim status), he or she would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention for disagreeing with it.

On the facts of the cases, the Court found that despite the applicants being discovered in circumstances which indicated that they had been victims of trafficking, they had been charged with a criminal offence to which they pleaded guilty on the advice of their legal representatives, without their case first being assessed by the competent authority. Even though they were subsequently recognised by the competent authority as victims of trafficking, the prosecution service, without providing adequate reasons for its decision, disagreed with that assessment and the Court of Appeal, relying on the same inadequate reasons, found that the decision to prosecute was justified. The Court considered this to be contrary to the State's duty under Article 4 to take operational measures to protect the applicants, either initially as potential victims of trafficking or subsequently as persons recognised by the competent authority as being victims of trafficking.

RIGHT TO LIBERTY AND SECURITY (ARTICLE 5)

Deprivation of liberty (article 5 § 1)

The decision in Terheş v. Romania26 concerned whether Article 5 § 1 is applicable to a general lockdown imposed by the national authorities in the context of a pandemic.

25 S.M. v. Croatia [GC], no. 60561/14, § 322, 25 June 2020.
26 Terheş v. Romania (dec.), no. 49933/20, 13 April 2021.

On account of the COVID-19 pandemic, a state of emergency on public-health grounds was put in place throughout Romania. Citizens were prohibited from leaving their homes, on pain of a fine, except in exhaustively listed circumstances and with a document attesting to valid reasons. The applicant, who stated that he had not been infected with or in contact with the virus, complained under Article 5 § 1 (e) of the Convention that the fifty-two-day lockdown to which he had been subjected in these conditions amounted to a "deprivation of liberty". The Court held that Article 5 § 1 was not applicable and that there was thus no need to examine whether the measure in question had been justified under sub-paragraph (e) of that provision. It found that the degree of intensity of the restrictions on the applicant's freedom of movement had not been such that the general lockdown could be regarded as a deprivation of liberty. The decision is noteworthy as this is the first time that the Court has examined the applicability of Article 5 to the ordering of a national lockdown on public-health grounds. The decision was delivered five months after the lodging of the application, with the COVID-19 pandemic still ongoing. The Court acknowledged that the pandemic was liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an "exceptional and unforeseeable context". The decision is of interest in that it applies the general case-law principles (*Austin and Others v. the United Kingdom*[27], and *De Tommaso v. Italy*[28]) to the unprecedented context of this pandemic and to the specific circumstances of the case. It sets out considerations leading to the finding that the level of restrictions imposed on citizens' freedom of movement did not amount to a "deprivation of liberty" within the meaning of the Convention. In the present case the Court noted, firstly, that the measure had been a general one applicable to everyone in the country. Secondly, the applicant had been free to leave home for various reasons expressly set out in the legislation and could go to different places, at whatever time of day the situation required. Thirdly, he had not been subject to individual surveillance by the authorities and did not claim to have been forced to live in a cramped space, nor had he been deprived of all social contact. Hence the conditions of the lockdown could not be equated with house arrest amounting to a "deprivation of liberty" for the purposes of the Court's case-law. The Court also stressed the fact that the applicant had not claimed that, owing to the exhaustive list of reasons for leaving home provided for by the legislation, he had been confined to his home for the entire duration of the state of emergency. The application was therefore declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention. The Court added that, in the context of the COVID-19 pandemic, Romania had announced its intention to derogate under Article 15 of the Convention from the obligations flowing from Article 2 of Protocol No. 4 guaranteeing freedom of movement, a right which the applicant had not asserted before the Court. Given that Article 5 § 1 was not applicable in the present case, the Court also considered it unnecessary to examine the validity of the derogation notified to the Council of Europe by Romania (see the notifications by member States under Article 15 of the Convention in the context of the COVID-19 pandemic).

Confinement in psychiatric hospital without consent (article 5 § 1 (e))

The judgment in *Denis and Irvine v. Belgium*[29] pertained to the link between the offences committed by persons "of unsound mind" and the lawfulness of their ensuing compulsory confinement.

After committing, respectively, the offences of theft and attempted aggravated burglary, the applicants were found to lack criminal responsibility and were placed in compulsory confinement on account of their mental disorders. In 2016 a new law, the Compulsory Confinement Act, came into force, reserving compulsory confinement to the most serious categories of offences involving an assault on the "physical or mental

27 Austin and Others v. the United Kingdom [GC], nos. 39692/09 and 2 others, ECHR 2012.
28 De Tommaso v. Italy [GC], no. 43395/09, 23 February 2017.
29 Denis and Irvine v. Belgium [GC], nos. 62819/17 and 63921/17, 1 June 2021.

integrity" of third parties. The applicants applied for final discharge, arguing that the acts they had committed no longer fulfilled the conditions for confinement under the new law. Their applications were dismissed on the grounds that their mental disorders were not sufficiently stabilised and that they had not completed the three-year probationary period prescribed by the new law in order to benefit from final discharge.

The Grand Chamber found no violation of Article 5 §§ 1 (e) and 4.

The judgment is noteworthy in that the Grand Chamber clarified two issues with regard to the compulsory confinement of offenders with mental disorders. In the first place, the Court elucidated the link between the offences committed by persons "of unsound mind" and the lawfulness of their ensuing detention under Article 5 § 1 (e). Secondly, the Court indicated whether the requirement to complete a probationary period as a condition for discharge from compulsory confinement can in itself thwart the right, enshrined in Article 5 § 4, to obtain a judicial decision ordering the termination of detention if it is proved unlawful.

In order to resolve the question whether the lawfulness of the applicants' detention, based on final court orders, was affected by the intervening change in legislation whereby the specific acts which had led to their confinement no longer gave rise to the imposition of such a measure, the Court proceeded using a two-step approach.

In the first place, it analysed the manner in which the domestic courts had applied the new legislation in the applicants' cases and found that their approach, consistent with the legislature's intention as shown in the drafting history of the new law, was neither arbitrary nor manifestly unreasonable. Noting the two successive phases in the Belgian system of compulsory confinement (imposition and enforcement), the new legislation was considered to apply only to the enforcement phase, during which the detainees could request a change in practical arrangements or their discharge. Given that the applicants had not been granted final discharge, their confinement continued to be validly based on the court orders which, though issued under the previous legislation, maintained their binding force.

Secondly, the Court examined the compatibility of the domestic court's approach with Article 5 § 1 (e). It began by observing that this provision does not specify the possible acts, punishable under criminal law, for which an individual may be detained as being "of unsound mind". Nor does it identify the commission of a previous offence as a precondition for detention. Compulsory confinement was a security measure, the purpose of which was preventive rather than punitive.

The Court proceeded to find that all three of the minimum conditions for an individual to be validly detained as being of "unsound mind" (set out in *Winterwerp v. the Netherlands*[30]) had been satisfied in the present case: it had been reliably shown that the applicants were of unsound mind; that their mental disorders were of a kind or degree warranting compulsory confinement; and that the disorders persisted throughout the entire period of the confinement. As to this third and last condition, the Court reiterated that the assessment carried out by the domestic courts had to take into account any changes to the mental condition of the detainee following the adoption of the compulsory-confinement order and it did not require the authorities to take into account the nature of the acts committed by the individual concerned which had given rise to his or her compulsory confinement. In assessing the applicants' requests for final discharge, the competent authorities had considered whether their mental disorders had stabilised to a sufficient degree (and found they had not) and they did not take into account the nature of the punishable acts the applicants had committed. Accordingly, the applicants' confinement continued to have a valid legal basis, despite the legislative change in question, and was compatible with Article 5 § 1 (e) of the Convention.

30 Winterwerp v. the Netherlands, 24 October 1979, Series A no. 33.

Procedural rights

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

Fairness of the proceedings

V.C.L. and A.N., cited above, concerned the impact of the positive obligation (Article 4) to protect victims of trafficking on the fair trial of such victims (Article 6 § 1).

The applications were lodged by two Vietnamese men who, while still minors, were charged with – and subsequently pleaded guilty to – drug-related offences after they were discovered working as gardeners in cannabis factories in the United Kingdom. Following their convictions, they were recognised as victims of trafficking by the designated competent authority. Although the prosecution service subsequently reviewed its decision to prosecute as a result of the authority's decision, it concluded that they were not victims of trafficking. The Court of Appeal subsequently found on the facts that the decision to prosecute had been justified. The Court found violations of Articles 4 and 6 of the Convention.

The judgment is noteworthy because the Court elaborated for the first time on the question whether a breach of the State's positive obligation under Article 4 of the Convention could amount to the denial of a fair trial within the meaning of Article 6 § 1.

The Court considered that there had been a breach of the State's duty under Article 4 to take operational measures to protect the applicants, either initially as potential victims of trafficking or subsequently as persons recognised by the competent authority as being victims of trafficking.

With respect to the fair trial issue under Article 6 § 1 of the Convention, the Court considered the following three questions: (a) did the failure to assess whether the applicants were victims of trafficking before they were charged and convicted of drug-related offences raise any issue under Article 6 § 1; (b) did the applicants waive their rights under that Article by pleading guilty; and (c) were the proceedings as a whole fair.

As to the first question, the Court stressed that evidence concerning an accused's status as a victim of trafficking should be considered a "fundamental aspect" of the defence which he or she should be able to secure without restriction. In this connection, despite the passivity of the applicants' representatives who did not raise the issue of their status as victims of trafficking, the Court referred to the positive obligation on the State under Article 4 to investigate situations of potential trafficking. Accordingly, relying on its findings under Article 4, the Court considered that the lack of a proper assessment of the applicants' status as victims of trafficking prevented the authorities from securing evidence which may have constituted a fundamental aspect of their defence.

As regards the second question, the Court found, in particular, that in the absence of any assessment of whether the applicants were trafficked and, if so, of whether that fact could have had any impact on their criminal liability, those pleas were not made "in full awareness of the facts". Moreover, in such circumstances, any waiver of rights by the applicants would have run counter to the important public interest in combating trafficking and protecting its victims. The Court therefore did not accept that the applicants' guilty pleas amounted to a waiver of their rights under Article 6 § 1.

Lastly, as regards the third question, the Court laid emphasis, in particular, on the Court of Appeal's failure to examine the case from the relevant Article 4 perspective, which resulted in its failure to cure the defects in the proceedings which led to the applicants' being charged and eventually convicted. The Court therefore considered that the proceedings as a whole had been unfair, in breach of Article 6 § 1 of the Convention.

OTHER RIGHTS IN CRIMINAL PROCEEDINGS

No punishment without law (article 7)

In *Norman v. the United Kingdom*[31] the applicant – a prison officer at the relevant time – passed information about the prison where he worked to a tabloid journalist in exchange for money over the course of a number of years. The applicant was convicted of misconduct in public office and sentenced to twenty months' imprisonment. He unsuccessfully appealed against his conviction and sentencing.

Before the Court, the applicant complained under Article 7 about the vague nature of the offence of misconduct. He also relied on Article 10. The Court found no violation of Article 7 of the Convention.

As regards the prosecution and conviction of the applicant, the Court was, in the first place, satisfied that the applicant ought to have been aware, if necessary with legal advice, that by providing internal prison information to a journalist in exchange for money on numerous occasions over a five-year period he had risked being found guilty of the offence of misconduct in public office. It stressed in that regard that such conduct did not fall outside the scope of the criminal law merely because it also constituted a disciplinary offence and further reiterated that Article 7 did not preclude the gradual clarification of the rules of criminal liability through judicial interpretation.

Other rights and freedoms

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE (ARTICLE 8)

Private life

Vavřička and Others v. the Czech Republic[32] concerned the fine imposed on a parent and the exclusion of children from preschool for the refusal to comply with a statutory duty to vaccinate children.

One of the applicants was fined for failing to have his school-age children vaccinated in conformity with the statutory duty to do so. The other applicants, minors, were refused admission to preschools or nurseries on the same grounds.

The applicants complained mainly, under Articles 8 and 9 of the Convention and Article 2 of Protocol No. 1, of the consequences for them of their non-compliance with the vaccination duty. The Grand Chamber found no violation of Article 8. It held, in the first place, that the mandatory approach to vaccination remained within the authorities' wide margin of appreciation in this area and represented their answer, supported by relevant and sufficient reasons, to the pressing social need to protect individual and public health. Secondly, the impugned measures themselves, assessed in the context of the domestic system, were reasonably proportionate to the legitimate aims pursued. The Grand Chamber declared inadmissible the complaint under Article 9: the applicants had not shown that their critical opinion on vaccination was of sufficient cogency, seriousness, cohesion and importance as to constitute a conviction or belief attracting the guarantees of this provision. It further found no need to examine the case separately under Article 2 of Protocol No. 1.

The Grand Chamber's judgment is noteworthy in that it is the first time the Court has extensively addressed compulsory child vaccination and the consequences of non-compliance with such a duty from the standpoint

31 Norman v. the United Kingdom, no. 41387/17, 6 July 2021.
32 Vavřička and Others v. the Czech Republic [GC], nos. 47621/13 and 5 others, 8 April 2021.

of the right to respect for private life under Article 8. The judgment clarifies the breadth of the margin of appreciation afforded to States in this specific context and the factors to be taken into account when assessing the proportionality of the impugned measures. In so doing, the Court recognised the importance of childhood vaccination as a "key measure of public-health policy" and linked it to the value of social solidarity and the best interests of children.

(i) Reiterating its case-law that healthcare policy matters came within the margin of appreciation of the national authorities (*Hristozov and Others v. Bulgaria*[33]), the Court went on to find that the margin as regards compulsory child vaccination should be a wide one. On the one hand, the duty to vaccinate may be regarded as relating to the effective enjoyment of intimate rights (*Solomakhin v. Ukraine*[34]) and thus as calling for a narrower margin of appreciation: however, this consideration was less significant here since no vaccinations had been, nor could have been, forcibly administered. On the other hand, the following factors leant in favour of a wider margin: (i) the general consensus among the Contracting Parties, strongly supported by international specialised bodies, was that vaccination was one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination; (ii) the absence of consensus over a single model of child vaccination and the existence of a spectrum of policies (one based wholly on recommendation, those that made one or more vaccinations compulsory, and those that made it a legal duty to ensure the complete vaccination of children); and (iii) while childhood vaccination, as a fundamental aspect of contemporary public-health policy, would not in itself raise sensitive moral or ethical issues, making vaccination obligatory could be regarded as raising such issues, including from the perspective of "social solidarity", since the purpose of the obligation was to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination.

(ii) The Court acknowledged that the chosen mandatory approach to vaccination was supported by the relevant expert data and weighty public-health rationale, especially seen in the light of a positive obligation, under Articles 2 and 8, to take appropriate measures to protect life and health. Vaccination of children being at issue, the Court drew upon its well-established case-law (*Neulinger and Shuruk v. Switzerland*[35]) to set down an obligation on States to place the best interests of the child, and interestingly also those of children as a group, at the centre of all decisions affecting their health and development. Based on such considerations, the respondent State's health policy was found to be consistent with the best interests of the children.

(iii) In its assessment of proportionality, the Court noted that the fine imposed had not been excessive and there had been no repercussions on the education of the first applicant's (adolescent) children. As to the exclusion of the other applicants from preschool, and while this meant the loss of an important opportunity to develop their personalities and to begin to acquire social and learning skills in a formative and pedagogical environment, they had not been deprived of all possibility of personal, social and intellectual development, even if this required additional effort and expense on their parents' part, and their subsequent admission to primary school had not been affected. In this context, the Court again emphasised the relevance of the value of social solidarity, considering that it was not disproportionate for a State to require those for whom vaccination represented a remote (very rare but potentially very serious) health risk to accept this universally practised protective measure, as a matter of legal duty, for the sake of the small number of vulnerable children who were unable to benefit from vaccination for medical reasons. The existence of a less prescriptive policy in some other European States or the notional availability of less intrusive means to protect the health

33 Hristozov and Others v. Bulgaria, nos. 47039/11 and 358/12, § 119, ECHR 2012 (extracts).
34 Solomakhin v. Ukraine, no. 24429/03, § 33, 15 March 2012.
35 Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, ECHR 2010.

of the population did not detract from the validity or legitimacy of the choice of a mandatory approach to vaccination.

Centrum för rättvisa v. Sweden[36] concerned the bulk interception of cross-border communications and the safeguards against abuse under Article 8.

The applicant, a non-governmental organisation, considered that there was a risk that its communications through mobile telephones and mobile broadband had been or will be intercepted and examined by way of signals intelligence.

The Grand Chamber found a violation of Article 8 of the Convention. The Grand Chamber's judgment is noteworthy in that it sets out fundamental safeguards as regards, and defines the criteria for a global assessment of, the operation of bulk interception regimes.

(i) In previous cases dealing with bulk interception regimes (*Weber and Saravia v. Germany*[37], and *Liberty and Others v. the United Kingdom*[38]), the Court applied the six minimum safeguards developed in targeted interception cases (set out for the first time in *Huvig v. France*[39] and *Kruslin v. France*[40]: (a) the nature of offences which may give rise to an interception order; (b) a definition of the categories of people liable to have their communications intercepted; (c) a limit on the duration of interception; (d) the procedure for examining, using and storing the data obtained; (e) the precautions to be taken when communicating the data to other parties; and (f) the circumstances in which intercepted data may or must be erased or destroyed).

The Grand Chamber found that those safeguards had to be adapted for two main reasons. The first was to take account of the very wide reach of surveillance achieved through technological developments in the past decades. The second was to reflect the specific features of a bulk interception regime, which were different from targeted interception in many important respects. For example, where specified individuals are "targeted" through bulk interception, their devices are not monitored: rather, strong selectors are applied to the communications intercepted in bulk by the intelligence services. Unlike targeted interception, bulk interception is generally directed at international communications and mainly used for foreign intelligence gathering and the identification of new threats. Its purpose being, in principle, preventive rather than the investigation of a specific target/offence, the first two of the six safeguards for targeted interception would not be readily applicable in a bulk interception context. Bulk interception is characterised by increasing degrees of intrusion with an individual's Article 8 rights as the impugned operation moves through its various stages (namely, (a) interception and initial retention (of communications/related communications data); (b) application of specific selectors; (c) examination of a selection by analysts; and (d) subsequent retention and use of the "final product", including sharing with third parties), which implies that the need for safeguards will be at its highest at the end of the process (where information about a particular person is analysed or the content of the communications is examined by an analyst).

(ii) The Court therefore expanded the range of safeguards to be clearly defined in the domestic legal framework (in *Big Brother Watch and Others v. the United Kingdom*[41] the Court indicated that the same safeguards were applicable to the acquisition of related communications data (that is, the traffic data belonging to the intercepted communications), which was not necessarily less intrusive than the

36 Centrum för rättvisa v. Sweden [GC], no. 35252/08, 25 May 2021. See also, under Article 10 (Freedom of expression) below, Big Brother Watch and Others v. the United Kingdom [GC], nos. 58170/13 and 2 others, 25 May 2021.
37 Weber and Saravia v. Germany (dec.), no. 54934/00, ECHR 2006-XI.
38 Liberty and Others v. the United Kingdom, no. 58243/00, 1 July 2008.
39 Huvig v. France, 24 April 1990, Series A no. 176-B.
40 Kruslin v. France, 24 April 1990, Series A no. 176-A.
41 Big Brother Watch and Others v. the United Kingdom [GC], nos. 58170/13 and 2 others, 25 May 2021.

acquisition of content), providing also some explanations as to the content of certain of those safeguards:

a. The grounds on which bulk interception might be authorised (in *Big Brother Watch and Others*, cited above, the Court noted that a regime which permitted bulk interception to be ordered on relatively wide grounds could still comply with Article 8, provided that, when viewed as a whole, sufficient guarantees against abuse were built into the system to compensate for that weakness. The closely related issue of whether there existed sufficient guarantees to ensure that the interception was necessary or justified was as important as the degree of precision with which the grounds on which authorisation might be given are defined);

b. The circumstances in which an individual's communications might be intercepted;

c. The procedure to be followed for granting authorisation, namely that authorisation should be given by a body independent of the executive (not necessarily judicial), which should be informed of both the purpose of the interception and the selection bearers or communication routes;

d. The procedures to be followed for selecting, examining and using intercept material;

e. The precautions to be taken when communicating the material to other parties, in particular the transferring State must ensure that the receiving State, in handling the data, had in place safeguards capable of preventing abuse and disproportionate interference (such as guaranteeing secure storage and restricting onward disclosure of the material);

f. The limits on the duration of interception, the storage of intercept material and the circumstances in which such material must be erased and destroyed;

g. The procedures and modalities for supervision by an independent authority of compliance with the above safeguards and its powers to address non-compliance; and

h. The procedures for independent *ex post facto* review of such compliance and the powers vested in the competent body in addressing instances of non-compliance, in particular that an effective remedy should be available.

(iii) More generally, the Court defined the "cornerstone" of an Article 8-compliant bulk interception regime as follows:

"[T]he process had to be subject to 'end-to-end safeguards', meaning that, at the domestic level, an assessment had to be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception had to be subject to independent authorisation at the outset, when the object and scope of the operation were being defined; and that the operation had to be subject to supervision and independent *ex post facto* review."

In particular, noting the considerable potential for abuse and the legitimate need for secrecy, the Court stressed that the margin of appreciation afforded to States in operating such a system must be narrower, while the importance of supervision and review would be amplified, when compared with targeted interception.

Lastly, the Court outlined the key elements of the global assessment of such regimes: whether the domestic legal framework contained sufficient guarantees against abuse; whether the process was subject to "end-to-end safeguards"; whether the actual operation of the system included the checks and balances on the exercise of power; and whether there was any evidence of actual abuse.

Family life

Abdi Ibrahim v. Norway[42] concerned the adoption of a child by foster parents with a religious faith different to that of the biological parent.

The applicant, a Somali national of Muslim faith, was granted refugee status in Norway in 2010; she was accompanied by her baby son. Later that year, the baby was placed initially in emergency care and then with a Christian family, despite the applicant's wish that he should go either to her cousins or to a Somali or Muslim family. The applicant was granted six supervised one-hour contact sessions per year. In 2013 the social welfare authorities applied to allow the foster family to adopt the child (meaning that the applicant would no longer have contact with him) and for her parental rights to be removed. The applicant appealed: she did not ask for the child's return but sought contact so that her son could maintain his cultural and religious roots. In 2015 the court of appeal dismissed her appeal and authorised the child's adoption.

The applicant complained to the Court under Articles 8 and 9 of the Convention; a Chamber of the Court considered that the applicant's submissions under Article 9 relating to her and her son's cultural and religious background fell to be examined under Article 8 of the Convention. Referring to the principles of *Strand Lobben and Others v. Norway*[43], it found a violation of Article 8, basing its conclusion on the case as a whole, including its religious aspects. The Grand Chamber also followed this approach and found a breach of Article 8 of the Convention, interpreted in the light of Article 9.

The Grand Chamber judgment is noteworthy because of its novel context: the biological mother's wish that her child, who was in foster care when still a baby, be brought up in line with her religious faith, which was different from that of the foster family (prospective adoptive parents). The Court had regard to the impact of the compulsory taking into care of a child on the scope of the biological parents' rights under Article 9 or Article 2 of Protocol No. 1. It clarified whether the religious aspect of the case warranted examination as a separate issue under Article 9, in addition to the usual Article 8 analysis and, in relation to the latter analysis, the Court stressed that due account had to be taken of the interests of the biological parent protected by Article 9. It also provided some indication as to how the domestic authorities could meet this requirement.

In the Court's view, a parent bringing his or her child up in line with his or her own religious or philosophical convictions may be regarded as a way to "manifest his religion or belief, in ... teaching, practice and observance" within the meaning of Article 9. By analogy with Article 2 of Protocol No. 1, the compulsory taking into care of a child, while entailing limitations, does not entirely preclude the exercise by a biological parent of his or her Article 9 rights. To some degree he or she may also be able to continue doing so, for example by assuming parental responsibilities or exercising contact rights aimed at facilitating family reunion.

The Court, however, did not find it necessary in the instant case to determine the scope of Article 9 and its applicability to the matters complained of: the applicant's complaint, relating to the adverse effect of the choice of foster home in regard to her wish that X be brought up in line with her Muslim faith, did not call for a separate examination under Article 9. In this regard, the Court reiterated its usual approach whereby it finds a complaint to be most appropriately characterised with reference to one Article, while acknowledging that the subject matter also touches upon interests protected by other Articles of the Convention. The Court therefore considered it appropriate to centre its examination of the present case on the compatibility of the impugned measures with the applicant's right to respect for her family life under Article 8 of the Convention, which had to be interpreted and applied in the light of Article 9. It followed that an important element of the Article 8 analysis in this context was the question whether the domestic authorities had had due regard to the applicant's interests protected by the Article 9 freedom.

42 Abdi Ibrahim v. Norway [GC], no. 15379/16, 10 December 2021.
43 Strand Lobben and Others v. Norway [GC], no. 37283/13, 10 September 2019.

With this in mind, the Court took particular note of the domestic court's reliance on Article 20 § 3 of the United Nations Convention on the Rights of the Child. In accordance with this provision, when assessing possible solutions (adoption, foster care, etc.) for a child temporarily or permanently deprived of his or her family environment, "due regard [is to] be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background". The Court clarified that in substance this standard corresponded to and was in compliance with the requirements of the Convention.

The Court further considered the scope of the obligation incumbent on the authorities in accordance with this standard. In the first place, a biological parent's interests protected by Article 9 are only part of the various interests to be taken into account throughout the whole process in cases of this nature where the child's best interest must remain paramount. Secondly, as follows from the relatively broad agreement in international law, in this connection domestic authorities are bound by an obligation of means and not one of result. This obligation could be complied with not only by ultimately finding a foster home which corresponded to a biological parent's cultural and religious background, but also through arrangements for regular contact with the child.

In the instant case, the authorities had indeed made efforts, which ultimately proved unsuccessful, to find from the outset a foster home for the applicant's son which would have been more suitable from the perspective of her Muslim faith. However, the arrangements made thereafter as to her ability to have regular contact with her child, culminating in the decision to allow for his adoption, had failed to take due account of the applicant's interest in allowing him to retain at least some ties to his cultural and religious origins. Considering the case as a whole, the Court concluded that the reasons advanced in support of the impugned decision had not been sufficient to demonstrate that the circumstances of the case had been so exceptional as to justify a complete and definitive severance of the ties between the applicant and her son, or that the decision to that effect had been motivated by an overriding requirement pertaining to his best interests.

Positive obligations

M.A. v. Denmark[44] concerned the waiting period for granting family reunification to foreigners who were beneficiaries of subsidiary or temporary protection.

The applicant is a Syrian national who fled the country in 2015. In Denmark, he was granted "temporary protection status" for one year and his residence permit was subsequently extended for one year at a time. Owing to a lack of an individualised threat, he did not qualify for refugee status under the UN Convention relating to the Status of Refugees or "protection status", for which residence permits were granted for five years. Five months after obtaining his first residence permit, the applicant requested family reunification with his wife, who had remained in Syria. His request was rejected because he had not been in possession of a residence permit for the previous three years, as required by law, and because there were no exceptional reasons to otherwise justify reunification. The applicant appealed unsuccessfully. In 2018, having resided in Denmark for just over two years and ten months, the applicant submitted a new request, which was granted. The Grand Chamber found a breach of Article 8.

The Grand Chamber judgment is noteworthy in that the Court considered, for the first time, whether, and to what extent, the imposition of a statutory waiting period for granting family reunification to persons who benefit from subsidiary or temporary protection status was compatible with Article 8. The Court specified the width of the margin of appreciation afforded to States in this respect and outlined procedural requirements for the processing of family-reunion requests, as well as substantive criteria for their assessment.

44 M.A. v. Denmark [GC], no. 6697/18, 9 July 2021.

(i) Considering the margin of appreciation, the Court had regard to its subsidiary role in the Convention protection system and the lack of consensus at national, international and European levels in this area, as well as the legitimate nature of immigration control, which served the general interests of the economic well-being of a country. The Court concluded that the States should be accorded a wide margin of appreciation in deciding whether to impose a waiting period for family reunification requested by persons who had not been granted refugee status but who enjoyed subsidiary protection or temporary protection. Nevertheless, the discretion enjoyed by the States in this field could not be unlimited and fell to be examined in the light of two factors. In the first place, the absolute nature of the right to protection against ill-treatment under Article 3, which did not allow for any exceptions, justifying factors or balancing of interests, even in a situation of an increased influx of migrants. In particular, the situation of general violence in a country might be so intense as to conclude that any returnee would be at real risk of ill-treatment solely on account of his or her presence there. In principle, that factor might reduce the latitude enjoyed by States in striking a fair balance between the competing interests of family reunification and immigration control under Article 8, albeit that, during periods of mass influx of asylum-seekers and substantial resource constraints, recipient States should be entitled to consider that it fell within their margin of appreciation to prioritise the provision of Article 3 protection to a greater number of such persons over the Article 8 interest of family reunification of some. Secondly, a State's discretion fell to be examined in the light of the proportionality of a particular measure. Following its usual approach, the Court would assess the quality of the parliamentary and judicial review of its necessity.

(ii) Regarding the length of a waiting period, the Court noted that Directive 2003/86/EC of the European Union on the right to family reunification allowed a waiting period of two years, or, by way of derogation, even three years. While the Court saw no reason to question the rationale of a waiting period of two years, beyond such duration the insurmountable obstacles to enjoying family life in the country of origin progressively assumed more importance in the fair-balance assessment. In its view, a waiting period of three years, although temporary, was by any standard a long time to be separated from one's family, when the family member left behind remained in a country characterised by arbitrary violent attacks and ill-treatment of civilians, and the actual separation would inevitably be even longer than the waiting period.

(iii) The Court further held that considerations as to procedural requirements for the processing of family-reunion requests of refugees had to apply equally to beneficiaries of subsidiary protection, including to persons who were at risk of ill-treatment falling under Article 3 owing to the general situation in their home country and where the risk was not temporary but appeared to be of a permanent or long-lasting character. In particular, the decision-making process had to sufficiently safeguard the flexibility, speed and efficiency required to comply with the applicant's right to respect for his or her family life (Tanda-Muzinga v. France45, Mugenzi v. France46, Senigo Longue and Others v. France47). Furthermore, it should include an individualised fair-balance assessment of the interest of family unity in the light of the concrete situation of the persons concerned and the situation in their country of origin, with a view to determining the actual prospect of return or the likely duration of obstacles thereto.

(iv) Regarding the substantive requirements, the Court drew upon the criteria it had developed in its case-law relating to other types of situations raising issues on the extent of the State's obligations to admit to its territory relatives of persons residing there (Jeunesse v. the Netherlands48, among other authorities),

45 Tanda-Muzinga v. France, no. 2260/10, 10 July 2014.
46 Mugenzi v. France, no. 52701/09, 10 July 2014.
47 Senigo Longue and Others v. France, no. 19113/09, 10 July 2014.
48 Jeunesse v. the Netherlands [GC], no. 12738/10, 3 October 2014.

notably: (a) status in and ties to the host country of the alien requesting family reunion and his or her family member concerned; (b) whether the aliens concerned had a settled or precarious immigration status in the host country when their family life was created; (c) whether there were insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting reunification; (d) whether children were involved; and (e) whether the person requesting reunion could demonstrate that he or she had sufficient independent and lasting income, excluding welfare benefits, to provide for the basic cost of subsistence of his or her family members.

(v) Assessing the facts of the instant case, the Court proceeded in two steps. In the first place, it examined the domestic legislative and policy framework. The Court found no reason to question the distinction in respect of persons granted protection owing to an individualised threat, namely refugee status or "protection status", on the one hand, and persons granted protection owing to a generalised threat, the so-called "temporary protection status", on the other hand. The latter regime was justified by the need to control immigration and to ensure the effective integration of those granted protection. The Court noted, however, that the three-year rule had not been reviewed following the sharp fall in the number of asylum-seekers in 2016 and 2017. Furthermore, the legislation did not allow for an individualised assessment of whether a shorter waiting period than three years could be warranted by considerations of family unity in a given case. Nor did it provide for a review of the situation in the country of origin of the aliens concerned. Secondly, turning to the applicant's individual circumstances, the waiting period had operated as a strict requirement for him to endure a prolonged separation from his wife of many years, irrespective of considerations of family unity in the light of the likely duration of the obstacles – considered insurmountable by the Supreme Court – to their cohabiting in Syria. The Court was therefore not satisfied, notwithstanding the margin of appreciation, that the authorities had struck a fair balance between the relevant interests at stake.

Freedom of thought, conscience and religion (article 9)

MANIFEST ONE'S RELIGION OR BELIEF

Polat v. Austria[49] concerned the post-mortem examination of a new-born, carried out despite the parents' objections on religious grounds.

While the applicant – a woman of Muslim faith – was pregnant, the foetus showed signs of a rare syndrome. She and her husband informed the hospital that, in the event of their child's death, they refused to consent to a post-mortem examination on religious grounds: they explained that, since they wished to ritually wash the corpse prior to a funeral, the corpse had to remain as unscathed as possible. The child died shortly after birth. Despite the applicant's objections, the public hospital performed a post-mortem to verify the cause of death and evaluate the risks for the applicant's future pregnancies: this was permitted for scientific purposes by domestic law. During the post-mortem, nearly all the child's organs were removed.

The applicant complained under Articles 8 and 9 that carrying out the post-mortem without taking into account her religious convictions had violated her right to respect for her private and family life and her right to freedom of religion. The Court found a breach of both Articles.

The case concerned a novel issue: the regulation of post-mortem examinations in public hospitals and the question whether, and in which cases, close relatives of the deceased should have the right to object to a post-mortem examination for reasons related to private life and religion where the interests of public health clearly call for such an examination.

The judgment is noteworthy because, for the first time, the Court stated that religious beliefs and respect for private and family life, under Articles 8 and 9, should be balanced against the protection of public health when conducting post-mortem examinations.

As regards the post-mortem, while the Court agreed with the Government that the protection of the health of others through the conduct of post-mortem examinations served a legitimate aim, it also attached weight to the relevance of the applicant's expressed interests (compare *Solska and Rybicka v. Poland*[50]). As the case related to sensitive moral and ethical issues, it required a balance to be struck between competing private and public interests. The Court put emphasis on the fact that the domestic authorities ought to have conducted a balancing exercise between the competing, scientific and religious/private interests, at stake. Even though there had indeed been a scientific interest in performing the post-mortem examination, the Court noted that the applicable legislation left a certain scope of discretion to the doctors, including as to the extent of the intervention "necessary" in any given case. While it could not therefore be excluded that a balancing of competing interests could or should have been carried out under domestic law, the domestic authorities did not appear to have engaged in any such exercise. Admittedly, the Supreme Court had addressed the proportionality of the interference with the applicant's rights under Articles 8 and 9. Nonetheless, the Court observed that the Supreme Court had not sufficiently addressed the applicant's individual rights under Articles 8 and 9 and the "necessity" of the post-mortem in the light of those rights.

49 Polat v. Austria, no. 12886/16, 20 July 2021.
50 Solska and Rybicka v. Poland, nos. 30491/17 and 31083/17, 20 September 2018.

Freedom of expression (article 10)

FREEDOM OF THE PRESS

Big Brother Watch and Others (cited above) concerned the bulk interception of cross-border communications and receipt of intelligence from foreign intelligence services and the safeguards against abuse.

The applicants, legal and natural persons, complained about the scope and magnitude of the electronic surveillance programmes operated by the respondent Government of which they considered they had likely been affected. The Grand Chamber found a breach of Article 8 (see also *Centrum för rättvisa*, cited above) and Article 10 in respect of the regimes for bulk interception and acquisition of communications data and no breach of both provisions as regards the receipt of intelligence from foreign intelligence services.

The Grand Chamber's judgment is noteworthy in that it sets out the fundamental safeguards required of a bulk interception regime under Article 8 (ibid.) and under Article 10, notably to ensure protection of confidential journalistic material. It also defines the requisite safeguards to ensure compliance with Article 8 of the receipt of intelligence from foreign intelligence services.

(i) Regarding Article 10 and access to confidential journalistic material by the intelligence services running a bulk interception operation, the Court distinguished two situations: intentional access through the deliberate use of selectors or search terms connected to a journalist or news organisation and unintentional access as a "bycatch" of such an operation. As to intentional access, the Court considered that preventive independent review was required given the significant degree of interference with journalistic communications: since such access would very likely result in the acquisition of significant amounts of confidential material, it could undermine the protection of sources to an even greater extent than an order to disclose a source, the interference being commensurate with that occasioned by the search of a journalist's home or workplace. Therefore, before the intelligence services used selectors or search terms known to be connected to a journalist, they had to be authorised by a judge or other independent and impartial decision-making body which would consider the public interest and the proportionality of the measure.

As regards unintentional access, it was considered to be materially different from the targeted surveillance of a journalist. In this connection, in Weber and Saravia v. Germany51, the Court accepted that the initial interception, without examination of the intercepted material, did not constitute a serious interference with Article 10, as it was not aimed at monitoring journalists. In the present judgment, however, the Court revised this position, noting that surveillance which was not targeted directly at individuals had the capacity to have a very wide reach indeed owing to recent technological developments. In particular, the examination of a journalist's communications or related communications data by an analyst would be capable of leading to the identification of a source. At the same time, in unintentional access the degree of interference cannot be predicted at the outset, making it impossible to assess its proportionality at the authorisation stage. Keeping this particularity in mind, the Court framed the requisite safeguard, considering it imperative that domestic law contain robust safeguards regarding the storage, examination, use, onward transmission and destruction of such confidential material.

Lastly, in finding a violation of Article 10, the Court took into account the weaknesses identified in its analysis of the bulk interception regime under Article 8 of the Convention.

51 Weber and Saravia v. Germany (dec.), no. 54934/00, ECHR 2006-XI.

(ii) With regard to receipt of intelligence from foreign intelligence services, the Court clarified that the interference with Article 8 did not lie in the interception itself, where it was carried out under the full control of foreign intelligence services and thus did not fall within the receiving State's jurisdiction. Rather, the interference lay, in the first place, in the initial request and, secondly, in the receipt of intercept material, followed by its subsequent storage, examination and use by the intelligence services of the receiving State. The Court indicated the requisite safeguards for each of the above two stages of the process, by drawing upon its case-law on the interception of communications by Contracting States (Roman Zakharov v. Russia52).

As to the first stage (the initial request), the Court was concerned by the need to prevent States from circumventing their Convention obligations through interaction with non-Contracting States. The Court held that where a request is made to a non-contracting State for intercept material the request must have a basis in domestic law, and that law must be accessible to the person concerned and foreseeable as to its effects. It will also be necessary to have clear detailed rules which give citizens an adequate indication of the circumstances in which and the conditions on which the authorities are empowered to make such a request and which provide effective guarantees against the use of this power to circumvent domestic law and/or the States' obligations under the Convention.

Considering the second stage (the receipt of the intercept material), the Court indicated that the receiving State must have in place adequate safeguards for its examination, use and storage; for its onward transmission; and for its erasure and destruction. If States do not always know whether material received from foreign intelligence services is the product of interception, then the same standards should apply to all material received from foreign intelligence services that could be the product of intercept. Moreover, any regime permitting the intelligence services to request either interception or intercept material from non-Contracting States, or to directly access such material, should be subject to independent supervision, and there should also be the possibility for independent ex post facto review.

Standard Verlagsgesellschaft mbH v. Austria (no. 3)[53] concerned a media company's duty to disclose data concerning the anonymous authors of online comments.

The applicant is a limited liability company which owns and publishes a daily newspaper published both in print format and in an online version. Its online news portal carries articles assigned to it by the editorial office, and discussion forums relating to those articles, on which registered users are allowed to post comments. Following the posting of offensive comments under two articles which the applicant company had published on its portal regarding two politicians and a political party, it was ordered to disclose the data of the authors of the comments. The domestic courts refused to consider the latter as journalistic sources.

The applicant company complained that this had infringed its right to freedom of expression under Article 10 and the Court found a violation of this provision.

The judgment is noteworthy in view of the novel scope of the case: a media company's duty to disclose data concerning anonymous authors of comments posted on its Internet portal. The Court clarified three issues: in the first place, whether authors of online comments could be considered a journalistic "source"; secondly, whether the lifting of the anonymity of those authors amounted to an interference with the press freedom of a media company; and, lastly, the level of scrutiny required from the domestic courts when conducting a balancing exercise in this particular context.

52 Roman Zakharov v. Russia [GC], no. 47143/06, ECHR 2015.
53 Standard Verlagsgesellschaft mbH v. Austria (no. 3), no. 39378/15, 7 December 2021.

(i) In the Court's view, the comments posted on the forum by readers of the news portal constituted opinions and therefore information within the meaning of the Recommendation on the right of journalists not to disclose their sources of information54. However, since they were clearly addressed to the general public rather than to a journalist, their authors could not be considered a journalistic "source" and the media company concerned could not rely on its editorial confidentiality in respect of them.

(ii) While ruling out therefore an interference on the basis of the disclosure of a journalistic source, the Court considered whether an obligation to disclose personal data of forum users could interfere with a media company's Article 10 rights in other ways. Two elements were key to its analysis: the specific role of the company concerned, and the effects of the lifting of anonymity.

As to the first element, the Court observed that its assessment of the existence of an interference could not depend on the legal categorisation of an applicant company – as a host provider or as a publisher – by the domestic courts. In this regard, the Court must take into account the circumstances of the case as a whole.The Court observed that the present applicant company's role and interlinked tasks extended beyond being a host provider: it published a daily newspaper and maintained a news portal which provided a forum for users; and it took an active role in guiding users to write comments which were at least partly moderated.

It was thus apparent that the applicant company's overall function was to further open discussion and to disseminate ideas with regard to topics of public interest. It could therefore claim the protection of the freedom of the press.

As to the second element, the Court reiterated the function of anonymity as a means of avoiding reprisals or unwanted attention and its role in promoting the free flow of opinions, ideas and information (Delfi AS v. Estonia55). It could thus indirectly serve the interests of a media company to award its users a certain degree of anonymity to protect their private sphere and freedom of expression. An obligation to disclose user data could have a chilling effect on forum users in general, deterring them from contributing to a debate through online posts. It followed that the lifting of anonymity and the effects thereof could also indirectly affect, and thus interfere with, a media company's right to freedom of the press. The Court pointed out that the existence of an interference in this context could be established irrespective of the outcome of any subsequent proceedings as to the content of the impugned comments.

(iii) Turning to the required scrutiny of the domestic courts, the Court noted that there was no absolute right to anonymity and that anonymity on the Internet, although an important value, had to be balanced against other rights and interests such as those of a potential victim of a defamatory statement, who had to be awarded effective access to a court in this respect. However, as also reflected in the relevant international-law materials concerning Internet intermediaries, the disclosure of user data had to be necessary and proportionate to the legitimate aim pursued. Therefore, the domestic courts, before deciding on such a measure, should – in accordance with their positive obligations under Articles 8 and 10 of the Convention – weigh all the conflicting interests at stake in a given case. In accordance with the Court's long-standing case-law, a sufficient balancing of interests was all the more important, where, as in the instant case, political speech and debates of public interest were concerned.

When determining the level of such scrutiny required in this context, the Court had regard to the weight of the impugned interference. It considered that the obligation to disclose user data weighed less heavily in the proportionality assessment than the interference in a case where a media company was held liable,

54 Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.

55 Delfi AS v. Estonia [GC], no. 64569/09, § 147, ECHR 2015.

under civil or criminal law, for the content of a particular comment by being fined or obliged to delete it (Delfi AS, cited above, and Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary56). Consequently, the Court accepted that a prima facie examination may suffice as regards the balancing exercise in domestic proceedings concerning the disclosure of user data, although even a prima facie examination required some reasoning and balancing.

On the facts of the case, the Court found that the domestic courts had failed to conduct any balancing at all between the competing interests at stake: on the one hand, the plaintiffs' right to protect their reputation and, on the other, the applicant company's right to freedom of the press, as well as its role in protecting the personal data of the authors of the comments and their freedom to express their opinions publicly. This was of particular concern, since the impugned comments could be characterised as political speech: they had been expressed in the context of a public debate on issues of legitimate public interest (the conduct of the relevant politicians acting in their public capacities) and in reaction to the comments of the politicians published on the same news portal. Moreover, though seriously offensive, the relevant comments had not amounted to hate speech or incitement to violence, nor had they been otherwise clearly unlawful. In sum, in the absence of the requisite balancing, the court order to disclose the data of the authors of the comments had not been supported by relevant and sufficient reasons to justify the interference with the right of the applicant company to freedom of the press.

FREEDOM OF ASSEMBLY AND ASSOCIATION (ARTICLE 11)

Freedom to form and to join trade unions

In *Yakut Republican Trade-Union Federation v. Russia*[57] the Court examined the rights of working prisoners to join and form trade unions.

The applicant, a trade-union federation, was ordered to expel a grass-roots union of working prisoners because of a statutory ban on the unionisation of prisoners.

It complained about this statutory restriction under Article 11 of the Convention. The Court found no violation of this provision.

The judgment is noteworthy in that the Court has, for the first time, ruled on the question whether trade-union freedom, guaranteed by Article 11 of the Convention, is applicable to working prison inmates. It is interesting in three respects.

In the first place, the Court clarified that the applicant federation did not lack victim status because, as argued by the respondent Government, the impugned statutory restriction affected the prisoners' union it had been ordered to expel. In this respect, the Court reiterated that Article 11 protected both workers and unions. Just as a worker should be free to join a union, so should the union be free to choose its members (*Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*[58]). In the Court's view, this principle implied, by extension, that just as a union should be free to join a federation, so should the federation be free to admit the union. Secondly, the Court was called upon to determine whether, for the purpose of trade-union activity, prison work could be equated with "ordinary employment". Indeed, most of the trade-union freedom cases previously considered by the Court concerned employees and, more broadly, persons in an "employment relationship". In this regard, the Court reiterated that prison work differed from the work performed by ordinary employees in many aspects. Prison work served the primary aim of

56 Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, 2 February 2016.
57 Yakut Republican Trade-Union Federation v. Russia, no. 29582/09, 7 December 2021.
58 Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom, no. 11002/05, 27 February 2007.

rehabilitation and resocialisation, was aimed at reintegration and was obligatory (*Stummer v. Austria*[59]). It could therefore not be equated to ordinary employment (compare the finding in *Stummer* that a working prisoner was in a relevantly similar situation to an ordinary employee as regards any provision of an old-age pension).

Thirdly, and on the one hand, the Court confirmed that prisoners in general continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty, and that no occupational group was excluded from the scope of Article 11. On the other hand, Convention rights were intended to be practical and effective, and trade-union freedom might be difficult to exercise in detention. In those circumstances, the Court attached significant importance to the lack of sufficient consensus between the Council of Europe member States as regards the rights of prisoners to join and form trade unions. The Court therefore concluded that the order of the domestic courts to the applicant federation to expel the union of working inmates had not exceeded the wide margin of appreciation available to the national authorities in this sphere. However, relying on the "living instrument" doctrine, the Court did not exclude that developments in that field might at some point in the future necessitate the extension of trade-union freedom to working inmates, especially if they worked for a private employer.

PROHIBITION OF DISCRIMINATION (ARTICLE 14)

Article 14 taken in conjunction with article 3

Sabalić v. Croatia[60] concerned the procedural obligation in respect of homophobic acts of violence.

The applicant was attacked in a nightclub by a man, M.M., who during the attack made a number of discriminatory statements concerning the applicant's sexual orientation. In response, the police did not inform the competent State Attorney's Office, which they were obliged to do under the domestic law, but instead instituted minor-offence proceedings against M.M. which did not deal with the hate-crime element of the incident. M.M. was found guilty of breaching public peace and order and sentenced to a fine of approximately 40 euros. The applicant was not informed of the minor-offence proceedings and received no information from the authorities. She therefore lodged a criminal complaint against M.M. with the State Attorney's Office, alleging criminal offences of violent hate crime and discrimination. Although the State Attorney's Office instituted a criminal investigation, it eventually rejected the criminal complaint on the basis that M.M.'s conviction of minor offences had created a formal impediment to criminal prosecution on the basis of the *ne bis in idem* principle. The domestic courts upheld this decision.

The applicant complained to the Court about the lack of an appropriate response by the domestic authorities to the homophobic violence against her. The Court found a violation of the procedural limb of Article 3 of the Convention taken in conjunction with Article 14.

The judgment is noteworthy because, in the first place, it contains a comprehensive statement of the relevant principles under Articles 3 and 14 concerning the State's procedural obligation when confronted with violent incidents triggered by suspected discriminatory attitudes. Secondly, the Court, for the first time, elaborated on how a failure to comply with the procedural obligation under Articles 3 and 14 may be considered to amount to a "fundamental defect" in those proceedings capable of setting aside their *res judicata* effect and allowing for their reopening to the detriment of an accused in accordance with Article 4 § 2 of Protocol No. 7 to the Convention.

59 Stummer v. Austria [GC], no. 37452/02, ECHR 2011.
60 Sabalić v. Croatia, no. 50231/13, 14 January 2021.

(i) As regards the State's procedural obligation under Articles 3 and 14, in the judgment the Court relied on the established principles set out in, for instance, Identoba and Others v. Georgia61, M.C. and A.C. v. Romania62, and Škorjanec v. Croatia63. In the present case, the Court found that the minor-offence proceedings against M.M. failed to meet the requisite standards of effectiveness under the Court's case-law: they did not address in any way the hate-crime element of the physical attack on the applicant; and they resulted in a sanction which was manifestly disproportionate to the gravity of the ill-treatment in question.

(ii) With respect to the domestic authorities' reliance on the ne bis in idem principle as a reason for discontinuing the criminal prosecution against M.M., the Court noted, firstly, that the domestic authorities had themselves brought about the situation in which they, by unnecessarily instituting the minor-offence proceedings, undermined the possibility of putting properly into practice the relevant provisions and requirements of the domestic criminal law.

The Court also considered it important to reiterate that the principle of legal certainty in criminal matters was not absolute. Indeed Article 4 § 2 of Protocol No. 7 expressly permitted Contracting States to reopen a case to the detriment of an accused where, *inter alia*, a fundamental defect has been detected in the proceedings (compare *Taşdemir v. Turkey*[64], in which the Court accepted that there may be *de facto* or *de jure* obstacles to reopening a case). Such a "fundamental defect" occurs where an accused has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law if there is a serious violation of a procedural rule severely undermining the integrity of the proceedings (*Mihalache v. Romania*[65]). Furthermore, an issue under the *ne bis in idem* principle could not even arise as regards grave breaches of fundamental human rights from the erroneous termination of the proceedings (*Marguš v. Croatia*[66]). Moreover, the Court considered that it would have been possible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level: in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the unwarranted set of proceedings and providing restitution for its effects, the Court may regard the situation as being remedied (*Sergey Zolotukhin v. Russia*[67]).

Accordingly, in the present case, the Court found that both the failure to investigate the hate motives behind a violent attack or to take into consideration such motives in determining the punishment for violent hate crimes amounted to "fundamental defects" in the proceedings within the meaning of Article 4 § 2 of Protocol No. 7. The Court also noted that the domestic authorities failed to remedy the impugned situation, although it could not be said that there were *de jure* obstacles to doing so: they could have offered the defendant the appropriate redress by, for instance, terminating or annulling the unwarranted set of minor-offence proceedings, providing restitution for its effects and re-examining the case.

In sum, the Court found that by instituting the ineffective minor-offence proceedings and therefore erroneously discontinuing the criminal proceedings on formal grounds, the domestic authorities failed to discharge adequately and effectively their procedural obligation under Article 3 of the Convention taken in conjunction with Article 14.

61 Identoba and Others v. Georgia, no. 73235/12, §§ 66-67, 12 May 2015.
62 M.C. and A.C. v. Romania, no. 12060/12, §§ 108-15, 12 April 2016.
63 Škorjanec v. Croatia, no. 25536/14, §§ 52-57, 28 March 2017.
64 Taşdemir v. Turkey (dec.), no. 52538/09, 12 March 2019.
65 Mihalache v. Romania [GC], no. 54012/10, §§ 129 and 133, 8 July 2019.
66 Marguš v. Croatia [GC], no. 4455/10, ECHR 2014 (extracts).
67 Sergey Zolotukhin v. Russia [GC], no. 14939/03, §§ 114-15, ECHR 2009.

Other convention provisions

DEROGATION IN TIME OF EMERGENCY (ARTICLE 15)

In *Dareskizb Ltd v. Armenia*[68] the Court considered the question whether massive post-election protests (with some violent episodes) amounted to a "public emergency threatening the life of the nation" within the meaning of Article 15.

In March 2008, and during massive protests that followed the announcement of the preliminary results of the presidential election, the incumbent President of Armenia adopted a decree declaring a state of emergency in Yerevan and imposing, *inter alia*, restrictions on the mass media. The necessity of the measures was confirmed by a parliamentary inquiry. In addition, under Article 15 of the Convention, the Armenian authorities gave notice of a derogation from a number of Convention rights, including those protected by Article 10. During the state of emergency, the applicant company, which published a daily opposition newspaper, was prevented from doing so, with national security officers prohibiting the printing of the newspaper's edition on two occasions. The applicant company unsuccessfully challenged the measure before the domestic courts.

The Court considered that the derogation had failed to satisfy the requirements of Article 15, and it found a breach of Article 10.

The judgment is noteworthy in that the Court examined the validity of a derogation under Article 15 in a novel context, namely massive post-election opposition protests during which there were some violent episodes. The Court disagreed with the State's view as to the existence of a public emergency threatening the life of the nation (the Commission having done so in the "*Greek case*"[69]). While the applicant company did not explicitly dispute the Government's argument as to the existence of a public emergency within the meaning of Article 15, this did not preclude the Court from examining the issue.

In the first place, the Court confirmed the principle that, notwithstanding the general approach of deference towards the assessment by the national authorities, their discretion was not unlimited (*Mehmet Hasan Altan v. Turkey*[70]; see also the "*Greek case*", cited above, §§ 159-65 and 207). While accepting that weight had to be attached to the judgment of the State's executive and Parliament, the necessity of declaring a state of emergency and the particular measures involved had apparently never been subjected to any judicial scrutiny at the domestic level.

Secondly, and while tensions had been running high between demonstrators and law enforcement after the heavy-handed police dispersal of the peaceful protest at Freedom Square, the Court did not have at its disposal sufficient material to establish how the situation had evolved and eventually got out of hand so as to lead to an armed confrontation, damage of property and deaths. However, relying on its previous findings on the events in question (*Mushegh Saghatelyan v Armenia*[71], and *Myasnik Malkhasyan v. Armenia*[72]), the Court took into account the following factors:

– The planned or organised character of the events in issue: the relevant situation did not amount to planned and organised disorder or an attempted coup (compare, for example, Mehmet Hasan Altan, cited above): the dispersal of the assembly at Freedom Square, as well as a number of

68 Dareskizb Ltd v. Armenia, no. 61737/08, 21 September 2021.
69 Denmark, Norway, Sweden and the Netherlands v. Greece (the "Greek case"), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12.
70 Mehmet Hasan Altan v. Turkey, no. 13237/17, § 91, 20 March 2018.
71 Mushegh Saghatelyan v. Armenia, no. 23086/08, 20 September 2018.
72 Myasnik Malkhasyan v. Armenia, no. 49020/08, 15 October 2020.

subsequent similar or uncontrollable events, might have played a role in the eventual escalation of violence.
- Extent of the violence: during the events in issue, the large crowd of several thousand people had remained peaceful throughout the relevant period; the violence that had taken place had been committed by small groups of protesters in a number of streets adjacent to the protest location.
- Use of weapons: no evidence had been submitted to demonstrate that the protesters who had committed violent acts had been armed with anything other than improvised objects as opposed to firearms or similar weapons as alleged by the Government.
- Causal link between the protesters' actions and casualties: there was no evidence to suggest that any of the deaths had occurred as a result of the deliberate or even unintentional actions of the protesters.

In the Court's view, there was therefore insufficient evidence to conclude that the opposition protests – protected under Article 11 of the Convention – even if massive and at times accompanied by episodes of violence, could be characterised as a public emergency "threatening the life of the nation" within the meaning of Article 15 or, therefore, as a situation justifying a derogation.

INTER-STATE CASES (ARTICLE 33)

In the inter-State application *Ukraine v. Russia (re Crimea)*[73], the Ukrainian Government made a series of complaints about the events of 27 February 2014 to 26 August 2015 in the course of which the region of Crimea (including the city of Sevastopol) was purportedly integrated into the Russian Federation. In its decision, the Grand Chamber held that the impugned facts fell within the "jurisdiction" of the Russian Federation within the meaning of Article 1; it dismissed the respondent Government's preliminary objections (incompatibility *ratione loci* with the provisions of the Convention, the alleged absence of the "requirements of a genuine application" and non-exhaustion of domestic remedies); and declared admissible the applicant Government's complaints about an alleged administrative practice contrary to Articles 2, 3, 5, 6, 8, 9, 10 and 11 of the Convention, Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, and Article 14 of the Convention taken in conjunction with Articles 8, 9, 10 and 11 of the Convention and Article 2 of Protocol No. 4.

The decision is interesting in several respects: the alleged absence of a "genuine application"; jurisdiction in the case of an "annexation"; the standard of proof applicable at the admissibility stage to the question of jurisdiction and to the existence of an administrative practice; and the duty to exhaust domestic remedies in the case of allegations of an administrative practice (Articles 1, 19, 33 and 35 § 1).

The Court addressed, for the first time, the relevance of any political motives for lodging an inter-State application and, importantly, the "jurisdiction" of a respondent State in the context of a purported "annexation" of territory from one Contracting State to another (as opposed to its military occupation or the provision of political/military support for a separatist entity). The decision also clarifies the standard of proof applicable at the admissibility stage to the question of jurisdiction and to the existence of an administrative practice. Lastly, it references extensively the case-law of the International Court of Justice (ICJ).

(i) Following the approach of the ICJ to its own jurisdiction, the Grand Chamber held that any political motives for lodging an inter-State application, or any political implications of this Court's ruling, were of no relevance to the establishment of its jurisdiction under Article 19 of the Convention to adjudicate the legal issues submitted to it. It therefore dismissed the respondent State's objection as to the alleged absence of a "genuine application" amounting to an "abuse of process".

(ii) Having clarified that the question of the respondent State's "jurisdiction" under Article 1 of the

73 Ukraine v. Russia (re Crimea) (dec.) [GC], nos. 20958/14 and 38334/18, adopted on 16 December 2020 and delivered on 14 January 2021.

Convention had to be examined to the "beyond reasonable doubt" standard of proof, the Grand Chamber determined that "jurisdiction" question by examining two periods separately: before and after 18 March 2014, that being the date on which the Russian Federation, the "Republic of Crimea" and the City of Sevastopol had signed a "Treaty of Unification" providing for the incorporation of Crimea into Russia. In this regard, the Grand Chamber stated that it would follow the recent approach of the ICJ, of several international arbitral tribunals and of the Swiss Federal Court in declaring that it was not called upon to decide in the abstract on the legality *per se* under international law of a purported "annexation" of Crimea or of the consequent legal status of that territory. These questions had not been referred to the Court and did not constitute the subject matter of the dispute before it. The Grand Chamber went on to find that the facts of the case fell within the "jurisdiction" of the respondent State, during both periods.

(iii Having established that the present case was expressly limited to general allegations of an "administrative practice" (as opposed to one requiring an individual assessment of specific incidents allegedly violating the rights of one or more clearly identified/identifiable person or persons (*Cyprus v. Turkey*[74]), the Grand Chamber clarified that the close interplay between the two admissibility issues which arose – the formal rule of the exhaustion of domestic remedies (Article 35 § 1) and the substantive admissibility of the complaint of an "administrative practice" (with its component elements of the "repetition of acts" and "official tolerance") – required the application of a uniform standard of proof to both. The Grand Chamber set this standard of proof at whether there was "sufficiently substantiated prima facie evidence" as opposed to the "beyond reasonable doubt" standard that would apply to the examination of the merits of the respective complaints. Accordingly, while the duty to exhaust domestic remedies did not apply to allegations of an "administrative practice", without such prima facie evidence of an administrative practice, the complaint could not be admissible on substantive grounds unless there were other grounds (such as the ineffectiveness of domestic remedies) exempting the applicant Government from the exhaustion requirement.

74 Cyprus v. Turkey (just satisfaction) [GC], no. 25781/94, §§ 43-45, ECHR 2014.

Advisory opinions

ADVISORY JURISDICTION UNDER PROTOCOL No. 16 TO THE CONVENTION

In its decision of 1 March 2021 on a request by the Supreme Court of the Slovak Republic for an advisory opinion[75], the panel of five judges of the Grand Chamber considered that the question raised did not concern an issue on which the requesting court would need the Court's guidance, and thus rejected the request.

This decision is noteworthy in that it represents the first time a request to the Grand Chamber for an advisory opinion has not been accepted on the grounds that the request did not meet the requirements of Article 1 of Protocol No. 16, namely that the highest courts or tribunals may request the Court to give advisory opinions on "questions of principle relating to the interpretation and application of the rights and freedoms defined in the Convention or the Protocols thereto", "in the context of a case pending before [them]".

It was observed in the decision, firstly, that the requesting court or tribunal had to consider that the opinion on the question of principle was necessary for its adjudication of the case.

In so far as this particular request related to the interpretation of Articles 2 and 3 of the Convention, there was no indication in the domestic procedural background or the arguments of the parties to the domestic proceedings, as described in the request, that the defendant or any other person had relied on the rights under those Articles. Therefore, in so far as it concerned the interpretation of Articles 2 and 3, the request did not appear to be related to points that were "directly connected to proceedings pending at domestic level" for the purposes of Article 1 §§ 1 and 2 of Protocol No. 16.

With regard to Article 6, which was also relied on by the requesting court, it was noted in the decision that in a unifying opinion issued by its Criminal Law Bench in accordance with a related judgment of the Court, the Supreme Court had itself already provided relevant indications as to the answer to the question submitted to the Court.

It was concluded in the decision that the questions raised in this request for an advisory opinion, "on account of their nature, degree of novelty and/or complexity or otherwise, do not concern an issue on which the requesting court would need the Court's guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it". The request did not therefore meet the requirements of Article 1 of Protocol No. 16, which the Court was able to clarify in this decision, thus providing guidance for the highest domestic courts and tribunals that might be considering making use of this advisory procedure in the future.

ADVISORY JURISDICTION UNDER THE OVIEDO CONVENTION

The Council of Europe's Committee on Bioethics ("the DH-BIO") sought an advisory opinion[76] under Article 29 of the Oviedo Convention[ZZ]. This provision provides that the Court may give "advisory opinions on legal questions concerning the interpretation of the present Convention". The request posed two questions, both relating to the protection of persons who have a mental disorder:

- In light of the Oviedo Convention's objective to "guarantee everyone, without discrimination, respect for their integrity" (Article 1 of the Oviedo Convention), which "protective conditions"

75 Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention [GC], request no. P16-2020-001, Supreme Court of the Slovak Republic, adopted on 14 December 2020 and delivered on 1 March 2021.

76 Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention [GC], Council of Europe's Committee on Bioethics, request no. A47-2021-001, 15 September 2021.

77 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.

referred to in Article 7 of the Oviedo Convention does a member State need to regulate to meet minimum requirements of protection?

– In case of treatment of a mental disorder to be given without the consent of the person concerned and with the aim of protecting others from serious harm (which is not covered by Article 7 but falls within the remit of Article 26 § 1 of the Oviedo Convention), should the same protective conditions apply as those referred to in question 1?

In a decision of 15 September 2021, the Grand Chamber rejected the request, finding both questions to be outside the Court's competence.

This is the first occasion on which use has been made of the procedure provided for in Article 29 of the Oviedo Convention. The Court took the opportunity to consider, in general terms, the question of its jurisdiction in relation to that instrument. It then clarified the nature, scope and limits of that jurisdiction and, based thereon, ruled on its competence in respect of the present request.

The Court clarified the relationship between its advisory jurisdiction under the Oviedo Convention and its jurisdiction – contentious and advisory – under the Convention. In this regard, the Court emphasised that it could not operate the procedure provided for in Article 29 of the Oviedo Convention in a manner incompatible with the purpose of Article 47 § 2 of the Convention, which is to preserve its primary judicial function as an international court administering justice under the Convention. This was rooted in the concern to reduce the risk of an interpretation that might hamper the Court at a later stage if the request originated in domestic proceedings that subsequently led to an application under the Convention. It followed that the Court's advisory jurisdiction under the Oviedo Convention had to operate harmoniously with its jurisdiction under the Convention, above all with its contentious jurisdiction: in other words, the latter had to remain unaffected. At the same time, the advisory jurisdiction conferred on the Court by Protocol No. 16 is to be clearly distinguished from that granted by the Oviedo Convention. In particular, the limits which apply to the latter and which are designed to preserve the judicial function of the Court cannot apply in the same way to the Court's jurisdiction under Protocol No. 16, which serves the purpose of reinforcing the implementation of the Convention in concrete cases pending before national courts, thereby enhancing the implementation of the principle of subsidiarity.

The Court then considered whether the present request, which made no direct reference to any specific proceedings pending in a court, respected the nature, scope and limits of the Court's advisory jurisdiction. The Court was asked to interpret the term "protective conditions", as used in Article 7 of the Oviedo Convention, so as to specify the minimum requirements of protection that the Parties need to regulate under that provision. However, that term could not be further specified by a process of abstract judicial interpretation. It was clear that that provision reflected the deliberate choice of the drafters to leave it to the Parties to determine, in further and fuller detail, the protective conditions applying in their domestic law in that context. Given the nature of the Oviedo Convention, this required a legislative exercise at the international level and, in relation to non-consensual interventions for the purpose of treating persons with a mental disorder, that process was ongoing. The degree of latitude thus left to the States Parties could therefore not be restricted by an interpretation of the Court in the sense requested. The DH-BIO had intimated that the Court should have regard to the Convention and to the relevant case-law. However, the Court should not, as part of this exercise, interpret any substantive provisions or jurisprudential principles of the Convention. Even though the Court's opinions under Article 29 of the Oviedo Convention are advisory, that is, non-binding, a reply in such terms would still be an authoritative judicial pronouncement focused at least as much on the Convention itself as on the Oviedo Convention. The Court could not take such an approach, which had the potential to hamper its pre-eminent contentious jurisdiction under the Convention. Nor could it follow the suggestion of the intervening organisations and modify its case-law for the sake of

aligning it with the Convention on the Rights of Persons with Disabilities, and then interpret Article 7 of the Oviedo Convention in like manner. The request was therefore outside the Court's competence.

The Court nevertheless observed that the safeguards in domestic law that corresponded to the "protective conditions" of Article 7 of the Oviedo Convention needed to be such as to satisfy, at the very least, the Convention requirements, including those that imposed positive obligations on States, as developed through its extensive case-law, with the guidance of the evolving legal and medical standards, both national and international.

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, 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 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 on Human Rights 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 (ACHR) that incorporate these standards and that develop their scope and content. In addition, subtitles have been included that underscore the topics, and the content includes references to specific judgments from which the case law was extracted.

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Inter-American Court of Human Rights

Rights to life (Article 4 of the ACHR) and to personal integrity (Article 5 of the ACHR)

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 child, 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"[78]. 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"[79].

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 girl children should be understood to include not only as 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 girl children, 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 if 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 girl children an adolescent, 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"[80].

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 girl children and adolescents from sexual violence in an educational setting. Also, 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[81].

78 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 109.
79 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 110.
80 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 119.
81 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 120.

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[82].

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[83]. 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 affective relationships, particularly as regards consent to such relations and the exercise of freedom with regard to their sexual and reproductive rights"[84] 98 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 Articles 19 of the American Convention and 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 situation of gender-based violence against girls in the context of education. Consequently, the acts of harassment and sexual abuse committed against Paola 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[85].

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[86].

RIGHT TO A DECENT LIFE AND 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 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[87].

82 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 127.
83 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 140.
84 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 139.
85 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 140.
86 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 141.
87 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 156.

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[88].

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 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[89].

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"[90].

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 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[91].

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

88 Case of Noguera et al. v. Paraguay. Merits, reparations and costs. Judgment of March 9, 2020. Series C No. 401, para. 67.
89 Case of Noguera et al. v. Paraguay. Merits, reparations and costs. Judgment of March 9, 2020. Series C No. 401, para. 69.
90 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 79.
91 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 80.

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"[92].

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"[93]

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"[94].

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 the 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[95].

GENERAL CONSIDERATIONS ON STATE OBLIGATIONS IN RELATION TO THE LIFE AND PERSONAL INTEGRITY OF ADOLESCENT 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 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[96].

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

92 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 81.
93 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 82.
94 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 85.
95 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 86.
96 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 88.

on prison conditions and the duty of prevention that the State must guarantee for persons deprived of liberty[97].

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[98].

The Court reiterated that, in itself, prison overcrowding constituted a violation of personal integrity and impeded the performance of essential functions in detention centers[99].

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[100].

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[101].

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 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[102].

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 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[103].

97 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 89.
98 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 91.
99 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 94.
100 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 98.
101 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 99.
102 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 104.
103 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.

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 60 individuals and the right to personal integrity of the six who survived[104].

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:

- Legality: The exceptional use of force must be established by law and a regulatory framework for its use must exist.
- Legitimate objective: the use of force must be addressed at achieving a legitimate objective.
- 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 the "absolutely necessary" in relation to the force or threat it is intended to repel.
- 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 situation105.

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[106].

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[107]. The 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,

104 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. 137.
105 Case of Roche Azaña et al. v. Nicaragua. Merits and reparations. Judgment of June 3, 2020. Series C No. 403, para. 53.
106 Case of Roche Azaña et al. v. Nicaragua. Merits and reparations. Judgment of June 3, 2020. Series C No. 403, para. 55.
107 Case of Mota Abarullo et al.v.Venezuela. Merits, reparations and costs. Judgment of November 18, 2020.Series C No. 417, para.102.

their participation must be characterized by being:

- Extraordinary, so that any intervention is justified and exceptional, temporary and restricted to the strictlynecessary in the circumstances of the case;
- Subordinated and complementary to the work of the prison authorities;
- 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
- Monitored by competent, independent and professional civilian organizations108.

Right to Personal Integrity (Article 5 of the ACHR) LGBTI people – Violence based on prejudice

In the *case of 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 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)"[109].

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."[110]

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 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 themself with a determined category. This violence, fed by hate speech, can result in hate crimes[111].

108 Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs. Judgment of November 18, 2020. Series C No. 417, para. 107.
109 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.
110 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. 92.
111 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. 93.

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 their 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 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 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[112].

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[113].

The Court reiterated that the failure to mention of 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[114]. In addition, not all cases of sexual violence or rape cause physical injuries or diseases that can be verified by a medical examination[115].

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[116]. In this specific case, the Court found that the intentionality and the severity of the suffering had been proved[117]. 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[118].

112 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. 142.
113 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. 146.
114 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. 148.
115 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. 153.
116 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. 160.
117 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. 162.
118 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. 163.

Consequently, the Court considered that the anal rape and the comments relating to victim's sexual orientation revealed a discriminatory purpose, so that it constituted an act of violence based on prejudice[119] and that the series of abuses and aggressions suffered by the victim, including the rape, constituted an act of torture by state agents[120].

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[121].

Right to Personal Liberty (Article 7 of the ACHR) 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."[122]

Based on the above criteria, in the specific case of Azul 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[123]. 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.[124]

DEPRIVATION OF LIBERTY FOR DISCRIMINATORY REASONS RELATED TO RACIAL PROFILING

In the case of Acosta Martinez 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

119 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. 164.
120 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. 166.
121 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. 165.
122 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. 127.
123 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. 128.
124 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. 164.

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 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 case, to life[125].

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 discotheque were Afrodescendants 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.[126]

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 the speak."[127]

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.[128]

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.

125 Case of Acosta Martínez et al. v. Argentina. Merits, reparations and costs. Judgment of August 31, 2020. Series C No. 410, para. 95.
126 Case of Acosta Martínez et al. v. Argentina. Merits, reparations and costs. Judgment of August 31, 2020. Series C No. 410, para. 97.
127 Case of Acosta Martínez et al. v. Argentina. Merits, reparations and costs. Judgment of August 31, 2020. Series C No. 410, para. 98.
128 Case of Acosta Martínez et al. v. Argentina. Merits, reparations and costs. Judgment of August 31, 2020. Series C No. 410, para. 99.

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

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 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 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.[129]

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.[130]

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

The Court recalled that Article 2 of the 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

129 Case of Fernández Prieto and Tumbeiro v. Argentina. Merits and reparations. Judgment of September 1, 2020. Series C No. 411, para. 90.
130 Case of Fernández Prieto and Tumbeiro v. Argentina. Merits and reparations. Judgment of September 1, 2020. Series C No. 411, para. 96.

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.

Rights to judicial guarantees, judicial protection and equal protection of the law (articles 8(1), 25(1) and 24 of the ACHR) Access to justice in cases of sexual violence against girls

In the specific *case of Guzmán Albarracín 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.[131]

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, were applicable to the case in which the victim of rape identified himself as a gay man at the time of the facts.[132]

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; (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.[133]

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

131 Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2020. Series C No. 405, para. 190.
132 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.
133 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. 180.

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.[134]

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.[135]

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.[136]

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.[137]

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[138].

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 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[139].

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

134 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. 196.
135 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. 202.
136 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. 203.
137 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. 204.
138 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.
139 Case of Martínez Esquivia v. Colombia. Preliminary objections, Merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 84.

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[140].

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"[141].

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[142].

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[143].

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[144].

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

140 Case of Martínez Esquivia v. Colombia. Preliminary objections, Merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 85.
141 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 86.
142 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 87.
143 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 88.
144 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 92.

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[145].

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 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[146].

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[147].

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[148].

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[149].

145 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 93.
146 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 97.
147 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 98.
148 Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations. Judgment of October 6, 2020. Series C No. 412, para. 99.
149 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 113.

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[150].

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 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[151].

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"[152], 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"[153].

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[154].

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 Convention, provided that those powers are vested in different bodies or units of the entity concerned, and that 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[155].

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

150 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 118.
151 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 120.
152 Case of Maldonado Ordóñez v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of May 3, 2016. Series C No. 311, para. 76.
153 Case of Maldonado Ordóñez v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of May 3, 2016. Series C No. 311, para.77.
154 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 121.
155 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 129.

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 Convention and the case law of this Court lacks Jurisdiction in this regard[156].

THE SCOPE OF THE PRINCIPLE OF LEGALITY IN DISCIPLINARY MATTERS

In the *case of Urrutia Laubreaux v. Chile* la Corte 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[157].

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[158]:

- 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 Convention, but also judicial independence[159].

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[160]. 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 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[161].

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.

156 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 132.
157 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 129.
158 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 131.
159 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 135.
160 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 137.
161 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 137.

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[162].

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[163].

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[164].

Right to freedom of thought and expression (Article 13 of the ACHR) 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[165].

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 that those expressed in the media[166].

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

162 Case of Roche Azaña et al. v. Nicaragua. Merits and reparations. Judgment of June 3, 2020. Series C No. 403, para. 91.
163 Case of Roche Azaña et al. v. Nicaragua. Merits and reparations. Judgment of June 3, 2020. Series C No. 403, para. 92.
164 Case of Roche Azaña et al. v. Nicaragua. Merits and reparations. Judgment of June 3, 2020. Series C No. 403, para. 92.
165 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 82.
166 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 84.

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)[167].

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 in the specific case of Urrutia Laubreaux v. Chile[168]. Right to property (Article 21 of the ACHR) 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[169].

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[170].

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

167 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 85.
168 Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2020. Series C No. 409, para. 89.
169 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.
170 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. 94.

of a state-granted full property title; (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[171].

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."[172] Accordingly, the State must ensure the 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[173].

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

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 decision on the land in accordance with their traditions and forms of organization[174].

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

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[175].

The "importance" of a public work (in this case, an international bridge) which "involves State policies

171 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. 95.
172 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. 96.
173 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. 98.
174 Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February6, 2020. Series C No. 400, para. 155.
175 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. 179.

and the administration of territorial borders, as well as decisions with implications for the economy, the State's 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"[176].

DETERMINATION OF PRESUMED VICTIMS TAKING CULTURAL CHARACTERISTICS INTO CONSIDERATION

In the case 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[177].

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 CONTENTS, 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"[178]. 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]"[179]. 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"[180].

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

176 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, paras. 181 and 182.
177 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. 34.
178 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, paras. 136 and 137.
179 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. 136.
180 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. 138.

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 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"[181]. 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) 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. 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"[182].

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[183]. 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; (b) to vote and to be elected in genuine and periodic elections, which shall 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[184].

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,

181 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. 329.
182 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 90.
183 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 91.
184 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 92.

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[185].

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[186].

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[187]:

- 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 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[188].

185 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 93.
186 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 94.
187 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 94.
188 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 96.

According to the Court, this literal interpretation is corroborated by considering the object and purpose of the 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"[189].

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[190].

Economic, social, cultural and environmental rights (Article 26 of the ACHR) 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. And, 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[191]. 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)[192].

Based on the standards described above, the Court finds that, in light of the American Convention, children

189 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 97.
190 Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of July 8, 2020. Series C No. 406, para. 98.
191 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.
192 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. 178.

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.

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[193]. 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[194].

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"[195]. 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[196].

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

193 Case of the 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.
194 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. 203.
195 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. 205.
196 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. 206.

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 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[197].

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'[198]. 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"[199].

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

197 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. 208.
198 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. 216.
199 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. 220.

to regulate activities of individuals or groups so as to prevent them from violating the right to food of others[200].

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 inclusions in the said Article 26 has been established in the judgment, as has 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[201].

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 requirements202.

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"[203]. 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[204].

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." And should 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"[205].

200 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. 221.
201 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. 222.
202 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. 225.
203 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. 226.
204 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. 229.
205 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. 230.

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"[206].

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 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[207].

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[208].

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[209]. 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" [210]

206 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. 231.
207 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. 234.
208 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. 237.
209 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. 238.
210 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. 240.

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[211].

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[212]. 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[213].

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. 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[214].

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 a 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[215].

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,"

211 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. 242.
212 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. 243.
213 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. 245.
214 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. 250.
215 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. 251.

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[216].

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[217].

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[218].

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

In the *case of Spoltore v. Argentina* 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,

216 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. 274.
217 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. 274.
218 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. 284.

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[219].

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[220].

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[221].

Provisional measures (Article 63(2)) 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[222].

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

219 Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs. Judgment of June 9, 2020. Series C No. 404, para. 97.
220 Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs. Judgment of June 9, 2020. Series C No. 404, para. 101.
221 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.
222 Case of Vélez Loor Vs. Panama. Provisional measures. Adoption of provisional measures. Order of the Inter-American Court of Human Rights of July 29, 2020, Considering paragraph 22.

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[223].

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:

- 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;
- 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;
- 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;
- Take measures to prevent the risk of violence and, in particular, sexual violence, to which women and child migrants are exposed;
- 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;
- 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;
- 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;
- Take all necessary measures to overcome legal, language and cultural barriers that hinder access to health care and information;
- Take measures to ensure natural ventilation, maximum cleanliness, sanitization, and collection of waste to avoid the spread of the virus;
- 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;
- 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;
- Provide sufficient food and drinking water, paying special attention to pre- and post-natal nutritional requirements;
- 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;
- Guarantee access to the Migrant Reception Stations for the Ombudsman and other independent monitoring mechanisms, and also international agencies and civil society; and
- 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 particularly, 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

223 Case of Vélez Loor Vs. Panama. Provisional measures. Adoption of provisional measures. Order of the Inter-American Court of Human Rights of July 29, 2020, Considering paragraph 23.

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''[224].

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 regional dialogue to create the conditions to make safe, orderly and regular transit possible, that guarantees, effectively, the rights of migrants[225].

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[226].

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[227].

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, shall inform the other States Parties. In this regard, the Court emphasizes that a State's intention to denounce the treaty

224 Case of Vélez Loor Vs. Panama. Provisional measures. Adoption of provisional measures. Order of the Inter-American Court of Human Rights of July 29, 2020, Considering paragraph 36.

225 Case of Vélez Loor Vs. Panama. Provisional measures. Adoption of provisional measures. Order of the Inter-American Court of Human Rights of July 29, 2020, Considering paragraph 37.

226 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.

227 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. 51.

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[228].

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[229]. However, the Court noted that, regardless of the different domestic procedures in the region for denouncing treaties, the denunciation of a human right 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 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[230].

THE EFFECTS ON THE INTERNATIONAL OBLIGATIONS OF A MEMBER STATE OF THE ORGANIZATION OF AMERICAN STATES THAT HAS DENOUNCED THE AMERICAN CONVENTION ON HUMAN RIGHTS, 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[231].

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:

- Convention-based obligations remain intact during the period of transition to full denunciation232;
- definitive denunciation of the American Convention produces no retroactive effects233;
- the validity of the obligations established through ratification of other inter-American human rights treaties remains in place234;

228 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. 59.

229 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. 61.

230 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. 64.

231 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. 114.

232 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, paras. 68 to 75.

233 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, paras. 76 to 82.

234 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, paras. 83 to 89.

- 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 violations235; 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 Commission236; and
- 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 law237.

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*[238].

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;
- 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 beco-

235 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, paras. 90 to 93.

236 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, paras. 94 to 99.

237 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, paras. 100 to 110.

238 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. 105.

> mes effective once the transition period has elapsed, at which point the Charter ceases to apply, although certain obligations arising from it remain239.

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[240].

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[241].

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239 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. 107.

240 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. 161.

241 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 162.

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[242]. 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[243].

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"[244].

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[245].

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

242 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. 163.

243 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. 164.

244 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. 166.

245 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. 167.

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[246].

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 Organization's political organs. 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[247].

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[248].

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"[249].

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

246 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. 168.

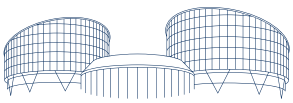
247 The obligations in matters of human rights of a State that has denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 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. 169.

248 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. 170.

249 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. 171.

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 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[250].

250 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. 172.



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

COUNCIL OF EUROPE

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